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Equal Protection Considerations of the Spousal Sexual Assault Exclusion

*Thomas K. Clancy**

Statutory formulations of the rape offense have not traditionally included criminal liability for acts of nonconsensual sexual intercourse between spouses. The author examines the validity of this spousal exclusion under a fourteenth amendment equal protection analysis, using the broad Vermont exclusion as a vehicle for discussion. The question of whether spousal victims or actors have standing to challenge such statutory formulations is addressed, followed by a discussion of equal protection standards of review and the nature of affected individual interests. The author suggests that the spousal exclusion should be subject to strict scrutiny and that state interests in perpetuating it are without truly rational foundation. The author concludes that the exclusion should be eliminated in favor of individually reviewing each instance of sexual assault in order to make more effective determinations of culpability and redress.

Historically, rape was the carnal knowledge of a woman by force and against her will.[1] Traditionally, common law[2] and statutory formulations of the rape offense have excluded nonconsensual acts of sexual intercourse between marital partners. This article considers the spousal exclusion in light of equal protection principles. Besides the main issue of whether liability can be constitutionally imposed for some actors

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* Instructor, Vermont Law School.

1. State v. Hodgdon, 118 Vt. 101, 103, 99 A.2d 615, 616 (1953).

2. For a discussion of the English precedents, *see* Scutt, *Consent In Rape: The Problem of the Marriage Contract*, 3 MONASH U.L. REV. 255 (1977) [hereinafter cited as *Consent in Rape*]; Howard, *Rape of a Wife*, 118 JUST. P. 99 (1954); Coddington, *Rape of a Wife*, 96 JUST. P. 199 (1932). *See also* Livneh, *On Rape and the Sanctity of Matrimony*, 2 ISRAEL L. REV. 415 (1967) (surveying the international status of the spousal exclusion).

although not for others, there are two important subsidiary issues regarding the spousal exclusion which have been dealt with in a variety of ways by modern statutory formulations. Assuming that liability for rape is excluded, then the question arises of whether liability for sexual assault occurring between spouses should be imposed after voluntary separation, court order, or divorce. Second, consideration must be given to whether liability should be excluded for all species of sexual assault, or just for rape.

The answers to these questions have been diverse. Vermont,[3] along with numerous other states,[4] has adopted a broad statutory exclusion

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3. A sexual act is defined as "conduct between persons consisting of contact between the penis and the vulva, the penis and the anus, the mouth and the penis, the mouth and the vulva, or any intrusion, however slight, by any part of a person's body other than the fingers or any object into the genital or anal opening of another. . . ." VT. STAT. ANN. tit. 13, § 3251(1) (Supp. 1980). Such acts between spouses are excluded and are not actionable as sexual assault. *Id.* § 3252.

4. The statutes breakdown into the following groups. One group of statutes provide for a complete exclusion from liability for all types of spousal sexual assault until the marriage is formally ended. *See* ARIZ. REV. STAT. ANN. § 13-1406(A) (1977); CONN. GEN. STAT. ANN. § 53a-67(b) (West Supp. 1980); KAN. STAT. ANN. §§ 21-3502(1), 21-3505 (Supp. 1979) (but there is no mention of an exclusion for aggravated sodomy, *see id.* at § 21-3506); N. D. CENT. CODE § 12.1-20-02.1 (Supp. 1979); OHIO REV. CODE ANN. §§ 2907.02(A)-.06 (Page 1978); TEX. PENAL CODE ANN. tit. 5, §§ 21.02(a)-.04 (Vernon 1974); WASH. REV. CODE ANN. §§ 9.79.140(1)(c), 9.79.170 (1975); W. VA. CODE § 61-8B-1(7) (1977). Other statutes, not reflecting the modern trend toward the adoption of more comprehensive sexual assault statutes, refer only to rape and exclude spousal liability therefor. *See* ALA. CODE §§ 13A-6-60(4), 13A-6-61 (1977); ILL. ANN. STAT. ch. 38, § 11-1(a) (Smith-Hurd 1979); OKLA. STAT. ANN. tit. 21, § 1111 (West 1958); S.D. COMP. LAWS ANN. § 22-22-1 (Supp. 1978). Several sexual assault statutes are silent on the exclusion. *See* FLA. STAT. ANN. § 794.011 (West 1975); HAWAII REV. STAT. §§ 707-730 (1976); MASS. GEN. LAWS ANN. ch. 265, § 22 (West Supp. 1979); NEB. REV. STAT. §§ 28-408.03 to .04 (1975). Several other statutes are merely codifications of the common law rape offense. *See* ALASKA STAT. § 11.15.120 (Supp. 1979); D.C. CODE ANN. § 22-2801 (1967); GA. CODE ANN. § 26-2001 (1977); MISS. CODE ANN. § 97-3-65-71 (1972); VA. CODE § 18.2-61 (1975). In the last two groups it can be argued that the exclusion is implicit in their application. *See* State v. Smith, 148 N.J. Super. 219, 372 A.2d 386 (Essex County Ct. 1977), *aff'd*, 169 N.J. Super. 98, 404 A.2d 331 (Super. Ct. App. Div. 1979).

Most of the remaining statutes provide for some type of spousal exclusion. Some statutes provide that the exclusion is inoperative when the spouses are judicially separated. *See* KY. REV. STAT. ANN. § 510.010(3) (Baldwin 1979); LA. REV. STAT. ANN. § 14:41 (West Supp. 1980); MD. ANN. CODE art. 27, § 464D (Supp. 1979) (although no exclusion for aggravated 'unnatural' acts); MO. ANN. STAT. §§ 566.010 to .120 (Vernon 1979). S.C. CODE § 16-3-658 (Supp. 1979) (liable for first or second degree sexual assault but not third degree); UTAH CODE ANN. § 76-5-407 (1978); WYO. STAT. § 6-4-307 (1977). Other statutes disallow the exclusion when the marital partners are living apart *and* have filed for divorce and separate maintenance. *See* IND. CODE ANN. § 35-42-4-1(3)(b) (Burns 1979) (excludes rape action but § 35-42-4-2 is silent on an exclusion for deviate acts); MICH. STAT. ANN. § 28.788(12) (Supp. 1980); MINN. STAT. ANN. § 609.349 (West Supp. 1980); NEV. REV. STAT. § 200.373 (1977) (rape only exclusion); TENN. CODE ANN. § 39-3709 (Supp. 1979); WIS. STAT. ANN. § 940.225(6) (West Supp. 1979).

Several statutes provide that the exclusion is inoperative when the spouses are living apart. *See* COLO. REV. STAT. § 18-3-409 (1978) (must have intent to live apart); IOWA CODE ANN. §§ 709.1-.4 (West 1979) (silent as to first and second degrees sexual abuse, but imposes liability for third degree violations when the persons are not cohabiting as husband and wife); ME. REV. STAT. ANN. tit. 17-A, § 251(1)(A) (Pamphlet 1980); MONT. REV. CODES ANN. § 45-5-506 (1979) (otherwise not liable for sexual contact or rape under §§ 45-5-502, 503 but are liable for deviate sexual assault under § 45-5-505).

There are numerous miscellaneous statutory definitions of the spousal exclusion. *See* ARK.

precluding liability for all sexual assaults occurring between marital partners until the marriage is formally ended at divorce. Because Vermont has such a broad exclusion it will be used as the basis for analyzing the exclusion's validity. Much of the analysis, however, is equally applicable to the other statutory formulations of the exclusion.

A claim alleging denial of equal protection of the laws is an appropriate challenge to a statutory scheme embodying the spousal exclusion. This is because the statute sets up a dichotomy whereby identical acts may or may not be the basis of criminal liability depending upon the participants' marital status. A nonspousal actor might claim that this statutory differentiation unconstitutionally burdens him by imposing liability on him for acts[5] that he would not bear if he were married to the victim.[6] The victim of a spousal sexual assault might claim that she is unconstitutionally discriminated against because she is left unprotected by the statute, while others who arguably may be similarly situated enjoy such protection. These dissonant claims of the nonspousal actor and spousal victim will be thoroughly explored. The first section of this article will examine the standing of each to challenge the statutory classification. The second section contains an examination of the relevant equal protection principles which would guide a court's review of the exclusion. To uphold the existence of the exclusion, the state must present sufficient justification for the statutory classification. The quantum of justification that the state must show is determined by the nature of the individual's interests that are affected through the state's action in maintaining the exclusion. Even if the state's interests are otherwise sufficient, the discrimination may still be

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STAT. ANN. §§ 41-1802 to 1809 (1975) (although there is no spousal exclusion for rape, there is no liability for carnal abuse or sexual abuse of a mentally incapacitated spouse); IDAHO CODE § 18-6107 (1979) (liability for rape if the couple have been living apart for 180 days or have filed for separate maintenance or divorce); N.H. REV. STAT. ANN. § 632-A:5 (Supp. 1979) (similar to Idaho); N.M. STAT. ANN. § 30-9-10(E) (1978) (not considered a spouse if living apart or filed for separate maintenance or divorce); N.Y. PENAL LAW § 1.30.00(4) (McKinney Supp. 1979) (action allowed if valid judicial order, decree of separation, or acknowledged written agreement specifically providing that the actor may be guilty of a crime for engaging in conduct that would otherwise be an offense); N.C. GEN. STAT. § 14-27.8 (Supp. 1979) (not liable for sexual assault unless the parties are living separate and apart pursuant to a written agreement or judicial decree); PA. STAT. ANN. tit. 18, § 3103 (Purdon Supp. 1979) (action allowed if the couple live apart or live in the same residence under terms of a written separation agreement or court order); R.I. GEN. LAWS §§ 11-37-1 to -4 (Supp. 1979) (not liable for first degree sexual assault unless living apart and a divorce decision has been granted, whether or not a final decree has been entered).

Only a few statutes treat spousal sexual assault similarly to nonspousal sexual assault. *See* CAL. PENAL CODE § 262 (West Supp. 1980); DEL. CODE ANN. tit. 11, § 772(b) (1979); N.J. STAT. ANN. § 2c:14-5.b (West Supp. 1979); 1977 OR. LAWS ch. 844 § 2 (repealing OR. REV. STAT. § 163.335). For a list of those statutes treating unmarried cohabitors as the equivalent of spouses for the purpose of assessing liability for sexual assault, see note 93 and accompanying text *infra*.

5. Although the Vermont law is gender neutral, this note generally refers to the male as the aggressor.

6. However, even the spousal actor may be liable for assault and battery. *See* notes 156 and accompanying text *infra*.

deemed unconstitutional if the scope of the statutory exclusion is so broad that, under the relevant standard of review, the court finds that the exclusion impermissibly differentiates between similarly situated individuals. Thus, after outlining the standards for reviewing equal protection clause challenges, the individual interests affected by the spousal exclusion will be discussed in the third section. Then the state's justifications will be examined in the light of the individual interests.

I. CRIMINAL LAW STANDING REQUIREMENTS

Before examining the merits of the Vermont spousal exclusion under the equal protection clause, the important procedural question of who may raise the issue must be discussed. Those persons typically interested in questioning the statute's validity are the victims of spousal sexual assault and the actor-defendants in nonspousal sexual assault cases. Clearly their goals could not be the same: the spousal victim would seek to have criminal liability imposed, at least prospectively,[7] while the nonspousal actor would seek to escape liability for a past assault.

There are two United States Supreme Court opinions which seem to control the ability of both victim and defendant to raise equal protection claims. In *Linda R. S. v. Richard D.*,[8] the Supreme Court established restrictions on the victim's ability to challenge disparate treatment of classes of actors. That case dealt with a local district attorney who refused to bring charges against the father of an illegitimate child under a Texas statute which made it a misdemeanor for parents to willfully refuse to support their children.[9] The mother of the child then brought a class action seeking to enjoin "discriminatory application" of the statute, which had been judicially construed to apply only to parents of legitimate children.[10] Dismissing the mother's claim for lack of standing, the Supreme Court said that "federal plaintiffs must allege some threatened or actual injury resulting from the putatively illegal action before a federal court may assume jurisdiction."[11] According to the majority opinion, the mother failed to allege a sufficient connection between her injury and the challenged governmental action to justify judicial intervention.[12] To gain standing to litigate her claim, the mother had to establish a "direct nexus between the vindication of her interest and the enforcement of the state's criminal laws."[13] The Court

7. *See* notes 20-23 and accompanying text *infra*.

8. 410 U.S. 614 (1973).

9. *Id.* at 615.

10. *Id.* at 615-16.

11. *Id.* at 617 (footnote omitted).

12. *Id.* at 617-18.

13. *Id.* at 619. Four justices dissented. Mr. Justice Blackman, with whom Mr. Justice Brennan concurred, argued that the case should be remanded to determine whether there was a live

noted that the woman had suffered some injury from the failure of the child's father to provide support payments. The majority, however, said there had been no showing that her failure to obtain his support directly resulted from the nonenforcement of the statute against the father.[14] The Court said that even if relief were to be granted, it would merely result in the jailing of the child's father, and the prospect of securing future support payments would be "only speculative."[15] In broad dictum, the Court spoke of the "special status" that criminal prosecutions have and explained that "a private citizen lacks a judicially cognizable interest in the prosecution or nonprosecution of another."[16]

If the broad language of *Linda R. S.*, were followed in a suit brought by the victim of a spousal sexual assault, an adjudication on the merits of an equal protection claim would be precluded. There is, however, some authority that *Linda R. S.* will not be read to preclude standing for all victims' claims.[17] Justice Rehnquist, dissenting in *Orr v. Orr*,[18] has stated that all that an individual in the position of the mother in *Linda R. S.* would have to show, based on recent cases, is a " 'substantial likelihood' that the relief requested will redress the injury."[19] *Linda R. S.* could also be interpreted more narrowly to require only a direct nexus between the relief requested and the injury.[20] However, even under Justice Rehnquist's interpretation of recent cases, or this narrow reading of *Linda R. S.*, a victim seeking standing to challenge the Vermont spousal sexual assault exclusion would have serious difficulties. Under either standard, a victim could not gain standing if she sought relief based merely on a past sexual assault. Due process requires that a defendant be given prior warning that his conduct will subject him to criminal liability.[21] Since the present Vermont statute clearly precludes liability for spousal sexual assault,[22] even if it were determined that the

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controversy. *Id.* at 622. Mr. Justice White, with whom Mr. Justice Douglas concurred, took a significantly different view of the victim's relationship to the enforcement of the criminal laws. *See* notes 23, 24 & 34 and accompanying text *infra*. For a criticism of the majority's approach, *see* L. TRIBE, AMERICAN CONSTITUTIONAL LAW 93-94 (1978).

14. 410 U.S. at 618.

15. *Id.*

16. *Id.* at 619.

17. *See, e.g.*, Nader v. Saxbe, 497 F.2d 676, 681 n. 27 (D.C. Cir. 1974); Inmates of Attica Correctional Facility v. Rockefeller, 477 F.2d 375, 378 (2d Cir. 1973).

18. 440 U.S. 268 (1979).

19. *Id.* at 298 n. 5, *quoting* Duke Power Co. v. Carolina Environmental Study Group, Inc., 438 U.S. 59, 75 n. 20 (1978).

20. *See* Inmates of Attica Correctional Facility v. Rockefeller, 477 F.2d 375, 378 (2d Cir. 1973).

21. Lambert v. California, 355 U.S. 225, 228 (1957); State v. Smith, 169 N.J. Super. 98, 101, 404 A.2d 331, 333 (Super. Ct. App. Div. 1979).

22. VT. STAT. ANN. tit. 13, § 3252 (Supp. 1980).

exclusion were unconstitutional, a spousal defendant could not be prosecuted for sexual assaults occurring prior to that determination. Because no relief for past sexual assaults could be granted, there would be no standing.

If the victim sought prospective relief, alleging a past and continuing threat of spousal sexual abuse, there would then be a more direct nexus between the injury and the relief requested than in the situation just discussed. The victim would allege that removal of the exclusion, thereby subjecting the spouse to liability, would provide relief from future harm. The claim, in effect, would be that the threat of prosecution would deter future spousal sexual assaults. The injury (future sexual assaults) would have a direct nexus to the relief sought (deterrence). An analogous argument, however, was rejected as merely "speculative" in *Linda R. S.*[23] Dissenting from the majority's view, Justice White, with whom Justice Douglas concurred, argued that our civilization has always "assumed that the threat of penal sanctions had something more than a 'speculative' effect on a person's conduct."[24] There is, however, a factual difference which may be a critical distinction. In *Linda R. S.* the threat of incarceration was considered speculative because the mother wanted support payments and the jailing of the father would not necessarily gain such relief. In the case of the spousal victim, jailing of the offender would provide the relief sought — prevention of sexual abuse. That would entail an additional step, making the relief sought indirect. The victim would be asking a court to remove the exclusion, and *then,* if sexually assaulted, she could seek redress through normal judicial processes.[25] Justice Rehnquist would ask whether there was a substantial likelihood that the relief sought (deterrence) would prevent the injury. The answer to this depends on one's perception of the effectiveness of deterrence as a criminal sanction. Unless the deterrence argument is accepted, a spousal victim's claims apparently meet neither the criteria of *Linda R. S.* nor Justice Rehnquist's interpretation of recent cases.

In contrast, turning for a moment to the ability of a nonspousal defendant to raise the claim of unfair discrimination as a defense to a charge of sexual assault, there seems to be little doubt that he can. Of the seven justices in *Linda R. S.* who discussed the issue,[26] all agreed that while the parent of an illegitimate child could not do so, a parent of

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23. 410 U.S. at 618. *Cf.* Coleman v. Wagner College, 429 F.2d 1120, 1126 (2d Cir. 1970) (Friendly, J., concurring) (Deterrence "is a principle justification for our system of criminal sanctions").

24. 410 U.S. at 621.

25. *See* Inmates of Attica Correctional Facility v. Rockefeller, 477 F.2d 375, 378 (2d Cir. 1973).

26. *See* notes 11 and 12 and accompanying text *supra.*

a legitimate child had standing to raise the issue of invidious discrimination in the application of the statute as a defense to a charge of nonsupport.[27] This dictum was converted into the holding of the Court in *Orr v. Orr.*[28] Stating that the facts were indistinguishable the Court analogized the plight of the husband in *Orr* to the parent of a legitimate child as was discussed in *Linda R. S.*[29] Therefore, the Court in *Orr v. Orr* held that the husband had standing to challenge the validity of a statutory classification which provided that husbands, but not wives, may be required to pay alimony upon divorce.[30] According to the majority in *Orr,* one burdened by a statutory classification will have standing to assert an equal protection claim. "The burden alone is sufficient to establish standing."[31] The husband in *Orr* claimed that he should not be required to pay alimony if similarly situated wives could not be required to pay.[32] This situation is directly analogous to the burden of the nonspousal defendant. He would allege that he should not be held criminally liable if similarly situated spouses were not held criminally liable under the statute. If anything, the burden of the nonspousal defendant is greater than the husband in *Orr.*

To highlight the issue in *Orr,* the Court analogized the husband's situation to that of racial discrimination. "There is no doubt that a state law imposing alimony obligations on blacks but not whites could be challenged by a black who was required to pay."[33] Interestingly, Justice White's dissenting opinion in *Linda R. S.* used a similar analogy. "If a State were to pass a law that made only the murder of a white person a crime, I would think that Negroes as a class would have sufficient interest to seek a declaration that that law invidiously discriminated against them."[34] These analogies indicate that victim and actor standing have identical foundations. Those who must carry the burden of a statutory classification — be they actor or victim — should be appropriate parties to challenge the statutory scheme simply because there is a burden they bear which others do not. In the context of sexual assault, the nonspousal actor has the burden of shouldering liability for prosecution and the nonspousal victim receives the benefit of the statute's protection. In contrast, the spousal actor retains the "benefit" of no liability under the statute, while the spousal victim must, arguably, bear the burden of the lack of protection under the statute.

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27. Linda R. S. v. Richard D., 410 U.S. 614, 619 n.5, 620 (1973).
28. 440 U.S. 268, 282-83 (1979).
29. *Id.* at 273.
30. *Id.*
31. *Id.*
32. *Id.* at 271.
33. *Id.* at 273.
34. 410 U.S. at 621. *See also* Littleton v. Berbling, 468 F.2d 389 (7th Cir. 1972), *cert. denied,* 414 U.S. 1143 (1974).

This "burden principle" was accepted in *Orr* but rejected in *Linda R. S.*, leading to perverse results. Innocent victims could be truly ravaged until an otherwise guilty actor successfully challenges the statutory classification and wins freedom. On the other hand, if it were held that spousal victims have standing when claiming a burden not shared by nonspousal victims, then the merits of a discriminatory treatment allegation would be determined in a context furthering societal interests. No otherwise guilty actor would go unpunished and claims of unequal treatment would be resolved.

II. EQUAL PROTECTION PRINCIPLES

The equal protection clause of the fourteenth amendment of the United States Constitution requires that similarly situated individuals be treated in a similar manner by a state. The equal protection mandate, as interpreted by the Supreme Court, neither imposes upon a state an affirmative obligation to protect those within its jurisdiction,[35] nor prevents a state from classifying persons in a discriminatory fashion.[36] However, it does guarantee that a classification will not arbitrarily burden a particular group of individuals,[37] unfairly affect fundamental rights,[38] nor be based upon impermissible criteria.[39]

Structurally, judicial review of a legislative classification involves three steps. First, there must be a determination of the nature of the individual's affected interest. Next there is an examination of the state's interest in classifying the way that it did, including a weighing of the two interests. Finally, the tailoring of the statute is scrutinized. The ob-

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35. U.S. CONST. amend. XIV. Assuming for the moment that the spousal sexual assault exclusion was held to violate the equal protection clause, that holding would not mandate that the legislature must include spouses within the reach of the statute's provisions. Instead, the statute would be struck down and the mandate would simply be that the legislature could not make the classification it had chosen. This analysis is consistent with Skinner v. Oklahoma, 316 U.S. 535 (1942) and Linda R. S. v. Richard D., 410 U.S. 614 (1973). *See also* Massachusetts v. Mellon, 262 U.S. 447, 488 (1923). *Cf.* Tussman & tenBroek, *The Equal Protection of the Laws,* 37 CAL. L. REV. 341, 341 (1949) ("[w]e now know that the equal protection clause was designed to impose upon the states a positive duty to supply protection to all persons in the enjoyment of their natural and inalienable rights — especially life, liberty, and property — and to do so equally.").

An affirmative duty whereby the state would be required to extend its protective functions to include spousal sexual assault within the sexual assault offense could be found through a substantive due process analysis. Under such a theory, the argument would be that the state, as guardian of individual rights, is under a duty to actively protect individuals from violations of their persons and property. *See* Kelley v. Johnson, 425 U.S. 238, 251 (1976) (Marshall, J., dissenting). To secure these rights is the purpose of government and when the government withholds its protective function it breaches the social compact. *See* THE DECLARATION OF INDEPENDENCE (July 4, 1776).

36. *See* Heisler v. Thomas Colliery Co., 260 U.S. 245 (1922).

37. Smith v. Cahoon, 283 U.S. 553, 566-67 (1931).

38. Shapiro v. Thompson, 394 U.S. 618, 658 (1969) (Harlan, J., dissenting).

39. *Id.*

jective of the analysis is to determine whether the legislative classification bears a sufficient relationship to a proper governmental purpose.[40] The United States Supreme Court has articulated at least two standards[41] for reviewing the sufficiency of the relationship of classifications to governmental purpose. The standard employed depends upon the nature of the individual's affected interest.[42] The "rational relationship" test, applied generally to economic legislation, requires only the showing of a rational relationship between the classification and the end that the statute seeks to serve.[43] In applying this test, courts generally defer to the legislature's determination that the enactment furthers some permissible state interest.[44] This standard places a heavy burden upon claimants, signalling "minimal scrutiny in theory and virtually none in fact."[45] The more stringent test, that of "strict scrutiny," is triggered when a fundamental right is impinged by the legislative classification.[46] Among others, marriage, procreation decision making, bodily integrity and individual autonomy are considered fundamental rights.[47] Generalizing about the qualities of fundamental rights, one commentator has suggested that they are rights essential to the freedom of the individual, and their denial will be tolerated only under circumstances where the denial would be tolerated universally.[48] When such rights are impinged, the state's interests are explicitly balanced against the discriminatory impact upon the fundamental rights. To sustain the legislation, the burden is on the state to establish that the law advances a compelling state interest.[49]

Besides these two polar opposites, the Supreme Court employs numerous techniques which effectively produce intermediate standards

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40. *See generally* Note, *Developments in the Law: Equal Protection*, 82 HARV. L. REV. 1065 (1969) [hereinafter cited as *Developments in the Law*].

41. *See* San Antonio Independent School District v. Rodriguez, 411 U.S. 1 (1973).

42. Memorial Hospital v. Maricopa County, 415 U.S. 250, 253 (1974).

43. In articulating the exact words of this standard, the Supreme Court has sometimes required that the classification "must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike." Eisenstadt v. Baird, 405 U.S. 438, 447 (1972), *quoting* Reed v. Reed, 404 U.S. 71, 75-76 (1971) *and* Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920). At other times it has been said that a "statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it." Dandridge v. Williams, 397 U.S. 471, 485 (1970) *quoting* McGowan v. Maryland, 366 U.S. 420, 426 (1961).

44. *See generally* L. TRIBE, *supra* note 13, at 994-96.

45. Gunther, *The Supreme Court, 1971 Term — Forward: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972) (footnote omitted).

46. *See, e.g.*, Shapiro v. Thompson, 394 U.S. 618 (1969).

47. *See* notes 71-74 and accompanying text *infra*.

48. Lackland, *Toward Creating a Philosophy of Fundamental Human Rights*, 6 COLUM. HUMAN RIGHTS L. REV. 473, 488-89 (1975).

49. Roe v. Wade, 410 U.S. 113, 155 (1973).

of review.[50] The intermediate standards still require a balancing of interests: the more important the individual's interests are held to be, the more substantial the state's interests must be to sustain the legislation.[51]

Once sufficient state interests to otherwise sustain the classification are established, the issue becomes whether the legislative classification is tailored to promote those interests by including all, but only those persons similarly situated with respect to the purpose of the law.[52] "How well tailored the classification must be remains somewhat obscure."[53] There is a recognition that "few classifications will be either a perfect promotion of an articulated governmental purpose or a clearly irrational mismatch of classification with ends."[54]

The validity of an inartfully tailored classification largely depends upon the standard under which the justices review the permissibility of the governmental ends and the degree of relationship between the classification and those ends.[55] Under the rational relationship standard there is judicial deference to a less than perfect fit of similarly situated persons with the statutory classification.[56] For example, a statute might be upheld even though it is under-inclusive in that it does not reach some persons who are similarly situated for the purposes of the statutory scheme.[57] Likewise, a statute still might be valid even though it is over-inclusive in that it treats persons in the scheme similarly, although, in fact, they should be treated differently.[58] On the other hand, if strict scrutiny is applied, the tailoring of the statute is closely examined.[59] At minimum, there must be a showing that the classification is more than one of several reasonable ways of achieving the state's goal.[60] If the classification is not necessary to achieve the government's interest,[61] or

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50. *See, e.g.*, Craig v. Boren, 429 U.S. 190, 211 (1976) (Powell, J., concurring) (the normally deferential rational basis test takes on sharper focus when gender-based classifications are addressed); San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 98-104 (1973) (Marshall, J., dissenting) (examining and advocating intermediate standards of review). *See generally* L. TRIBE, *supra* note 13, at 1082-97 (cataloguing the techniques of intermediate review).

51. L. TRIBE, *supra* note 13, at 1082-83.

52. *See, e.g.*, Shelton v. Tucker, 364 U.S. 479, 488 (1960); J. NOWAK, R. ROTUNA & J. YOUNG, CONSTITUTIONAL LAW 519-22 (1978) [hereinafter cited as J. NOWAK].

53. *Developments in the Law, supra* note 40, at 1122.

54. J. NOWAK, *supra* note 52, at 522.

55. *Id. See also Developments in the Law, supra* note 40, at 1101.

56. *See, e.g.*, Dandridge v. Williams, 397 U.S. 471, 485 (1970).

57. *See, e.g.*, Williams v. Lee Optical Co., 348 U.S. 483 (1955).

58. *See* L. TRIBE, *supra* note 13, at 999.

59. *See, e.g.*, McLaughlin v. Florida, 379 U.S. 184, 192 (1964); Skinner v. Oklahoma, 316 U.S. 535, 541 (1942). *See also* L. TRIBE, *supra* note 13, at 1080; *Developments in the Law, supra* note 40, at 1121-22.

60. *Developments in the Law, supra* note 40, at 1122.

61. *See* Loving v. Virginia, 388 U.S. 1, 11 (1967); McLaughlin v. Florida, 379 U.S. 184, 196 (1964).

perhaps that less drastic means are available,[62] then the law will be held to violate the equal protection clause.[63]

This three part analysis of equal protection principles provides the structure for the remainder of this article. First considered is the nature of the individual's interests affected by the spousal sexual assault exclusion. Then, taking the character of those interests as the guide to measure the closeness of the scrutiny to be employed, the state's interests in maintaining the exclusion will be examined. Also contained within the next two sections is a discussion of the tailoring of the statute.

III. NATURE OF THE INDIVIDUAL'S INTEREST

In articulating the nature of the individual's interest in a situation where the state treats spousal sexual assault differently from similar acts occurring between nonspouses, it should be recalled that those interested in challenging the validity of the exclusion are defendants in nonspousal sexual assault cases and victims of spousal sexual assault. The nonspousal defendant has an interest in equal application of the laws. He also has a liberty interest at stake in his defense to a criminal prosecution. Neither of these interests, however, create an independent right justifying strict scrutiny. Otherwise, the mere assertion that a defendant is treated differently, or that he might lose his liberty, would cause every criminal statute that contained classifications to be subjected to exacting judicial review. This principle can readily be discerned from the Court's opinion in *Skinner v. Oklahoma.*[64] In that case the Court recognized that the legislature could distinguish between 'degrees of evil' and that it "may mark and set apart the classes and types of problems according to the needs and as dictated or suggested by experience."[65] Such classifications warrant strict scrutiny only if they un-

62. *See* Shapiro v. Thompson, 394 U.S. 618, 637 (1969).

63. A classic examination of the tailoring of a statute is the case of Skinner v. Oklahoma, 316 U.S. 535 (1942). In that case, an Oklahoma statute provided for mandatory sterilization of those individuals who were habitual criminals. A habitual criminal was defined as a person convicted of two or more felonies involving moral turpitude. *Id.* at 535-36. Embezzlement, however, was expressly excluded from the statute. *Id.* at 537. Through application of the law, the theft of a chicken and the embezzlement of a chicken, crimes of intrinsically the same nature, were treated differently for the purposes of sterilization. *Id.* at 539. The United States Supreme Court recognized that the legislation involved "one of the basic civil rights of man. Marriage and procreation are fundamental to the very existence and survival of the race." *Id.* at 541. Therefore, "[w]hen the law lays an unequal hand on those who have committed intrinsically the same quality of offense and sterilizes one and not the other, it has made as invidious a discrimination as if it had selected a particular race or nationality for oppressive treatment." *Id.*

64. 316 U.S. 535 (1942). *See* note 63 *supra* for a discussion of the case.

65. 316 U.S. at 540.

equally burden individuals' fundamental rights.[66] Absent such an impingement, there would be deference to the legislature's classification.[67]

Other than the interests just described, the nonspousal defendant has no rights affected by his defense to a sexual assault charge. This conclusion does not necessarily mean that the nonspousal defendant cannot obtain strict scrutiny of the statutory scheme which subjects him, but not others, to possible liability. Although the general rule is that a claimant may only assert his own constitutional rights,[68] there are numerous exceptions to the rule.[69] One exception is where fundamental rights are impinged in situations where it is difficult or impossible for the persons whose rights are affected to present their grievance before any court.[70] Thus, if it were determined that spousal victims had fundamental rights impinged by the statutory scheme and that those victims could not present their claims before any court, then the nonspousal defendant might be allowed to "use" the spousal victims' rights to obtain strict scrutiny of his equal protection defense.

Viewed from the prospective of the spousal victim, marital sexual assault and the exclusion thereof from liability for criminal sexual assault affect several recognized fundamental rights: marriage,[71] individual autonomy,[72] procreation,[73] and bodily integrity.[74] Although all

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66. *Id.* at 541. There is also "heightened" sensitivity when a criminal statute raises distinctions based on race, *see, e.g.*, McLaughlin v. Florida, 379 U.S. 184, 192 (1964), or gender, *see, e.g.*, Meloon v. Helgemoe, 564 F.2d 602 (1st Cir. 1977), *cert. denied*, 436 U.S. 950 (1978).

67. 316 U.S. at 541. *But cf.* Comment, *The Right to Nondiscriminatory Enforcement of State Penal Laws*, 61 COLUM. L. REV. 1103 (1961) (suggesting that the equal protection clause creates an independent right to nondiscriminatory penal enforcement). For examples of courts' responses to equal protection challenges under the rational basis standard, *compare* United States v. Robinson, 311 F. Supp. 1063, 1066 (W.D. Mo. 1969) (otherwise guilty defendant escaped liability because he was convicted under a wiretap statute that was intentionally discriminatorily enforced against only private individuals, the court holding that there was "no rational distinction between the activity of the Government and that of the defendant.") *with* State v. Giant of St. Albans, Inc., 128 Vt. 539, 548, 268 A.2d 739, 744 (1970) (upholding a blue law riddled with exceptions against an equal protection challenge).

68. Singleton v. Wulff, 428 U.S. 106, 114 (1976); United States v. Raines, 362 U.S. 17, 22 (1960); Barrows v. Jackson, 346 U.S. 249, 255 (1953).

69. *See, e.g.*, Singleton v. Wulff, 428 U.S. 106, 114 (1976); Peters v. Kiff, 407 U.S. 493 (1972); Barrows v. Jackson, 346 U.S. 249, 257-58 (1953).

70. Singleton v. Wulff, 428 U.S. 106, 115-16 (1976); *id.* at 125-26 (Powell, J., separate opinion); Barrows v. Jackson, 346 U.S. 249, 257 (1953).

71. *See, e.g.*, Zablocki v. Redhail, 434 U.S. 374, 383 (1978); Boddie v. Connecticut, 401 U.S. 371, 376 (1971); Loving v. Virginia, 388 U.S. 1, 12 (1967); Griswold v. Connecticut, 381 U.S. 479, 485-86 (1965); Skinner v. Oklahoma, 316 U.S. 535, 541 (1942).

72. *See, e.g.*, Abood v. Detroit Bd. of Educ., 431 U.S. 209, 235 (1975) (in a free society, one's beliefs are shaped by one's own mind and conscience rather than coerced by the state); Kelley v. Johnson, 425 U.S. 238, 251 (1976) (Marshall, J., dissenting) (the Constitution is designed to protect autonomy and personal dignity); Stanley v. Georgia, 394 U.S. 557, 568 (1969) (right to pornography in home); Aptheker v. Secretary of State, 378 U.S. 500, 505 (1964).

73. *See, e.g.*, Carey v. Population Servs. Int'l, 431 U.S. 678, 685 (1977); Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52, 69 (1976); Roe v. Wade, 410 U.S. 113, 153 (1973); Eisenstadt v. Baird, 405 U.S. 438, 453-54 (1972). *Cf.* Buck v. Bell, 274 U.S. 200, 207 (1927) (compulsory sterilization to prevent birth of imbeciles).

74. *See, e.g.*, Rochin v. California, 342 U.S. 165, 172 (1952) (stomach pump in search of

of these rights are considered aspects of the right to privacy,[75] it is well established that procreative decision making and bodily integrity are individual rights having priority over the marital relationship.[76]

Regardless of whatever else it is,[77] the act of sexual assault is a violation of the individual's bodily integrity and a denial of the ability to control procreation. The spousal sexual assault statute makes a distinction which affects these fundamental rights. The statute provides protection of these rights for nonspouses but denies the protective function of the statute for nonconsensual sexual acts occurring between spouses. The Supreme Court has "long been mindful that where fundamental rights and liberties are asserted under the Equal Protection Clause, classifications which might invade or restrain them must be closely scrutinized and carefully confined."[78] Thus the mere showing of the difference in treatment of these fundamental rights should be sufficient to warrant strict scrutiny.[79]

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evidence is shocking to the conscience); Union Pacific R. Co. v. Botsford, 141 U.S. 250, 251 (1891) (refusal to order person to submit to surgical exam before trial based on "the right of every individual to the possession and control of his own person"); Gerety, *Refining Privacy,* 12 HARV. C.R.-C.L. L. REV. 233, 266 (1977) (the body is the most basic form of individual autonomy). *See generally* L. TRIBE, *supra* note 13, at 913-38. *Cf.* Roe v. Wade, 410 U.S. 113, 154 (1973) (right to bodily integrity is not an unlimited right to do with one's body as one wishes); Schmerber v. California, 384 U.S. 757, 772 (1966) ("The integrity of the individual's person is a cherished value in our society. That we hold today that the Constitution does not forbid the States minor intrusions into an individual's body under stringently limited conditions in no way indicates that it permits more substantial intrusions, or intrusions under other conditions."); Raleigh Fitkin — Paul Morgan Memorial Hospital v. Anderson, 42 N.J. 421, 201 A.2d 537, *cert. denied,* 377 U.S. 985 (1964) (compulsory blood transfusion to fetus over mother's religious objections).

75. Carey v. Population Servs. Int'l, 431 U.S. 678, 684-85 (1977). "This right of personal privacy has been said to include 'the interest in independence in making certain kinds of important decisions.' " *Id.* (citations omitted). *Cf.* Gerety, *supra* note 74, at 236 (privacy is autonomy or control over the intimacies of personal liberty); Ruebhausen & Brim, *Privacy & Behavioral Research,* 65 COLUM. L. REV. 1184, 1189 (1965) (the essence of privacy is the freedom of the individual to pick and choose for himself the time, circumstances, and "extent to which his attitudes, beliefs, behavior, and opinions are to be shared with or withheld from others").

76. The discussion of this hierarchy of fundamental rights is postponed until the state's interests are examined. *See* notes 94-106 and accompanying text *infra.*

77. *See* notes 144-49 and accompanying text *infra.*

78. Harper v. Virginia Bd. of Educ., 383 U.S. 663, 670 (1966).

79. Under this view the codification of the exclusion is itself sufficient state action. The inquiry would then be whether the statutory scheme is constitutional. *See* Horowitz, *The Misleading Search for "State Action" Under the Fourteenth Amendment,* 30 S. CAL. L. REV. 208, 209 (1957). Since the statutory scheme makes a distinction in the treatment of the protection of fundamental rights, it should warrant strict scrutiny. This is somewhat analogous to situations where the legislature passes a law making distinctions based on race or sex. In these situations the presence of state action in private activity is assumed. *See* Parks v. "Mr. Ford," 556 F.2d 132, 135-36 n.6a (3rd Cir. 1977).

It might be argued that the statutory distinction alone is not sufficient to warrant strict scrutiny in that it is not the state that impinges upon the victim's fundamental rights but rather the individual spousal actor. Thus, the argument would run, the statutory scheme should be tested under a more deferential standard of review. Even if this argument were accepted by the court, there are several other theories, outlined below, which arguably establish a sufficient connection between the private conduct and state action to justify close examination of the classification. The indirectness of the state action will always be a factor in any instance where a victim challenges a

Even if the state interests are sufficient to justify some type of spousal exclusion given the character of the individual's interests, equal protection principles still require that the exclusion be tailored to reflect those state interests. In other words, state and individual interests must be coordinated to prevent unjustified impingement of any individual in-

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criminal law classification on equal protection grounds except in the hypothetical case where the government is itself the criminal actor. But upon examining the purposes of the equal protection clause and our system of criminal laws, it is of primary importance that a remedy should be had when a victim is not given an equal opportunity to be protected by our criminal justice system. Moreover, not all challenges to the criminal laws by victims on equal protection grounds would warrant strict scrutiny. For example, where only property rights are invaded, a more deferential standard would be appropriate.

In the present context, if the mere distinction contained in the statute is not sufficient to warrant close scrutiny, there remain several theories which illuminate the state's involvement in the act of spousal sexual assault. First, it could be argued that the state is a party to the marital relation. *See, e.g.*, Maynard v. Hill, 125 U.S. 190, 210-11 (1888). The marriage relationship is pervasively regulated by the state. *See, e.g.*, Sosna v. Iowa, 419 U.S. 393, 404 (1974); DeBurgh v. DeBurgh, 39 Cal. 2d 858, 863-64, 250 P.2d 598, 601 (1957). During the continuance of the marriage, the state has the power to regulate all the incidents of the relationship. Sherrer v. Sherrer, 334 U.S. 343, 354 (1948); *id.* at 360 (Frankfurter, J., dissenting); Maynard v. Hill, 125 U.S. 190, 210-11 (1888). One aspect of the regulation and involvement of the state has been the determination that spousal sexual assault should not be actionable as such. Thus, because of the very pervasiveness of the state's involvement in the marriage relation, it cannot be said that there is no state involvement in spousal sexual assault.

Arguably, the required connection between the fundamental rights infringement and state action could also be established if it were empirically shown that the effect of the exclusion is to encourage spousal sexual assault. This would be analogous to such situations as the Court's refusal to enforce racially restrictive covenants based partially on the theory that less private discrimination would take place if the courts did not enforce that discrimination. *See* Barrows v. Jackson, 346 U.S. 249, 254 (1953). The spousal claimant would have to show that the incidence of sexual assault among spouses is greater because of the aggressor's nonliability, or, that the incidence of spousal sexual assault is more frequent than nonspousal sexual assault because of the spousal aggressor's nonliability. Either of these comparisons would be difficult to demonstrate, given the almost universal application of the exclusion. Presently, there are no studies of the effect of the exclusion on the incidence of spousal sexual assault.

Finally, "if the conception of liberty is sufficiently developed to define a sphere of private autonomy free from both governmental and private infringement, a government decision not to protect individuals from private infringements will plainly be a species of unconstitutional state action." L. TRIBE, *supra* note 13, at 1150. It could be argued that state action is established by the action of a court in refusing to give declaratory relief to a spousal victim. By its refusal to grant the relief it would be sanctioning the conduct. *See* Parks v. "Mr. Ford," 556 F.2d 132, 154-55 (3rd Cir. 1977) (Gibbons, J., concurring). Courts have refused to sanction some private actions. *See, e.g.*, Barrows v. Jackson, 346 U.S. 249 (1953); Shelley v. Kramer, 334 U.S. 1 (1948). In one case the plaintiff alleged that a private individual had violated her constitutional right of privacy. The defendant argued that this right runs only against state action. The court rejected the defendant's contention.

> The claim that this constitutional right runs only against "state action" overlooks the fact that the act of a court — even the entry of a judgment denying relief — is state action within the meaning of the Fourteenth Amendment. . . . Hence, the denial of relief in this case — relief essential to vindicate a basic human and constitutional right — would itself violate the Constitution.

Galella v. Onassis, 353 F. Supp. 196, 232 (S.D. N.Y. 1972) (citations omitted). Applying this test to spousal sexual assault, it must be determined that the relief is "essential to vindicate a basic human and constitutional right," which entails an examination of the state's justification for the exclusion. *Id.*

terests. Contained in the spousal exclusion embodied in Vermont's Sexual Assault Act are three groups of individuals whose treatment relative to the exclusion bears examination. These groups include those individuals who compel their spouses (or are compelled by their spouses) to perform "unnatural acts," those spouses who are separated from their mates, and unmarried cohabitors. Each group will be separately examined.

Vermont's statute excludes liability under the statute for *all* sexual acts occurring between spouses.[80] This exclusion encompasses "unnatural acts." The question is whether this exclusion of liability for all sexual acts is justified by the articulated state interests. If the state interests do not justify such a broad exclusion, it could be argued that the statute as a whole is under-inclusive because it does not protect against such acts, and correlatively, that the exclusion itself is unconstitutionally over-inclusive because it excludes liability for such acts from the operation of the statute.

To anticipate somewhat, the position that this broad exclusion does not reflect the state's interests can be asserted partly by analogy to several courts' treatment of statutes prohibiting *consensual* sodomy. These courts have struck down statutes prohibiting consensual sodomy as applied to the unmarried on equal protection grounds believing that marital privacy prevented applying the statute to married couples.[81] The issue, as the courts perceived it, was whether marital status had any logical basis for determining the morality or legality of the acts. Marriage, at least one court has reasoned, is not relevant in these situations, because all arguments pertaining to 'deviate' intercourse are applicable irrespective of the participant's marital status.[82] Accepting this as fact, that deviate sexual intercourse is no different in character whether it is performed by spouses or unmarried couples when consensual in nature,[83] it must be shown that the act becomes qualitatively different for the purposes of distinguishing between spouses and nonspouses when the element of compulsion is introduced. Moreover, it has been

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80. *See* note 4 *supra*.

81. *See* Buchanan v. Batchelor, 308 F. Supp. 729 (N.D. Tex. 1970), *vacated on other grounds*, Wade v. Buchanan, 401 U.S. 989 (1971); State v. Pilcher, 242 N.W.2d 348, 358-59 (Iowa 1976); *In re* P., 92 Misc. 2d 62, 400 N.Y.S.2d 455 (Fam. Ct. 1977); People v. Johnson, 77 Misc. 2d 889, 355 N.Y.S.2d 266 (Buff. City Ct. 1974); *cf.* Carey v. Population Servs. Int'l, 431 U.S. 678, 694 n.17 (1977) (the Court has not definitely answered the question whether, and to what extent, the Constitution prohibits state statutes regulating private sexual behavior among adults). *But see* Doe v. Commonwealth's Attorney, 403 F. Supp. 1199 (E.D. Va. 1975), *aff'd mem.*, 425 U.S. 901 (1976). *Contra*, Hughes v. State, 14 Md. App. 497, 287 A.2d 299 (1972) (dictum) (conviction of a husband and wife for voluntary sodomy is conceivable), *cert. denied*, 409 U.S. 1025 (1972); State v. Lair, 62 N.J. 388, 301 A.2d 748 (1973) (based on the intimacies of married life, the state can regulate consensual sex between singles, but not married couples).

82. People v. Johnson, 77 Misc. 2d 889, 891, 355 N.Y.S.2d 266, 267 (Buff. City Ct. 1974).

83. *Id.*

said that forced spousal sodomy can be constitutionally proscribed,[84] and, in other jurisdictions, it has been held that the state has a compelling interest in protecting the individuals within marriage from such deviate acts.[85] Presumably, Vermont has the same interest in protecting its citizens from such acts and prosecuting those who force others to perform them. If this were true, then unless the state has an alternative method of protecting the interests of individuals within marriage from sexually deviate acts which makes the protection of the sexual assault statute unnecessary, the state's interests in excluding spouses from liability must be at least equally compelling.[86]

A second group of persons excluded from protection or liability under the Vermont statute are those spouses who are separated, whether or not under a judicial order.[87] While waiting for a divorce action to be heard, the husband can still forcibly seek sexual satisfaction and there can be no action against him under the statute.[88] Even if the spouses maintain separate households on a permanent basis, the exclusion remains in effect. In these instances where the marital relationship has obviously broken down, there must be a determination whether the state interests are sufficient to justify such a broad exclusion. If not, the classification is impermissibly over-inclusive because those who are separated or waiting for divorce are included within the spousal exemption.

A third group to consider in examining the scope of Vermont's spousal exclusion are those who live together without the "benefit" of marital bonds.[89] Identical acts of forced sexual behavior could occur between married cohabitors and unmarried cohabitors, but actual criminal liability under the statute can be only imposed on those individuals who are not married.[90] Although Vermont does not recognize common law marriage,[91] recent decisions[92] and statutes[93] in other states

84. *See, e.g.*, State v. Bateman, 113 Ariz. 107, 547 P.2d 6 (1976); Towler v. Peyton, 303 F. Supp. 581 (W.D. Va. 1969); Cotner v. Henry, 394 F.2d 873, 875-76 (7th Cir. 1968) (dictum), *cert. denied*, 393 U.S. 847 (1968); People v. Bales, 189 Cal. App. 2d 694, 11 Cal. Rptr. 639 (1961), *cert. denied*, 368 U.S. 866 (1961).

85. State v. Bateman, 113 Ariz. 107, 547 P.2d 6, 9 (1976).

86. *See* notes 156-66 and accompanying text *infra*.

87. Many jurisdictions impose liability for sexual assault when the spouses are separated. *See* note 4 *supra*. These statutes represent a recognition that there are limits to the state's interests in excluding liability.

88. *See* Regina v. Miller, [1954] 2 Q.B. 282, 2 All E.R. 529, Annot., 84 A.L.R. 1017, 1019-20.

89. The number of unmarried couples living together increased eightfold in the 1960's. Willamson, *Justice Tobriner & the Tolerance of Evolving Lifestyles: Adapting the Law to Social Change*, 29 HASTINGS L. J. 73, 74 (1977).

90. *See* Note, *Rape Reform Legislation: Is it the Solution?*, 24 CLEV. ST. L. REV. 463, 473 (1975).

91. Stahl v. Stahl, 136 Vt. 90, 385 A.2d 1091 (1978).

92. *See, e.g.*, Marvin v. Marvin, 18 Cal. 3d 660, 134 Cal. Rptr. 815, 557 P.2d 106 (1976); Carlson v. Olson, 256 N.W.2d 249 (Minn. 1977). *See also* Weitzman, *Legal Regulation of Marriage: Tradition and Change*, 62 CALIF. L. REV. 1169 (1974).

93. Several statutes define "spouses" as those living together as man and wife, regardless of

have begun to blur the distinction between marital partners and unmarried cohabitors. This trend lends support to the idea that unmarried cohabitors and married couples are similarly situated for the purposes of assessing liability for nonconsensual sexual acts occurring between cohabitors. Given this situation, the classification created by the Vermont statute is under-inclusive, if the state's interests do not provide a basis for distinguishing between these types of cohabitors.

IV. NATURE OF THE STATE'S INTEREST

Examination of the origins of the spousal rape exclusion "reveal that it is rooted in the ancient concepts of a wife as a chattel and the inviolability of the husband's supreme role in the marriage relationship."[94] At the time the rape laws came into being, women were viewed as their husband's property,[95] and the exclusion was a means of legitimating and protecting the husband's sexual behavior.[96] Probably somewhat related to this property theory is the "unity of person" principle. At common law the legal identity of the woman merged into that of her husband upon marriage.[97] Since during marriage only one person remained, there could be no sexual assault.

Both the property and "unity of person" theories are obsolete. In a recent opinion, the United States Supreme Court has said that nowhere in modern society "is a woman regarded as chattel or demeaned by denial of a separate legal identity and the dignity associated with recognition as a whole human being."[98] Today, the purpose of the rape laws has become the protection of individual safety and freedom of choice.[99] Unless a sufficient modern justification exists, the present spousal exclusion is just a holdover of the discrimination of the past.[100]

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their legal status. CONN. GEN. STAT. ANN. § 53a-67(b) (West Supp. 1980); DEL. CODE ANN. tit. 11, § 772 (1979); KY. REV. STAT. ANN. § 510.010(3) (Baldwin 1979); MINN. STAT. ANN. § 609.349 (West Supp. 1980); MONT. REV. CODES ANN. § 45-5-506(2) (1979); PA. STAT. ANN. tit. 18, § 3103 (Purdon Supp. 1979); W. VA. CODE § 61-8B-1(2) (1977); MODEL PENAL CODE § 213.6(2) (1962).

94. State v. Smith, 148 N.J. Super. 219, 229, 372 A.2d 386, 391 (Essex County Ct. 1977), *aff'd* 169 N.J. Super. 98, 404 A.2d 331 (Super. Ct. App. Div. 1979). *See also* Note, *The Marital Rape Exemption,* 52 N.Y.U. L. REV. 306, 309 (1977) [hereinafter cited as *Marital Rape*].

95. State v. Smith, 148 N.J. Super. 219, 229, 372 A.2d 386, 391 (Essex County Ct. 1977), *aff'd* 169 N.J. Super. 98, 404 A.2d 331 (Super. Ct. App. Div. 1979); S. BROWNMILLER, AGAINST OUR WILL 6-22 (1975); *Marital Rape, supra* note 94, at 309.

96. State v. Smith, 148 N.J. Super. 219, 229, 372 A.2d 386, 390 (Essex County Ct. 1977), *aff'd,* 169 N.J. Super. 98, 404 A.2d 331 (Super. Ct. App. Div. 1979); *Marital Rape, supra* note 94, at 309.

97. Richard v. Richard, 131 Vt. 98, 105, 300 A.2d 637, 641 (1973); Comment, *The Marital Exception to Rape: Past, Present and Future,* 2 DET. C.L. REV. 261, 263 (1978).

98. Trammel v. United States, 100 S. Ct. 906, 913 (1980). *Accord,* Richard v. Richard, 131 Vt. 98, 105-06, 300 A.2d 637, 641 (1973).

99. *Marital Rape, supra* note 94, at 311.

100. If the history of the spousal exclusion were combined with the fact that most rapes are done by males, a plausible case for heightened scrutiny based on a gender discrimination can be argued. *See* Massachusetts v. Feeney, 442 U.S. 256, 274 (1979). In *Feeney,* the Court stated that "[w]hen a statute gender-neutral on its face is challenged on the ground that its effects upon women are disproportionably adverse, a twofold inquiry is thus appropriate. The first question is

Two general ideas might be said to underlie the modern justifications for the spousal exclusion. The first is a perception that the status of being married, by itself, has changed the *nature* of the nonconsensual sexual acts. The other idea asserts that the *quality* of such acts is sufficiently different and less dangerous when occurring within marriage. Each of these conceptions has produced numerous theories to support the exclusion.

A. Marriage as Status

It could be argued that the legislature has recognized the special status[101] of marriage, and has determined that liability under the sexual assault statute should not attach to nonconsensual sexual acts in marriage. The concept of marriage is important in American jurisprudence. It is a recognized fundamental right.[102] The state is vitally interested in matters surrounding the relationship.[103] This relationship is favored in the law,[104] and the law holds marital partners to various special obligations and liabilities.[105] Based on these considerations, it could be argued that vulnerability to nonconsensual sexual acts is simply an obligation of the relationship. This obligation, stemming perhaps from an obligation to engage in sexual intercourse within marriage,[106] arguably

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whether the statutory classification is indeed neutral in the sense that it is not gender based. If the classification itself, covert or overt, is not based upon gender, the second question is whether the adverse effect reflects invidious gender based discrimination. *Id.* In this second inquiry, impact provides an 'important starting point,' but purposeful discrimination is 'the condition that offends the Constitution.' " Massachusetts v. Feeney, 442 U.S. 256, 274 (1979), *citing* Arlington Heights v. Metropolitan Hous. Dev. Corp. 429 U.S. 252, 266 (1977); Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 16 (1971).

101. *See, e.g.*, Maynard v. Hill, 125 U.S. 190, 210-11 (1888); Buchholz v. Buchholz, 197 Neb. 180, 182-83, 248 N.W.2d 21, 22-23 (1976); B v. B, 355 N.Y.S.2d 712, 716 (Sup. Ct. Kings County 1974); *In re* Hanrahan's Will, 109 Vt. 108, 121, 194 A. 471, 477 (1937); Washington Statewide Organization of Stepparents v. Smith, 85 Wash. 2d 564, 567, 536 P.2d 1202, 1205-06 (1975).

102. *See* note 71 and accompanying text *supra*.

103. *See, e.g.*, State v. Austin, 234 S.E.2d 657, 663 (W. Va. 1977). *See also* Maynard v. Hill, 125 U.S. 190, 210-11 (1888).

104. Davidson v. Davidson, 111 Vt. 68, 74, 10 A.2d 197, 200 (1940), *citing* Rogers v. Rogers, 67 N.J. Eq. 534, 538, 58 A. 822, 824 (1904).

105. Sherrer v. Sherrer, 334 U.S. 343, 354 (1948) (by implication); *id.* at 360 (Frankfurter, J., dissenting); Maynard v. Hill, 125 U.S. 190, 210-11 (1888).

106. *See* Miller v. Miller, 132 Misc. 121, 122, 228 N.Y.S. 657 (Sup. Ct. 1928) ("Marital intercourse, so that children may be born, is an obligation of the marriage contract, and 'is the foundation upon which must rest the perpetuation of society and civilizations.' "); Mayhew v. Mayhew, 61 Conn. 233, 235, 23 A. 966, 967 (1891) (Each spouse is entitled to demand and to have sexual intercourse with the other, but neither has a right to the relation against the reasonable request of the other to forebear, and correlatively, each is under the duty of submission to the reasonable request of the other, either for intercourse or forbearance therefrom.); Weitzman, *supra* note 92, at 1211-16 (the marriage contract assumes that procreation is an essential element of the relationship). *Cf.* Reynolds v. Reynolds, 85 Mass. (3 Allen) 605, 610 (1862) ("one of the leading and most important objects of the institution of marriage under our laws is the procreation of children"). *But cf.* Murphy v. Ramsey, 114 U.S. 15, 42 (1884) ("Cohabitation is but one of the many incidents to the marriage relation. It is not essential to it.")

justifies the difference in treatment that married individuals receive. If, however, it is determined that an individual's fundamental rights of bodily integrity and procreation decision making are impinged by the legislative classification, a series of judicial precedents seem to clearly preclude the validity of the classification if its only ground is the fact of marriage itself.

The first in the series, *Eisenstadt v. Baird,*[107] has provided a modern definition of the nature of the marital relationship. During the course of the opinion which invalidated a statutory scheme more severely limiting access of unmarried individuals than married individuals to contraceptives, the Court said:

> [T]he marital couple is not an independent entity with a mind and heart of its own, but an association of two individuals each with a separate intellectual and emotional makeup. If the right to privacy means anything, it is the right of the *individual,* married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.[108]

The Supreme Court opinion in *Planned Parenthood of Central Missouri v. Danforth*[109] explicitly established the independence of the individual within marriage concerning matters affecting the procreation decision. Factually, the case involved a Missouri statute requiring that a wife obtain her husband's consent before an abortion could be performed. The state's theory in support of the requirement was the perception of marriage as an institution and the belief that any change in the family status should only be made jointly by the spouses.[110] The state argued that, because "[t]he consent of both parties is generally necessary . . . to begin a family, the legislature has determined that a change in the family structure set in motion by mutual consent should be terminated only by mutual consent."[111] The Court rejected this theory, however, holding that a state could not require consent of a spouse as a condition for abortion.[112] In reaching its decision, the Court recognized that a wife could act unilaterally, perhaps having a serious deleterious effect on the marriage,[113] yet marital harmony would also not be promoted by giving the husband the veto power over the decision of the woman.[114] Thus, the Court was faced with a direct conflict be-

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107. 405 U.S. 438 (1972).

108. *Id.* at 453 (emphasis in original). *See also* Carey v. Population Servs. Int'l, 431 U.S. 678, 687 (1977).

109. 428 U.S. 52 (1976).

110. *Id.* at 68.

111. *Id. quoting* brief for Appellee Danforth at 38.

112. *Id.* at 69.

113. *Id.* at 70.

114. *Id.* at 71.

tween the individual rights of the wife and those of the marital relationship as an institution. Resolving the conflict, it was reasoned that the balance must weigh in the woman's favor since it is the "woman who physically bears the child and who is the more directly and immediately affected by the pregnancy. . . ."[115]

In addition, state courts have held that a woman has the right to have a hysterectomy[116] or a sterilization operation[117] without spousal consent. These courts reason that the right of a competent person to control his or her body is paramount to the spouse's desires.[118]

These decisions are a recognition that the individual, not the marital relationship, is the repository of the basic right to control procreation. Thus when individuals within the marital relationship have differing opinions concerning procreation, each has the protected right to control his or her own reproductive functions.[119] This right to the control of the reproductive functions of one's own body is just an aspect of the more comprehensive right to bodily integrity.[120] More generally, then, these cases stand for the principle that the individual's right to control his or her body continues within the marital relationship even when the exercise of that right has a deleterious effect upon the marriage.[121] The additional principle for which these cases stand — that the marriage relationship cannot be favored in the law at the expense of the fundamental rights of the individuals within that relationship — eliminates the marital status itself as an underlying justification if fundamental rights are impinged.

Several traditional theories for the exclusion stem at least partly from

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115. *Id.*

116. Murray v. Vandevander, 522 P.2d 302 (Okla. Ct. App. 1974).

117. Ponter v. Ponter, 135 N.J. Super. 50, 342 A.2d 574 (1975).

118. Murray v. Vandevander, 522 P.2d 302, 304 (Okla. Ct. App. 1974); Ponter v. Ponter, 135 N.J. Super. 50, 55, 342 A.2d 574, 577 (1975).

119. *See* Carey v. Population Servs. Int'l, 431 U.S. 678, 688-89 (1977). *See also* L. TRIBE, *supra* note 13, at 923 (*Skinner* and *Griswold* together stand for the proposition that *"whether one person's body shall be the source of another life must be left to that person and that person alone to decide."*) (emphasis in original); Tribe, *The Supreme Court 1972 Term — Forward: Toward A Model Of Rules In The Due Process Of Life And The Law*, 87 HARV. L. REV. 1, 39 (1973), *quoting The Presidential Task Force of the Citizens Advisory Council on the Status of Women*, TASK FORCE REPORT ON FAMILY LAW AND POLICY 31 (1968) ("The right of the woman to determine her own reproductive life is a basic human right.").

120. Gerety, *supra* note 74, at 266.

121. The many convictions of spouses for nonconsensual sodomy are another recognition of the spouse's individual right to bodily integrity. *See* note 84 *supra*. *See also* Brooks v. Burkeen, 549 S.W.2d 91, 93 (Ky. 1977) ("The Federal constitutional right to privacy has been held to protect the decision of one spouse to act in a way which affects the most basic considerations of a marriage from the veto of the other spouse."); Fadgen v. Lenkner, 469 Pa. 272, 283, 365 A.2d 147, 152-53 (1976) (Manderino, J., concurring). The action for criminal conversation should be abolished because the right to privacy is broad enough to include the spouse's right to engage in sexual activity with one other than his or her spouse and there is no compelling state interest which justifies limiting the exercise of that right. *Id.*

the concept of the marital status. The most frequently cited justification for the perpetuation of the spousal exclusion is the contract theory. According to this theory, the wife irrevocably consents to her husband's offers of sexual intercourse.[122] Consent, of course, is a defense to a charge of sexual assault.[123] The state's interest underlying the theory, presumably, is in upholding the marriage contract.[124] The state theory has flaws similar to the status rationale. If the consent is irrevocable, it denies individual control over the birth control decision subsequent to the marriage ceremony. This is especially true if no artificial means of birth control are employed. The procreation decisions, however, have held that the individual retains the decision to control whether one's body shall be a source of another's life. It would be an untenable anomaly if the procreation decisions were to be read narrowly as standing only for the proposition that the individual's control over sexual functions were limited to the ability to practice artificial birth control or receive an abortion. To the contrary, these decisions should be read to recognize that a spouse may withhold sexual relations at any time during marriage, because each person is an individual, retaining the right to make such fundamental decisions.[125]

Additional reasons to question the validity of the contract theory abound. Opponents of the theory argue that the doctrine is not factually sound as it requires one to infer that the wife intends to let her husband initiate sex upon demand.[126] In contrast, opponents argue that

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122. This theory of consent, although not explicitly a reason for the Vermont spousal exclusion, has been the primary reason for the exclusion. *See, e.g.,* State v. Haines, 51 La. Ann. 731, 25 So. 372 (1899); Commonwealth v. Fogerty, 74 Mass. (8 Gray) 489 (1857); State v. Smith, 148 N.J. Super. 219, 372 A.2d 386 (Essex County Ct. 1977) *aff'd,* 169 N.J. Super. 98, 404 A.2d 331 (Super. Ct. App. Div. 1979); State v. Bell, 90 N.M. 134, 560 P.2d 925 (1977); Frazier v. State, 48 Tex. Crim. 142, 86 S.W. 754 (1905); Regina v. Clark, [1949] 33 Crim. App. 216, 2 All E.R. 448. This theory of implied consent was first advanced in 1 M. Hale, THE HISTORY OF THE PLEAS OF THE CROWN 628 (London 1800): "[T]he husband cannot be guilty of a rape committed by himself upon his lawful wife, for by their mutual matrimonial consent an [sic] contract the wife hath given up herself in this kind unto her husband, which she cannot retract." At the time Hale wrote these words it was an "accepted view of the law because at that time a valid marriage could not be dissolved except by death . . . [and] [t]he only way in which a marriage could be voided . . . was by a private Act of Parliament." Regina v. Miller, [1954] 2 Q.B. 282, 286, 2 All E.R. 529, 530.

123. VT. STAT. ANN. tit. 13, § 3252(1)(A) (Supp. 1980).

124. [W]hilst marriage is often termed ... a civil contract ... it is something more than a mere contract. The consent of the parties is of course essential to its existence, but when the contract to marry is executed by the marriage, a relation between the parties is created which they cannot change .... The relation once formed, the law steps in and holds the parties to various obligations and liabilities. It is an institution, in the maintenance of which in its purity the public is deeply interested, for it is the foundation of the family and of society, without which there would be neither civilization nor progress.

Maynard v. Hill, 125 U.S. 190, 210-11 (1888).

125. Some states do not differentiate in their statutory treatment of spousal and nonspousal actors in imposing liability for sexual assault. *See* note 4 *supra.*

126. Comment, *Rape and Battery Between Husband and Wife,* 6 STAN. L. REV. 719, 722

marriage is merely an indication that the wife will usually consent to intercourse but that she "probably believes that she can expressly decline the act at any given time."[127] In refusing to recognize this basic fact of modern marital relations, the contract theory has simply "lost touch with the reality of the 20th Century."[128] In other areas of the law the irrevocable consent fiction can be viewed as having been directly contradicted. For example, although Vermont's courts have not addressed the question, in other states divorces may be granted on the grounds of indignities or cruelties arising from excessive sexual demands.[129] In addition, although the consent is said to be sexual intercourse,[130] Vermont excludes liability for nonconsensual "unnatural acts." Thus the exclusion is broader than the support that the contract theory provides.[131] Moreover, it is unreasonable to infer such consent when the spouses are separated. The contract theory does, however, provide a ground for differentiating the behavior of cohabitors who have not formalized their relationship with the state.

Two other theories more clearly articulate modern state interests in the marriage relation. It has been said that the exclusion represents an attempt to promote marital privacy[132] or encourage marital reconciliation by preventing prosecutions.[133] These are permissible interests if the exclusion does not unfairly burden fundamental rights. If these poten-

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(1954) [hereinafter cited as *Rape and Battery*]. The consent is implied, the inference being that, "consent to marry" and "consent to intercourse at all times" are the same thing because the marriage ceremony does not contain specific references to intercourse. *Consent in Rape, supra* note 2, at 258.

127. *Rape and Battery, supra* note 126, at 722. The result of the irrevocable consent theory has been called 'illogical' because in cases of "rape of a woman other than one's wife, the victim's prior consent to sexual access is not a defense where *she* withdraws or refuses to consent on another subsequent occasion." State v. Smith, 148 N.J. Super. 219, 228, 372 A.2d 386, 391 (Essex County Ct. 1977), *aff'd*, 169 N.J. Super. 98, 404 A.2d 331 (Super. Ct. App. Div. 1979) (emphasis in original).

128. State v. Smith, 148 N.J. Super. 219, 227, 372 A.2d 386, 390 (Essex County Ct. 1977), *aff'd*, 169 N.J. Super. 98, 404 A.2d 331 (Super. Ct. App. Div. 1979). This "superficial reasoning has been perpetuated . . . without consideration of the fact that such a mechanical application of principles of contract law are illogically applied in the area of forcible sexual invasions." *Id.*

129. *See, e.g.*, Mayhew v. Mayhew, 61 Conn. 233, 23 A. 966 (1891); Gardner v. Gardner, 104 Tenn. 410, 58 S.W. 342 (1900). Intolerable severity is a ground for divorce in Vermont. VT. STAT. ANN. tit. 15, § 551(3) (1974).

130. In light of the repressive attitude of the common law toward sex, " 'consent to intercourse' envisaged within the marital union probably meant 'consent to intercourse in the missionary position.' " *Consent in Rape, supra* note 2, at 279.

131. Other jurisdictions impose liability for nonconsensual deviate sexual acts. *See* note 84 and accompanying text *supra*.

132. "[I]t would appear that the courts have . . . resolved the issue upon some inarticulated judicial policy decision encompassing some fear or reluctance to invade the marital relationship." State v. Smith, 148 N.J. Super. 219, 228, 372 A.2d 387, 391 (Essex County Ct. 1977), *aff'd*, 169 N.J. Super. 98, 404 A.2d 331 (Super. Ct. App. Div. 1979).

133. *See* statement of Senator Bloomer, Vermont Senate Judiciary Hearings on the Sexual Assault Act, Transcript at 12 (Feb. 16, 1977); *Rape and Battery, supra* note 126, at 725.

tial justifications are tested under a deferential standard, there must be a determination as to whether these interests are rationally or substantially promoted.

The purpose of marital privacy is to promote the marriage relationship by allowing the fostering of consensual acts between marital partners.[134] Marital privacy was not designed as a shield to allow one marital partner to force the other into nonconsensual acts.[135] Given its purpose, it is inapplicable as a rational justification for the exclusion of liability for sexual assault. Moreover, because other actions can be brought for nonconsensual sexual acts occurring during marriage, it is illogical to exclude liability upon this ground alone.[136]

The state's interest in favoring marriage includes the encouragement of reconciliation. The exclusion could be said to reflect the state's hope that the partners will informally resolve their problems. Unfortunately, "reconciliation hardly seems an expected or likely consequence of a relationship that has deteriorated to the point of forcible sexual advances."[137] If this were the sole justification for the exclusion, it would have the effect of permitting one spouse to escape justice at the expense of the other based on an unlikely hope of reconciliation.[138] Moreover, this theory is somewhat contradicted by the allowance of other actions.[139]

Some commentators have cited problems of proof as another possible justification for the spousal exclusion.[140] This rationale can also be seen as a result of the existence of the relationship itself. Often mentioned are such problems as fabricated complaints in seeking a more favorable divorce settlement, and actually establishing that a sexual attack occurred. Yet these problems cannot be a valid reason for denying a cer-

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134. *See* Griswold v. Connecticut, 381 U.S. 479, 485-86 (1965).

135. *See* Trammel v. United States, 100 S. Ct. 906, 913 (1980) wherein the Court modified the common law privilege that prohibited one spouse from testifying against the other in federal criminal proceedings. The Court held that the choice of whether to give such testimony belongs to the witness spouse alone. Rejecting the argument that permitting one spouse to testify against the other would interfere with marital harmony, the court reasoned that there was probably little harmony to preserve when one spouse is willing to testify against the other in a criminal proceeding. Moreover, not permitting a spouse to testify against the other in order to avoid prosecution herself would have the "effect of permitting one spouse to escape justice at the expense of the other." *Id.*

136. *See, e.g.,* Richard v. Richard, 131 Vt. 98, 105, 300 A.2d 637, 641 (1973). In *Richard,* the Vermont Supreme Court, in allowing spousal tort claims said: "there has been nothing to show that in states which have permitted such action that the peace and harmony of the home is disrupted to any greater extent . . . than in states which deny such action." *Id.*

137. State v. Smith, 148 N.J. Super. 219, 226, 372 A.2d 386, 389 (Essex County Ct. 1977), *aff'd,* 169 N.J. Super. 98, 404 A.2d 331 (Super. Ct. App. Div. 1979).

138. *See* note 135 *supra.*

139. State v. Smith, 148 N.J. Super. 219, 225-26, 372 A.2d 386, 389 (Essex County Ct. 1977), *aff'd,* 169 N.J. Super. 98, 404 A.2d 331 (Super. Ct. App. Div. 1979).

140. *Consent in Rape, supra* note 2, at 286-87; *Rape and Battery, supra* note 126, at 724-25; *Marital Rape, supra* note 94, at 313-15.

tain segment of society equal protection of the law. The legal system is designed to adjudicate difficult evidentiary issues.[141] If these problems were a valid justification, then they would also apply to other actions allowed between spouses,[142] or to other situations where the victim is familiar with the attacker.[143]

In summary, the contract theory, marital privacy, the promotion of reconciliation, and problems of proof are all at least partly based upon the marriage relationship as an institution or status. None of these theories can withstand strict scrutiny because of the priority given to individual fundamental rights in our constitutional scheme. Even in the absence of an impingement of individual fundamental rights, serious criticisms can be leveled against each of these theories, raising doubts about the rationality of any of them as a justification of the spousal exclusion.

B. The 'Qualitative' Difference and Alternative Remedies

Another group of theories supporting the spousal classification rest on a perceived *qualitative* difference in the consequences of a sexual assault occurring between married persons as compared to unmarried persons. At least one commentator maintains that forcible rape is a separate criminal category to deter the classical form of rape — the ambush of a lone woman by a stranger in a deserted place at night.[144] In that form sexual assault carries with it a grave risk of serious physical, mental, and many-times social harm.[145]

> Because in its classical form it is the expression of an unprovoked, unpredictable, and highly brutal impulse, it calls forth fear and vengeance. Accordingly, forcible rape is usually much more severely punishable than other nonfatal invasions of the person.
>
> In the ordinary marriage relationship the classical form of forcible rape is not probable. Presumably the parties have at times been very intimate, and the possibilities of serious social, physical or mental harm from a familiar, if unwanted, conjugal embrace are rather small. Thus neither the deterrent nor vengeance thought appropriate to the classical crime are appropriate here.[146]

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141. Richard v. Richard, 131 Vt. 98, 105, 300 A.2d 637, 641 (1973) ("we have not lost such faith in our courts and juries that they could not weed out the spurious claims of the few").

142. *See* State v. Smith, 148 N.J. Super. 219, 225, 372 A.2d 386, 389 (Essex County Ct. 1977), *aff'd*, 169 N.J. Super. 98, 404 A.2d 331 (Super. Ct. App. Div. 1979).

143. Problems of proof exist in all rape cases except "the paradigm situation of the stranger leaping from the bushes. Thus if the lack of enforceability argument is carried to its logical conclusion, it would result in the revision of rape law so that the crime consisted only of the paradigm. . . ." *Consent in Rape, supra* note 2, at 286.

144. *Rape and Battery, supra* note 126, at 723-24.

145. *Id.* at 724.

146. *Id.* (footnotes omitted).

Consistent with this commentator's view, several courts have said that the true purpose of the criminal category is the protection from the emotional horrors of sexual assault.[147] Recognizing that spouses consent to intercourse many times during the course of marriage,[148] it could be argued that the state has determined that the consequences of spousal sexual assault do not carry the same potential for serious harm and therefore spousal sexual assault should not be actionable as such.

Even if the main purpose of the rape laws is to protect against the emotional effects of such an assault,[149] if it can be fairly said that there is a state impingement of an individual's fundamental rights through the operation of the exclusion, then equal protection doctrine requires that the law be subjected to strict scrutiny. This qualitative approach would then be examined as a possible justification for the exclusion. In examining this approach, it is incorrect to say that marriage prevents trauma from accompanying sexual assault. The existence of shelters for married women is an indication that a sizeable number of wives suffer emotional and physical harm from spousal sexual abuse.[150] On the other hand, there are probably many instances where a husband has forced himself upon his wife and the relationship continued as if nothing had happened.

Under strict scrutiny analysis, the fact that *some* spouses suffered emotional and physical trauma similar to that suffered by nonspouses would clearly show that the statute was not precisely tailored. The classification would then be unconstitutional. If a middle tier test were employed, the state would be obliged to show that by concentrating its enforcement efforts on the nonspousal offender class and ignoring the spousal offenders, it is likely to achieve some greater measure of protec-

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147. Commonwealth v. Goldenberg, 338 Mass. 377, 384, 155 N.E.2d 187, 191-92 (1959), *cert. denied*, 359 U.S. 1001 (1959) ("The essence of the crime is not the fact of intercourse but the injury and outrage to the feelings of the woman by the forceful penetration of her person. It is a crime radically different from assault and battery although the latter offense is incidental to it."); State v. Romo, 66 Ariz. 174, 189, 185 P.2d 757, 767 (1947); State v. Castner, 122 Me. 106, 119 A. 112 (1922).

148. *Interview with Charles Burt*, OREGON MAGAZINE, Mar. 1979, at 12.

149. It could be contended that an appeal to this approach is incorrect. This approach essentially says that sexual assault should not be a crime unless the victim is emotionally harmed as a result of the forced character of the relations. The law makes no such inquiry. Once it is determined that a sexual invasion has occurred, the perpetrator violates the law. *See* note 3 *supra*. The severity of the emotional harm may, however, influence the severity of the punishment.

150. The Women's Crisis Center in Brattleboro, Vermont estimates that 60% of the married women they see as clients are victims of spousal rape. Describing spousal rape as a situation which is dealt with almost daily, the center has files documenting incidents where guns, knives, or other weapons have been involved. Letter from the Staff of the Women's Crisis Center (Mar. 1, 1979). Other cases of spousal sexual assault are discussed in Faulk, *Sexual Factors in Marital Violence*, 11 MEDICAL ASPECTS OF HUMAN SEXUALITY 30 (Oct. 1977); Gelles, *Power, Sex, and Violence: The Case of Marital Rape*, 26 THE FAMILY COORDINATOR 339 (Oct. 1977). *Cf.* D. MARTIN, BATTERED WIVES 182 (1972) (marital status does not lessen traumatic effects on the victim).

tion for its citizens that a non-classified statute would achieve.[151] Similarly, the state would have to show that by exclusively protecting a class disproportionately vulnerable to attack and offering no protection to the class of spouses, it is maximizing its overall objective of protecting its inhabitants from sexual assault.[152] Furthermore, the state would have to affirmatively show that the class of spousal victims is a limited number as compared to nonspousal victims.[153] Under a deferential standard, a showing that *most* spousal victims do not suffer such trauma might be sufficiently rational to uphold the state's distinction between degrees of evil.[154] If an empirical study were to show that most (or a sizeable number of) spouse victims suffer a comparable amount of physical or mental harm as nonspousal victims do, then the classification should be viewed as increasingly irrational. Currently, however, there are no studies examining the comparative incidence of spousal and nonspousal sexual assault.[155]

As a result of his perceptions of the effects of spousal sexual assault, the aforementioned commentator concludes that "[a]lthough wives need some form of protection under the criminal law from the injurious consequences of forced sexual intercourse with their husbands, rape is a category ill-suited to marriage."[156] The commentator suggests that criminal battery actions are the proper remedy in cases of forced intercourse in marriage.[157] This is equivalent to an action for assault under Vermont law.[158] According to the commentator's view, the fact of un-

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151. For analogous reasoning as to the size of the victim and offender classes in a statutory rape situation which made it a crime to have sexual relations with females under 15 years old, but not for males, *see* Meloon v. Helgemoe, 564 F.2d 602, 605-06 (1st Cir. 1977), *cert. denied,* 436 U.S. 950 (1978). The court discussed the various rationales for a gender based statutory rape statute holding that such reasons were insufficient. Thus, the statute violated the equal protection clause of the constitution. *Id.* at 608.

152. *Id.* at 605-06.

153. *Id. But see* Craig v. Boren, 429 U.S. 190 (1976) (rejecting Oklahoma's contention that because ten times as many males in the 18-20 age group were arrested for drunken driving as were women in the same age group for purposes of supporting a gender based criminal statute).

154. Meloon v. Helgemoe, 564 F.2d 602, 606 (1st Cir. 1977), *cert. denied,* 436 U.S. 950 (1978).

155. *See* Gelles, *supra* note 150, at 341. *Cf.* Whitehurst, *Violence in Husband — Wife Interaction, reprinted in* VIOLENCE IN THE FAMILY 75-81 (S. Steinmetz & M. Straus eds. 1974). Because the idea of male superiority is still the dominant ideology in our society and because of changes which bring about greater equality between the sexes, there is a resulting strain and frustration for the males attempting to retain their superior position. This will tend to increase the violence between husbands and wives. *Id.*

156. *Rape and Battery, supra* note 126, at 725.

157. *Id.* at 725-28.

158. The maximum penalties for simple assault are not more than one year imprisonment or $1,000.00 fine. VT. STAT. ANN. tit. 13, § 1023(b) (1974). The penalties for sexual assault are not more than 20 years imprisonment or $10,000.00 or both. *Id.* at § 3252 (Supp. 1980). The penalties for aggravated assault are not more than 15 years imprisonment or a fine of $10,000.00 or both. *Id.* at § 1024(b) (1974). For aggravated sexual assault the violator could get 25 years or a fine up to $15,000.00 or both. *Id.* at § 3253 (Supp. 1980).

wanted intercourse alone is not sufficient to make a husband guilty of battery.[159] Required would be some injury to the victim's health for an action to lie.[160] If physical harm other than unwanted sexual conduct is required, then a spouse is protected against the accompanying assault and battery and not the sexual invasion. This means that the fundamental rights of procreation decision making and the sexual aspects of the right to bodily integrity and privacy go unprotected. Yet, deprivation of these rights is no less serious in marriage than outside marriage.[161] Continuing, if the assault action is considered inapplicable to the sexual component of the act, then the classification's rationality is called into question if there is no reason for excluding an action for sexual assault other than to say that an ordinary assault action exists. Because, if the ordinary assault action is construed in a manner as consistent with the commentator's views, it does not provide a remedy for sexual invasions.[162]

Even assuming that the assault statute includes the sexual aspects of spousal sexual assaults, and that a psychological difference in the consequences of a spousal sexual assault justified the classification during the course of marriage, there would still be serious problems with the tailoring of the exclusion. Presumably, unmarried cohabitors are also often quite intimate. The normally consensual nature of that relationship in all probability mitigates the psychological trauma in a manner similar to the mitigation occurring during marriage. The exclusion is therefore under-inclusive because unmarried cohabitors, in a similar position to married cohabitors in relation to the purpose of the statute, are liable while spouses are not.[163] The tailoring of the classification may also be arbitrary in another respect, given the psychological basis as a justification. When spouses are separated the effects of a spousal sexual assault can be quite severe.[164] Regarding these spouses, the attack

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159. *Rape and Battery, supra* note 126, at 728.

160. *Id.*

161. Illustrative of the seriousness of the offense are the consequences of involuntary conception for the woman. Her alternatives are either to carry the child to term or face the ethical and religious dilemma of an abortion. *See* Ramsey, *The Morality of Abortion, reprinted in* MORAL PROBLEMS (J. RACHELS ed. 1971).

162. To separate the act into two portions . . . and to say that there was consent to so much of [the sexual part of the assault,] . . . seems to me to be subtlety of an extreme kind. There is . . . just as much and just as little consent to one part of the transaction as to the rest of it . . . . [B]ecause the consent was not to the act done, the thing done is an assault. If an assault, a rape also, as it appears to me . . . [T]o me it seems a strange misapplication of language to call such a deed as that under consideration either a rape or an assault. . . . [A]n assault which includes penetration does not seem to me . . . to be anything but rape.

Regina v. Clarence, [1889] 22 Q.B. 23, 33-34, 59 L.T.R. 700 (opinion of Wills, J.).

163. This position is supported by those statutes defining "spouse" as including unmarried cohabitors. *See* note 93 *supra.*

164. *See, e.g.*, Regina v. Miller, [1954] 2 Q.B. 282, 289, 2 All E.R. 536.

is more like the classical form of rape in that it probably is generally more unprovoked, unpredictable, and potentially brutal than a non-consensual act occurring during marital cohabitation. By treating separated spouses similarly to cohabitating spouses, although in fact they are dissimilar from each other, the classification is over-inclusive.

One final theory can be quickly dismissed. Divorce might be considered an adequate alternative remedy justifying the classification. It is, however, "small comfort to a married woman whose husband has forcibly ravished her against her will to know that she may resort to the matrimonial courts to recapture or retrieve her right to sexual privacy."[165] If this justification is the sole reason for the exclusion, it would be inadequate because a divorce action provides absolutely no protection during marriage.[166]

C. *State Interests Revisited*

So far, substantially all of the discussion has focused on the state's interests in excluding liability for spousal sexual assault. The attention now shifts to a consideration of the state's interests in making sexual assault a separate offense.

> Rape is made a crime to protect the personal integrity of a woman against forcible sexual abuse. Historically, it has been considered a sex offense because emphasis was placed on that aspect of the crime. The essence of the crime, in fact, is not the victim's lack of consent to the act of sexual intercourse but the physical and psychological harm inflicted upon the victim. The traditional approach overlooks the most significant aspect of the individual and social harm occasioned by the forcible physical abuse of a person and the psychological consequences occasioned by such an act. The crime's predominant aspect is that it constitutes an unwarranted invasion of the personal integrity of the victim. . . .[167]

Given this purpose, which is consonant with the position that sexual assault is a violation of bodily integrity and procreation decision making, it is clear that the state has a compelling interest in protecting its inhabitants from sexual assault. Consistent with both this purpose and the examination of alternative methods available to the state under equal protection principles, the state can promote its interests in protecting against violations of personal integrity by eliminating the ex-

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165. State v. Smith, 148 N.J. Super. 219, 227, 372 A.2d 386, 390 (Essex County Ct. 1977), *aff'd*, 169 N.J. Super. 98, 404 A.2d 331 (Super. Ct. App. Div. 1979).

166. It could be argued that divorce is a more appropriate remedy when one spouse refuses to engage in sexual relations, rather than after one forces the other to engage in them. *See* Brown v. Brown, 78 N.H. 337, 100 A. 604 (1917); Diemer v. Diemer, 8 N.Y.2d 206, 209, 203 N.Y.S.2d 829, 832, 168 N.E.2d 654, 656 (1960). *Contra* Pratt v. Pratt, 75 Vt. 432, 56 A. 86 (1903).

167. M. C. BASSIOUNI, SUBSTANTIVE CRIMINAL LAW 282-83 (1978).

clusion. The judicial system would then handle the problem of spousal sexual assault on a case by case basis. The fact of marriage and how well the relationship worked, including past sexual conduct between the spouses, would be relevant evidence to consider in weighing the claim.[168] As a practical matter, juries would probably not convict a spouse of a sexual offense unless the evidence was clear that serious sexual abuse had occurred. Moreover, the trial judge has enormous discretion under the present statute in imposing sentence.[169]

This alternative would provide both flexibility and protection. It is flexible because there is an individualized determination of the merits of each claim. Furthermore, it would protect those whose claims are similar to nonspousal sexual assaults. On the other hand, potential minor offenses would either not result in a conviction, or be punished lightly. An unclassified statute would most completely serve the purposes of the law — the protection of personal integrity — by treating separated spouses, spousal rapists, and sexual deviates similar to unmarried cohabitors and others who commit sexual assault.

CONCLUSION

Sexual assault is a serious offense. The present Vermont statute has excluded liability for nonconsensual sexual acts occurring during marriage. The scope of the exclusion encompasses unnatural acts and acts occurring while the spouses are separated. On the other hand, unmarried cohabitors are subject to liability under the terms of the statute.

A court's analysis of the validity of the spousal sexual assault exclusion under the equal protection clause could arguably take many paths, each leading to a different result. For example, a spousal victim might not gain standing to challenge the validity of the classification. Or, even if granted standing, the court might decide that her interests should be treated under a deferential standard of review. A nonspousal defendant might seek to challenge the statutory scheme but the challenge might be heard under a deferential standard because *his* fundamental rights are not impinged by the classification. On the other hand, the court might strictly scrutinize the claim of either spousal victim or nonspousal defendant because the statute makes a distinction in the area of fundamental rights. The latter possibility is, at least arguably, the proper approach.

Although the principle of equal protection requires that similarly situated persons be treated similarly, the substance of that protection depends on the character of the individual's interests. The sexual assault

168. *See* VT. STAT. ANN. tit. 13, § 3255(a)(3)(A) (Supp. 1980).
169. *See* note 158 *supra*.

offense protects against violations of personal integrity. Personal integrity includes the fundamental rights of bodily integrity, procreation decision making, and privacy. Clearly this is how the individual's interests should be characterized. Thus, the state's interests in classifying the way it has should be strictly scrutinized.

Substantially all of the modern state interests in classifying in the manner chosen are perceived to stem from the idea that the marital status itself changes the nature of the acts, or from the idea that consequences of that status change the quality of the offense. Theories evolving from the marital status include the irrevocable consent theory, the promotions of marital privacy or reconciliation, and problems of proof. Each of these theories present specific problems, making their existence as a justification doubtfully compelling, and hardly rational. All of these status theories have the flaw, under strict scrutiny, that they seek to promote the marital relation over fundamental rights. As has been established, this is impermissible, given the priority of the individual in our constitutional scheme.

As a result of a perceived psychological or physical difference in the consequences of unwanted marital intercourse as compared to the severity of an unexpected attack outside of marriage, it has been suggested that the sexual assault statute is an inappropriate vehicle to punish spousal offenders. Thus, the alternative remedies of assault and battery or a divorce are considered adequate substitutes. These theories also have singularly specific problems. The underlying premise may also rest on inadequate foundation, at least under a strict scrutiny approach. Clearly, at least some spouses are the victims of severe sexual attacks inflicted by their marital partners. These attacks may also be in the form of unnatural acts or done during the time of separation. Moreover, unmarried cohabitors are liable for such attacks even though the psychological or physical effects might be quite similar to married cohabitors.

Finally, the availability of the less onerous method of simply eliminating the exclusion and determining the severity of the attack and the necessity of protection and punishment on an individualized basis through the legal system may, in itself, be a sufficient alternative to warrant striking down the classification.

Marital Privacy and Spousal Rape†

Michael Gary Hilf *

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Until recently, the laws of most states did not encompass spousal rape under statutory definitions of the crime. Now, the trend is to allow for rape prosecutions regardless of marital status. In this Article, the author suggests that this trend be viewed in light of the constitutional right to marital privacy. Balancing the interests of marital privacy against the need to protect spouses from non-consensual spousal intercourse, the author concludes that to allow for some possibility of marital reconciliation, marital partners, in limited circumstances, should be provided some protection from rape prosecutions.

In recent years, a number of states have amended their penal laws to allow for rape prosecutions of persons who have engaged in non-consensual sexual intercourse with their spouses.[1] As a result of these

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1. The state statutes attempting to proscribe non-consensual sexual intercourse can be divided into two broad categories: those that allow spousal rape prosecutions when the parties are living apart and/or are divorced or separated, and those statutes which allow a prosecution for spousal rape to go forward even if there is an ongoing marriage and the spouses are cohabitating.

Some typical examples of statutes that fall into the first category are: KY. REV. STAT. ANN. § 510.010(3) (Bobbs-Merrill 1975); LA. REV. STAT. ANN. § 14.41 (West Supp. 1980); MO. ANN. STAT.

statutory amendments, at least one very famous criminal trial has occurred: *State v. Rideout,*[2] in which John Rideout was acquitted of raping his wife Greta.

Elimination of the spousal immunity in rape cases has generated some controversy. On the one hand, spousal rape may be viewed as an abuse of the marriage relationship, with some protection being deemed necessary for the abused spouse. Conversely, prosecuting a person for the rape of his or her spouse exposes an intimate private relationship to public scrutiny and may hinder whatever chance exists for a reconciliation of the spouses involved. This Article will trace the history of spousal immunity and will examine the policies underlying the spousal immunity doctrine. It will then address the possible constitutional challenges to rape laws which do not provide for spousal immunity. Finally, an argument will be made that considerations of marital privacy dictate that some limited form of spousal immunity remain in rape cases.

I. THE DEVELOPMENT OF SPOUSAL IMMUNITY

The origin of the spousal immunity is found in the oft-quoted language of Lord Hale: "But the husband cannot be guilty of a rape committed by himself upon his lawful wife, for by their mutual matrimonial consent and contract the wife hath given up herself in this kind unto her husband, which she cannot retract."[3] Lord Hale's statement is the foundation upon which spousal immunity was judicially recognized in the United States as early as 1857.[4]

Judicial recognition of the immunity spread.[5] But Lord Hale's remarks are not the only, or even the best, explanation of the spousal immunity in rape. Professor Perkins offers this analysis:

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§ 566.010 (Vernon 1979); MONT. CODE ANN. § 45-5-506(2) (1979); S.C. CODE § 16-3-658 (Supp. 1979); UTAH CODE ANN. § 76-5-407(1) (1978); and WYO. STAT. § 6-4-307 (1977). In contrast, the following states' statutes permit prosecution for spousal rape when the parties are still married: ARK. STAT. ANN. § 41-1803 (Bobbs-Merrill 1977); DEL. CODE ANN. tit. 11, § 763-64 (1978); N.J. STAT. ANN. § 2C, 14-5 (West 1980); and 1977 Or. Laws, c. 844 § 1. *See* IOWA CODE § 709.2 (1979) (no distinction between married and nonmarried individuals). Additionally, there are statutes that fall between these two categories. For example, in Idaho, New Hampshire, and New Mexico, the marital exception to rape will be denied so long as the parties live apart or one of the spouses has filed for dissolution of the marriage: IDAHO CODE § 18-6107 (1979); N.H. REV. STAT. ANN. § 632-A:5 (Supp. 1977); and N.M. STAT. ANN. § 30-9-10(E) (1978).

New York's statute is unique. It gives the spouses themselves the power to establish criminal liability in advance where the spouses are separated pursuant to a private agreement (as opposed to a judicial order). N.Y. PENAL LAW § 130.00(4)(b)(iii) (McKinney 1975 & Supp. 1979).

2. No. 108,866 (Marion County Cir. Ct., Or., Dec. 27, 1978).

3. 1 M. HALE, PLEAS OF THE CROWN 628 (J. Dougherty ed. 1800).

4. *See* Commonwealth v. Fogerty, 74 Mass. (8 Gray) 489, 490 (1857); Note, *The Marital Rape Exemption,* 52 N.Y.U. L. REV. 306, 307 (1977) (citation omitted).

5. The cases are collected in 75 C.J.S. *Rape* § 6 (1952 & Supp. 1978).

> A man does not commit rape by having sexual intercourse with his lawful wife, even if he does so by force and against her will. The old rationalization for this result was that she gave a consent at the time of marriage which she cannot revoke. This type of explanation by means of "double talk" is definitely out of date, and was never needed at this point. It is not necessary to pretend that the woman consented, if the facts show very clearly otherwise, because the act of intercourse is not rape, if it was by her lawful husband, for a better reason. An essential part of the common-law definition of rape is "*unlawful* carnal knowledge" and so forth, and this is an implied part of every definition of the crime even if not expressed. And the true reason why the husband, who has sexual intercourse with his wife against her will, is not guilty of rape is that such intercourse is not unlawful. The word "unlawful" is used with different meanings. In this connection it is used in the sense of "not authorized by law." Sexual intercourse between husband and wife is sanctioned by law; all other sexual intercourse is unlawful although the secret act of fornication is not punished, as such, in many jurisdictions.[6]

The modern rationale underlying spousal immunity can be traced through a case involving spousal assault and battery. *State v. Oliver*[7] was one of the first American cases to reject the English rule that a husband had a right to beat his wife. In rejecting the English rule, however, the North Carolina Supreme Court indicated that it would not open the court's doors to every type of marital assault: "If no permanent injury has been inflicted, nor malice, cruelty, nor dangerous violence shown by the husband, it is better to draw the curtain, shut out the public gaze, and leave the parties to forget and forgive."[8] The modern law of spousal assault and battery seems to have been significantly shaped by *Oliver*. Indeed, in 1971, a commentator summarizing the law of spousal assault and battery in the United States noted, "it would appear that the harm required is greater than simple assault but less than aggravated assault. Cases indicate that visible bruises and injuries must be present."[9] This state of affairs, in which the wife is granted "less protection than if that same violence had been inflicted on her by someone [other than her husband],"[10] has been criticized of late.[11] Certainly,

6. R. PERKINS, CRIMINAL LAW 156 (2d ed. 1969) (emphasis in original) (footnotes omitted). *See also* K. Cobb & N. Schauer, *Michigan's Criminal Sexual Assault Law*, in FORCIBLE RAPE 170, 183 (D. Chappel, R. Geis, and G. Geis eds. 1977) ("The common law definition of rape required unlawful carnal knowledge. A husband could not be guilty of raping his wife, since the marital relationship was sanctioned by the law.")

7. 70 N.C. 60 (1874).

8. *Id.* at 61-62.

9. Truninger, *Marital Violence: The Legal Solutions*, 23 HASTINGS L.J. 259, 263 (1971) (citation omitted).

10. Davidson, *Wifebeating: A Recurring Phenomenon Throughout History*, in BATTERED WOMEN 2, 20 (M. Roy ed. 1977).

11. *Id.* One of the grounds for this criticism has been an alleged denial of equal protection

however, there is good sense in not permitting every marital scuffle to become a case for the courts, and the considerations that support this point of view also bear on the problem of non-consensual spousal intercourse.

The *Oliver* court spoke of drawing the curtain.[12] To expand on this analogy, two things occur simultaneously when the curtain is drawn: the public stays out, and the spouses stay in. Both of these consequences are important. First, it appears unseemly to permit the public to examine the intimacies of a marital relationship. Allowing the public this examination is to encourage a type of public voyeurism.[13] Second, one or both of the spouses may feel embarrassed about having the details of their private marital life exposed to the public view. Furthermore, it is questionable whether the complaining spouse alone has the right to waive the marital privacy right of the couple by presenting the matter before the courts and the public.

Aside from keeping the public out, drawing the curtain keeps the spouses in. This requires the spouses to resolve their problems and differences on their own.[14] When two people are able, on their own, to compromise differences and resolve problems, a greater mutual respect and bond might be expected to result than if the couple had to resort to the legal system for resolution. Allowing access to the criminal justice system for every type of marital dispute will discourage resolution by the spouses and will make their ultimate reconciliation more difficult.[15]

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under the fourteenth amendment. An equal protection challenge to spousal rape immunity is problematic. First, it may well be that spousal rape is an act, the very nature and quality of which differs from, and is less serious than, ordinary rape. If this is the case, an equal protection challenge might fail because it is not a violation of equal protection principles to proscribe one type of conduct, while allowing another, less serious type of conduct, to remain unpunished. *See* L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 16-1 (1978).

Moreover, unless it could be established that one had a fundamental right to be free from unwanted *spousal* sexual intercourse, the immunity could be sustained by the state. The state could attempt to show that the immunity bears an at least rational relationship to the fostering of a legitimate state interest, such as marital privacy. *Id.* at §§ 16-1, 16-2. A more thorough and incisive analysis of this area is beyond the scope of this paper.

12. 70 N.C. 60, 61-62 (1874).

13. *See* Lovisi v. Slayton, 363 F. Supp. 620 (E.D. Va. 1973), *aff'd*, 539 F.2d 349 (4th Cir. 1976), *cert. denied*, 429 U.S. 977 (1977). In *Lovisi*, the Federal District Court in Virginia was mindful of protecting the intimacies of a marital relationship. The marital privacy rights of a couple to engage in consensual sodomous activity were found to have been waived because the couple committed the acts in front of other persons. The value of marital privacy, noted the court, lies in keeping marital intimacies from the gaze of the public. 363 F. Supp. at 625.

14. The "bilateral loyalty" that can develop between spouses, as emphasized by Justice Douglas in Griswold v. Connecticut, 381 U.S. 479, 485-86 (1965), is thereby promoted.

15. There are two possible problems that can arise when marital disputes become involved with the legal system. First, knowledge by the spouses that the law can step in may pose impediments to direct resolution of disagreements by the spouses. There is some indication that this may have been a factor in the Rideout case. "A friend of the couple, David Lowe, testified that in an argument the day before the reported rape, Mrs. Rideout threatened to charge her husband under Oregon's newly revised rape law...." N.Y. Times, Dec. 22, 1978, § A, at 18, col. 5. The

The argument that spousal rape prosecutions will impede marital reconciliation has been criticized. In *State v. Smith,*[16] the New Jersey Superior Court held that "reconciliation hardly seems an expected or likely consequence of a relationship that has deteriorated to the point of forcible sexual advances by a husband."[17] Obviously, the likelihood of reconciliation after forcible sexual advances will depend upon the nature of the relationship and the individuals concerned. In *State v. Rideout,*[18] the husband was acquitted of rape and the couple attempted reconciliation.[19] Had their private life not been exposed to public scrutiny, perhaps the Rideouts could have saved their marriage. Undoubtedly, it was an inefficient use of judicial resources for the court to get involved in this volatile relationship.

II. THE MARITAL PRIVACY RIGHT

Mr. Justice Harlan must be credited with laying the modern groundwork for the constitutional right of marital privacy. In *Poe v. Ullman*[20] and in *Griswold v. Connecticut,*[21] the right of the State of Connecticut to prohibit the use of contraceptives was at issue. In *Poe,* the constitutional issues were never decided, the appeal having been dismissed.[22] In dissent, Justice Harlan argued that the constitutional issues should have been reached, and he dealt with them in his dissent. He argued that a right of marital privacy protected a married couple that desired to use contraceptives:

> Adultery, homosexuality and the like are sexual intimacies which the State forbids altogether, but the intimacy of husband and wife is necessarily an essential and accepted feature of the institution of marriage, an institution which the State not only must allow, but which always and in every age it has fostered and protected. It is one thing when the State exerts its power either to forbid extramarital sexuality altogether, or to say who may marry, but *it is quite another when, having acknowledged a marriage and the intimacies inherent in it, it undertakes to regulate by means of the criminal law the details of that intimacy.*

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second problem is that interspousal efforts at reconciliation may well be frustrated by a rape prosecution. *See* Comment, *Rape and Battery Between Husband and Wife,* 6 STAN. L. REV. 719, 725 (1954). *See also* note 64 *infra.*

16. 148 N.J. Super. 219, 372 A.2d 386 (Essex County Ct. 1977). *See* Comment, *The Marital Exception to Rape: Past, Present and Future,* 1978 DET. C.L. REV. 261, 271; Note, *The Marital Rape Exemption,* 52 N.Y.U. L. REV. 306, 315-16 (1977).

17. 148 N.J. Super. at 226, 372 A.2d at 389.

18. No. 108,666 (Marion County Cir. Ct., Or., Dec. 27, 1978).

19. *But see* N.Y. Times, Aug. 30, 1979, § B, at 4, col. 5 where it is noted that the Rideouts were eventually divorced.

20. 367 U.S. 497 (1961).

21. 381 U.S. 479 (1965).

22. 367 U.S. 497, 509 (1961).

> In sum, ... the intrusion of the whole machinery of the criminal law into the very heart of marital privacy *requiring husband and wife to render account before a criminal tribunal of their uses of that intimacy,* is surely a very different thing indeed from punishing those who establish intimacies which the law has always forbidden and which can have no claim to social protection.[23]

It is important to note that Justice Harlan was concerned not merely with state interference in marital intimacy, but also with the spectacle created by having the details of this intimacy recounted in public at a trial.[24]

Justice Harlan's *Poe* dissent apparently became accepted by a majority of the Supreme Court in *Griswold.*[25] There, the Court struck down Connecticut's birth control law.[26] In *Griswold,* a director of a Planned Parenthood organization and one of the organization's physicians were convicted of being accessories to the use of birth control articles.[27] They appealed their convictions on the ground that the birth control law infringed on the marital privacy rights of their clients.[28] The Supreme Court agreed and overturned the convictions.[29] After noting that a number of amendments to the Constitution had penumbras which pro-

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23. *Id.* at 553 (Harlan, J., dissenting) (emphasis added).

24. *Id.* This concern of Justice Harlan's seems to have materialized in *Rideout.* Although the trial lasted only one week, the press provided a detailed running account of the proceedings, illuminating most all of the Rideout's sexual encounters. For example, Jack Hinkle, John Rideout's half-brother, "told the jury that during several months when the Rideouts lived in his [Hinkle's] home they 'played games' of chasing one another in and out of the bedroom before having sexual intercourse." N.Y. Times, Dec. 23, 1978, at 10, col. 5. More explicitly, the *New York Times* provided the following summary when both of the Rideouts themselves testified:

> 'He beat me into submission. He forced me to have sex with him,' Mrs. Rideout said. . . .
>
> ....
>
> Mrs. Rideout ... began her testimony by saying that she woke at 9 A.M. on the day of the incident and did her household chores while her husband slept on the couch.
>
> She said that he awoke in the afternoon and demanded that she have sex with him. She refused, she testified, telling him she had to prepare to go to work at 4:30 P.M., and then he began to chase her.
>
> ....
>
> She said that after a chase and a fight in which he beat her and struck her in the jaw, she submitted to him.
>
> ....
>
> After his wife's testimony, John Rideout testified that he did not assault or rape her on the date in question.
>
> 'She hit me first,' he said. He told the jury that the two of them had been arguing over his behavior and that she kneed him in the groin, after which he struck her in the jaw.
>
> Mr. Rideout said he apologized immediately after hitting his wife, saying, 'Greta, I'm sorry. I didn't mean to do that.'
>
> 'She said it was all right,' he told the jury.
>
> Mr. Rideout said that they then kissed and had sexual intercourse that 'was voluntary.'

N.Y. Times, Dec. 27, 1978, § A, at 16, col. 3.

25. 381 U.S. at 484-85.

26. *Id.* at 485.

27. Griswold v. Connecticut, 151 Conn. 544, 200 A.2d 479, *rev'd,* 381 U.S. 479 (1965).

28. 151 Conn. 544, 200 A.2d 479 (1964).

29. 381 U.S. at 485.

tected rights of privacy,[30] the Court enunciated a right of marital privacy. Justice Douglas wrote:

> Would we allow the police to search the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives? The very idea is repulsive to the notions of privacy surrounding the marriage relationship.
>
> We deal with a right of privacy older than the Bill of Rights — older than our political parties, older than our school system. Marriage is a coming together for better or worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions.[31]

In a concurring opinion, Justice Goldberg reinforced the marital privacy notions articulated in the opinion of the Court:

> The Connecticut statutes here involved deal with a particularly important and sensitive area of privacy — that of the marital relation and the marital home. . . .
>
> . . . .
>
> The entire fabric of the Constitution and the purposes that clearly underlie its specific guarantees demonstrate that the rights to marital privacy and to marry and raise a family are of similar order and magnitude as the fundamental rights specifically protected.
>
> Although the Constitution does not speak in so many words of the right of privacy in marriage, I cannot believe that it offers these fundamental rights no protection. The fact that no particular provision of the Constitution explicitly forbids the State from disrupting the traditional relation of the family — a relation as old and as fundamental as our entire civilization — surely does not show that the Government was meant to have the power to do so.[32]

As might have been expected, the *Griswold* Court, which articulated a right of marital privacy, did not take great pains to outline the scope of that right.

After *Griswold*, questions still remained concerning the scope of the marital privacy right: what acts were protected and did a right attach to the couple or to an individual spouse. Some cases handed down after *Griswold* suggested that marital privacy might be a mistaken concept, and that *personal,* not *marital,* privacy was what the Constitution protected. Thus, in *Eisenstadt v. Baird,*[33] a Massachusetts law which prohibited the dispensing of contraceptives to unmarried people was struck

30. *Id.* at 483.
31. *Id.* at 485-86.
32. *Id.* at 495-96 (Goldberg, J., concurring).
33. 405 U.S. 438 (1972).

down as unconstitutional. The Court, while noting "that in *Griswold* the right of privacy in question inhered in the marital relationship,"[34] went on to point out that:

> [T]he marital couple is not an independent entity with a mind and heart of its own, but an association of two individuals each with a separate intellectual and emotional makeup. If the right of privacy means anything, it is the right of the *individual,* married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.[35]

The *Baird* emphasis on *personal,* as opposed to *marital,* privacy was reinforced in *Roe v. Wade.*[36] There, the right of a woman, whether single or married, to terminate a pregnancy at certain stages was recognized as protected by the right of privacy.[37] Furthermore, in *Planned Parenthood of Missouri v. Danforth,*[38] the Supreme Court ruled that a state could not require the prior written consent of a husband before his wife could obtain an abortion.[39] The *Danforth* Court was not altogether unmindful of marital privacy concerns. It found, however, that it was "difficult to believe that the goal of fostering mutuality and trust in a marriage, and of strengthening the marital relationship and the marriage institution, will be achieved by giving the husband a veto power exercisable for any reason whatsoever or for no reason at all."[40]

At this point, an argument might be made based on the *Baird-Roe-Danforth* line of cases. It might be argued that these cases support a woman's right to control the use of her sexual organs and that this right would outweigh any marital privacy rights. However, the thrust of the *Baird, Roe,* and *Danforth* cases is that the decision to bear or not to bear a child is so personal that neither state nor spouse may interfere with that decision. This is so because of the great physical imposition that bearing a child imposes on a woman. "Maternity, or additional offspring, may force upon the woman a distressful life and future. Psychological harm may be imminent. Mental and physical health may be taxed by child care."[41] In a criminal case based upon marital rape, the burden of maternity is not in issue. Therefore, the policy regarding marital privacy must reflect the interests of both spouses.

Though the *Baird-Roe-Danforth* line of cases may have weakened the

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34. *Id.* at 453.
35. *Id.*
36. 410 U.S. 113 (1973).
37. *Id.* at 154.
38. 428 U.S. 52 (1976).
39. *Id.* at 74.
40. *Id.* at 71.
41. Roe v. Wade, 410 U.S. 113, 153 (1973).

notion of a distinct concept of marital privacy, other post-*Griswold* cases have maintained a special place for marital privacy. In cases involving consensual sodomy a distinction has been drawn based upon marital privacy. In *Doe v. Commonwealth's Attorney,*[42] male homosexuals challenged Virginia's sodomy law on privacy grounds. A three-judge court rejected the challenge.[43] It noted that the precedents

> rest exclusively on the precept that the Constitution condemns State legislation that trespasses upon the privacy of the incidents of marriage, upon the sanctity of the home, or upon the nurture of family life. This and only this concern has been the justification for nullification of State regulation in this area.[44]

In *Cotner v. Henry,*[45] Charles Cotner, who had pled guilty to a charge of sodomizing his wife,[46] petitioned for federal habeus corpus relief and attempted to have the plea vacated on the grounds that it was not made with a full understanding of the charge.[47] The Seventh Circuit Court of Appeals reversed the district court's denial of the habeas corpus petition.[48] In so doing, it had occasion to discuss the scope of marital privacy. "The import of the *Griswold* decision is that private, *consensual,* marital relations are protected from regulation by the state through the use of a criminal penalty."[49] Mrs. Cotner's affidavit, which charged her husband with committing sodomy upon her, "contained no charge that he used force. He was prosecuted under a statute which prohibits sodomy but which does not explicitly mention force and which no Indiana court has construed as requiring force when applied to married couples in the privacy of the bedroom."[50] The appellate court held that in light of *Griswold,* Indiana could not make consensual spousal sodomy a crime, but could make non-consensual spousal sodomy a crime.[51] Thus, in *Cotner,* the conviction was overturned by the court

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42. 403 F. Supp. 1199 (E.D. Va. 1975), *aff'd,* 425 U.S. 901, *rehearing denied* 425 U.S. 985 (1976).

43. 403 F. Supp. at 1200.

44. *Id.*

45. 394 F.2d 873 (7th Cir. 1967), *cert. denied,* 393 U.S. 847 (1968).

46. 394 F.2d at 874.

47. *Id.* at 876.

48. 394 F.2d 873 (7th Cir. 1967).

49. *Id.* at 875 (citation omitted) (emphasis added).

50. *Id.* at 876.

51. *Id.* at 875-76. Most state courts appear to be in agreement that forbidding consensual spousal sodomy is unconstitutional. *See, e.g.,* State v. Lair, 62 N.J. 388, 301 A.2d 748 (1973) (New Jersey Supreme Court held that the state's sodomy statutes did not apply to the consensual, private acts of a married couple).

In contrast, laws proscribing non-consensual spousal sodomy have been regularly upheld. Illustrative of this point is the holding of the court in Towler v. Peyton, 303 F. Supp. 581 (W.D. Va. 1969), wherein it was stated:

> The grand jury indictment charged petitioner with forcing the act of sodomy on his wife. From a reading of the trial record, the court finds facts from which the judge hearing the case without a jury could infer the use of force. Because the petitioner

based upon marital privacy; while in *Doe,* consensual sodomy was a criminal act and no individual privacy right was recognized. These cases illustrate the continued vitality of marital privacy as a constitutional doctrine.

III. THE NATURE OF THE ACT

In the normal case, when parties marry, there is an expectation on both sides that sexual intercourse will occur. The state has always allowed this type of intercourse, and indeed, this was the only type of intercourse allowed by many states for a long time.[52] A spouse who, on a particular occasion, refuses to engage in sexual intercourse will usually not be objecting to the *practice* of sexual intercourse, but will rather be objecting to engaging in the practice on a particular instance. A spouse who objects to engaging in a particular act of sodomy may well be revolted by the practice. The objection may be not to engaging in the sodomitic practice just on this particular occasion, but to engaging in it at all. As the Court in *State v. Bateman*[53] pointed out, "[s]odomy has been considered wrong since early times in our civilization,"[54] No such condemnation has been found for sexual intercourse between husband and wife. Thus one might expect that the psychic harm suffered by a spouse forced to engage in sodomitic behavior would be more pronounced than that suffered by a spouse forced to engage in sexual intercourse. Therefore, cases upholding laws forbidding non-consensual spousal sodomy should not necessarily control cases involving non-consensual spousal sexual intercourse.

A further distinction can be made between spousal rape and non-spousal rape. Modern writers on the subject of rape agree that the essential evil is not the genital contact:

> Rape is an abomination not because it is an assault on innocence, but because it is an assault on freedom. The gravity of rape is not in the injury to the hymen or the vagina, it is in the injury to autonomy, to self-esteem. The physical batterings which accompany the rape are not the rape. They are injuries added to insult, battle scars which may be borne triumphantly because they are proof of the insult.[55]

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was tried and convicted of forcing this act of sodomy on his wife, the court finds the Virginia Sodomy Statute not to be unconstitutional as applied to the facts of this case.

Id. at 582-83. *See also* State v. Bateman, 113 Ariz. 107, 547 P.2d 6 (1976) (Arizona statute prohibiting non-consensual sexual conduct was held constitutional).

52. *See* note 6 and accompanying text *supra. Cf.* K. Cobb & N. Schauer, *Michigan's Criminal Sexual Assault Law,* in FORCIBLE RAPE 170, 183 (D. Chappel. R. Geis, and G. Geis eds. 1977).

53. 113 Ariz. 107, 547 P.2d 6 (1976).

54. *Id.* at 111, 547 P.2d at 10 (citations omitted).

55. B. TONER, THE FACTS OF RAPE 198 (1977).

Similarly, "[a] sexual assault is an invasion of bodily integrity and a violation of freedom and self-determination wherever it happens to take place, in or out of the marriage bed."[56] The great harm of rape seems to be the psychological harm. Rape is domination, an interference with free will and personal autonomy. However, the nature of spousal rape differs from non-spousal rape:

> Forcible rape is a criminal category created to protect females from unwanted sexual intercourse. Its classical type is the ambush of a lone woman by one or more strangers in a deserted place at night. In this form it always carries with it a grave risk of very serious physical and mental harm. . . . Forcible rape has been common enough and dangerous enough in its consequences to require a strong deterrent penalty. Because in its classical form it is the expression of an unprovoked, unpredictable, and highly brutal impulse, it calls forth fear and vengeance. . . .
>
> In the ordinary marriage relationship the classical form of forcible rape is not probable. Presumably the parties have at times been very intimate, and the possibilities of serious social, physical or mental harm from a familiar, if unwanted, conjugal embrace are rather small.[57]

While an act of non-consensual sexual intercourse is an interference with personal autonomy, a married person's general expectation of autonomy is less than a single person's expectation. Professor Henkin, not long ago, likened the constitutional right of privacy to a right of autonomy.[58] It follows that the right of marital privacy may be likened to a right of marital autonomy. A problem arises when one tries to reconcile marital autonomy with the personal autonomy of each spouse. It is obvious that some personal autonomy is sacrificed when one enters into a marital relation in order to allow for some degree of marital autonomy. A woman who marries does not consent to all acts of sexual intercourse with her husband as Lord Hale would have us believe.[59] However, a married person has, to some extent, a lesser expectation of personal autonomy; therefore, the affront to one's autonomy is less in the case of spousal rape than in the case of ordinary rape. Moreover, the harm caused by spousal rape would seem to be less severe than the harm caused by non-spousal rape. While a married person's interest in bodily integrity is not inconsiderable, a balance must be struck between the individual's interest in private autonomy and the public policy favoring spousal immunity.

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56. S. BROWNMILLER, AGAINST OUR WILL 381 (Bantam ed. 1976).

57. Comment, *Rape and Battery Between Husband and Wife,* 6 STAN. L. REV. 719, 723-24 (1954). *See generally* Truninger, *Marital Violence: The Legal Solutions,* 23 HASTINGS L.J. 259 (1971).

58. Henkin, *Privacy and Autonomy,* 74 COLUM. L. REV. 1410 (1974).

59. *See* note 3 and accompanying text *supra.*

One fears that spousal rape laws may have a significant effect upon reconciliation. These laws may exacerbate existing marital problems by providing another level of escalation for marital disputes with a concommitant danger of false accusations. While the New Jersey Superior Court in *State v. Smith*[60] argued that the danger of false accusations by a spouse should not be taken seriously because "[c]harges of assault and battery, larceny, fraud and other offenses may just as readily be the subject of such false accusation between spouses,"[61] this position has already been criticized on a number of grounds.[62] The obvious charge is that: "The courts' allowance of one charge capable of fabrication is not, of itself, an argument for allowing other charges capable of fabrication."[63] Another objection to the court's position is that some charges are more easily fabricated than others.[64] To prove assault and battery by a spouse, for instance, some visible evidence is generally required.[65]

Another factor supporting rape immunity is the absence of any compelling need for prosecuting cohabiting spouses. Proceedings for separation or divorce can be instituted soon after a single nonconsensual encounter.[66] Furthermore, serious cases of physical abuse will be taken care of by spousal assault and battery laws. Although one recent commentator admits that "the most outrageous cases [of spousal rape] can be 'dealt with' by the law,"[67] he argues that this is insufficient: "[The law] provides remedies but should also seek to provide the *appropriate* remedy. The label attached to the conduct should be the appropriate label. So long as rape remains a separate crime, not simply one form of assault, conduct which is, in reality, rape, should be so charged."[68] Admittedly, it is aesthetically pleasing for labels to be appropriate, but when there are significant countervailing marital privacy considerations, the formal symmetry between wrong and remedy is not paramount.[69]

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60. 148 N.J. Super. 219, 372 A.2d 386 (Essex County Ct. 1977).

61. *Id.* at 225-26, 372 A.2d at 389.

62. Recent Case, *Husband Cannot Be Guilty Of Raping His Wife: State v. Smith,* 82 DICK. L. REV. 608 (1978).

63. *Id.*

64. Indeed, there is some evidence that Greta Rideout contemplated making a false accusation. *See* N.Y. Times, Dec. 22, 1978, § A, at 18, col. 5.

65. An analysis of the "[c]ases indicate[s] that visible bruises and injuries must be present." Truninger, *Marital Violence: The Legal Solutions,* 23 HASTINGS L.J. 259, 263 (1971) (citation omitted). For a discussion of assault and battery and its relation to spousal immunity, *see* notes 7-15 and accompanying text *supra.*

66. Notwithstanding this separation and/or divorce remedy, it has been propounded that a wife may desire more comfort and retribution than separation or divorce can provide. State v. Smith, 148 N.J. Super., 219, 227, 372 A.2d 386, 390 (Essex County Ct. 1977).

67. English, *The Husband Who Rapes His Wife,* 126 NEW L.J. 1223, 1225 (1976).

68. *Id.* (emphasis in original).

69. Lest it be misunderstood by omission, it is not being advocated that marital privacy considerations should impede a legislature's ability to criminalize sexual attacks by a divorced or

Rape statutes which treat a cohabiting spouse like a stranger may have unintended consequences.[70] One writer has suggested, "[c]onsent is better arrived at by husband and wife afresh each time . . . ."[71] This is an unwise suggestion. For one thing, it has been held, quite sensibly, that one who engages in sexual intercourse with an unconscious woman is guilty of rape, because the sexual act is deemed to be without the woman's consent.[72] Similarly, "[w]here a female is intoxicated to the extent of being unable to resist, the [sexual] act is without her consent and is rape . . . ."[73] Do we quite seriously want to subject to criminal liability a husband who begins to engage in sexual contact with his sleeping or intoxicated wife? To ask the question is to answer it.

Another problem may occur when one spouse wrongly believes, in good faith, that his partner wants to engage in sexual activity. This may result from the very nature of their marital relationship. Married people often act in a more familiar and less formal manner with each other than they act with other people. This may, on occasion, make it difficult to know a spouse's true feelings. This must be recognized by legislatures which are considering passage of spousal rape laws. As one writer has already noted: "[A] seeming lack of consent may be simply a manifestation of the fact that resistance during preliminary love-making greatly increases the sexual pleasure of some women."[74] The danger of a spouse not being able to differentiate seeming lack of consent from actual lack of consent suggests that there are serious difficulties in attempting to criminalize non-consensual sexual conduct between cohabiting spouses.

CONCLUSION

Statutes which provide for spousal immunity in simple rape cases are not denials of the equal protection of law.[75] Non-consensual sexual intercourse between spouses is an act whose nature and quality make it distinct from the ordinary case of rape. Moreover, there does not appear to be any fundamental right to be free from unwanted sexual intercourse with one's spouse.[76] Additionally, providing a party with im-

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separated spouse. In those situations it is difficult to find much of a marital relationship that requires or deserves privacy rights. This is obvious where a divorce has already been granted, and also true where the parties have been living apart for any substantial length of time. If the parties have lived apart for quite awhile, this is usually evidence of a serious marital breakdown, and not just a transient disagreement.

70. *See* note 1 *supra*.

71. S. BROWNMILLER, AGAINST OUR WILL 381 (Bantam ed. 1976).

72. *See* State v. Stroud, 362 Mo. 124, 240 S.W.2d 111 (1951); State v. Welch, 191 Mo. 179, 89 S.W. 945 (1905); *In re* Childers, 310 P.2d 776 (Okla. 1957).

73. 75 C.J.S. *Rape* § 14, at 480 (1952).

74. Comment, *Rape and Battery Between Husband and Wife,* 6 STAN. L. REV. 719, 728 (1954).

75. For a brief discussion of equal protection considerations, *see* note 11 *supra*.

76. *See* note 11 *supra*.

munity in cases of simple spousal rape can be justified by the state's interest in respecting marital privacy and encouraging married people to resolve their problems on their own.

Statutes which provide no spousal immunity in cases of simple rape of a cohabiting spouse may well run afoul of a constitutional right of marital privacy. In any event, such laws are unwise for a number of other reasons.

To be sure, those states which still provide spousal immunity in simple rape cases until a divorce is granted provide insufficient protection to married people. Spousal immunity should terminate when a divorce or separation action is filed, or after the couple has been living separate and apart for a certain period of time.[77] Providing spousal immunity after an obvious breakdown of a marriage protects no important interests and serves no useful purpose. But doing away completely with spousal immunity seriously impinges upon marital privacy rights, and may make impossible marital reconciliations that might otherwise occur.

77. Idaho has a 180 day requirement. Idaho Code § 18-6107 (1979). This is probably too long as one can infer a serious marital breakdown when the spouses have been living apart for a shorter period of time. Some minimum time period, perhaps thirty days, should be required, lest the law interfere with minor, transitory, marital disagreements.

Scores of Victims, Years of Neglect: A View of the Massachusetts Compensation for Victims of Violent Crimes Statute, ch. 258A

In January, 1968, the Massachusetts legislature enacted a system designed to provide government compensation to innocent victims of violent crimes.[1] In so acting, Massachusetts became the third state in the country to recognize the plight of the victims of crime.[2] In contrast to New York and California, however, the Commonwealth has not analyzed the performance of its compensation statute, nor amended its provisions, nor acted in any significant way to correct the inadequacies of the law.

This Note argues that although there are scores of potentially eligible victims, the Massachusetts Compensation to Victims of Violent Crimes statute inadequately addresses their needs. A more reasonable law is needed which recognizes the victim's need to be informed of a state compensation system, and is drafted with greater cognizance of the victim's financial, vocational, rehabilitative, psychological and legal needs.

This Note begins by reviewing the legislative history of the statute, explaining the mechanics of the compensation procedure and suggesting a hypothetical operation of the law. Section II examines the substantive and procedural aspects of the California and New York violent crimes

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1. MASS. GEN. LAWS ANN. ch. 258A, §§ 1-7 (West 1968).

2. California, in 1965, and then New York, in 1966 became the first American jurisdictions to adopt compensation of victims of violent crimes (CVVC) programs. But the concept of compensation of victims of crime has its origins in antiquity. Its emergence as a contemporary social issue of international symposia and national legislation is often credited to an English social philosopher, Margaret Fry. *See generally* R. MEINERS, VICTIM COMPENSATION (1978); S. SCHAFER, COMPENSATION AND RESTITUTION TO VICTIMS OF CRIME (2d Ed. 1970); *Symposium — Compensation for Victims of Criminal Violence,* 8 J. PUB. L. 191 (1959); *Symposium — Compensation to Victims of Crimes of Personal Violence: An Examination of the Scope of the Problem,* 50 MINN. L. REV. 211 (1965); *Symposium — Governmental Compensation for Victims of Violence,* 43 S. CAL. L. REV. 1 (1970). *See also* Annot., *Statutes Providing for Governmental Compensation for Victims of Crime,* 32 ALR 3d 1446; 70 J. CRIM. L. & CRIMINOLOGY 57 (1979).

compensation programs. The contrasting aspects of these programs are then analyzed in comparison to the Commonwealth's program in Section III.

Section IV urges a revamping of the current statute, including a notice to victims, increased benefits and a clarification of the attorney's role in the benefit securing process. In conclusion, this Note calls on the legislature to alleviate a dozen years of neglect and proposes remedies to ameliorate the plights of innocent victims of violent crimes.

I. MASSACHUSETTS STATUTE

A. Legislative History

The Commonwealth of Massachusetts' Compensation of Victims of Violent Crimes (CVVC) statute, Chapter 258A, evolved from a series of petitions presented to the state legislature in 1966.[3] These petitions brought about the creation of the Special Commission on the Compensation of Victims of Violent Crimes.[4]

Following study, deliberation and public hearing, the Special Commission filed its report and recommendation that the Commonwealth compensate victims of violent crimes.[5] With two modifications, the Commission's proposal was enacted, signed into law on January 3, 1968, and became effective on July 1, 1968.[6] As enacted, the statute delineates the procedure which an eligible victim must follow in order to secure carefully enumerated benefits.

B. Initiating A Claim for Compensation

To be an eligible victim under the provisions of the statute, a person must suffer personal injury or death as a direct result of a crime.[7] In addition to personal injury, a victim must incur an out-of-pocket loss of at

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3. *See* note 1, *supra*. *See also* H. 1117, Petition of John Sears, providing for investigation, study and recommendation by an unpaid special commission relative to establishing compensation for victims of criminal assaults; H. 2634, Petition of Gerald Morrissey, establishing the criminal injuries compensation commission; H. 3010, Petition of Albert Gammal, Jr., establishing a special injuries compensation commission providing for indemnity for certain persons helping a person being assaulted and providing a penalty for refusing to help persons being unlawfully assaulted; H. 3011, Petition of Edward McCormack (Att'y Gen.), providing for an investigation and study by a special commission relative to compensation for crimes of violence; and H. 3012, Petition of Endicott Peabody (Governor), establishing a special commission to investigate and study the advisability and means of compensation for innocent victims of crime.

4. *See* 1966 Mass. Acts ch. 29, 112.

5. *Report of the Special Commission on the Compensation of Victims of Violent Crimes*, Mass. House of Representatives, No. 5151 (1967) [hereinafter referred to as H. 5151].

6. *Compare* H. 5151, *supra*, note 5, *with* MASS. GEN. LAWS ANN. ch. 258A, §§ 1-7 (West 1968). The Special Commission recommended an Emergency Compensation provision of $500; also the Commission's preamble stressing compensation as a matter of grace was eliminated.

7. MASS. GEN. LAWS ANN. ch. 258A, § 3 *as amended by* 1980 Mass. Acts ch. 459:

Except as hereinafter provided the following persons shall be eligible for compensation

least one hundred dollars or have lost two continuous weeks of earnings or support.[8] Further, the victim has forty-eight hours in which to report the crime to the police.[9] After satisfying the injury, financial loss and report requirements, a victim has one year after the occurrence of the crime in which to file a claim.[10]

A claim for compensation is filed by an eligible victim in the office of the clerk of the district court within the territorial jurisdiction in which the claimant lives.[11] The clerk forwards the claimant's petition for com-

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pursuant to this chapter:
(a) a victim of a crime;
(b) in the case of the death of the victim as a direct result of the crime, a dependent of the victim.

An offender or an accomplice of an offender or, except in the case of rape, a member of the family of the offender or a person maintaining sexual relations with the offender shall not be eligible to receive compensation with respect to a crime committed by the offender.

Section 1 of the statute defines pertinent terms:
"Crime", an act committed in the commonwealth which, if committed by a mentally competent, criminally responsible adult, who had no legal exemption or defense, would constitute a crime; provided that such act involves the application of force or violence or the threat of force or violence by the offender upon the victim; and provided, further, that no act involving the operation of a motor vehicle which results in injury to another shall constitute a crime for the purpose of this chapter unless such injury was intentionally inflicted through the use of a motor vehicle.
"Dependent", mother, father, spouse, spouse's mother, spouse's father, child, grandchild, adopted child, illegitimate child, niece or nephew, who is wholly or partially dependent for support upon and living with the victim at the time of his injury or death due to a crime alleged in a claim pursuant to this chapter.
"Family", the spouse, parent, grandparent, step-mother, step-father, child, grandchild, brother, sister, half-brother, half-sister, adopted children of parent, or spouse's parents of the offender.
"Offender", a person who commits a crime.
"Victim", a person who suffers personal injury or death as a direct result of a crime.

8. *Id.* at § 5, para. 1 *as amended by* 1980 Mass. Acts ch. 459:

No compensation shall be paid unless the claimant has incurred an out-of-pocket loss of at least one hundred dollars or has lost two continuous weeks of earnings or support. Out-of-pocket loss shall mean unreimbursed or unreimbursable expenses or indebtedness reasonably incurred for medical care or other services necessary as a result of the injury upon which such claim is based. In case of rape, out-of-pocket losses requiring compensation shall include counseling and emergency funds for housing but shall not include funds for abortion or funds for counseling for abortion. One hundred dollars shall be deducted from any award granted under this chapter.

9. *Id.* at para. 2:

No compensation shall be paid unless the court finds that a crime was committed, that such crime directly resulted in personal physical injury to, or the death of, the victim, and that police records show that such crime was promptly reported to the proper authorities. In no case may compensation be paid if the police records show that such report was made more than forty-eight hours after the occurrence of such crime, except in the case of rape, unless the court finds said report to the police to have been delayed for good cause.

10. *Id.* at § 4, para. 2:

A claim shall be filed not later than one year after the occurrence of the crime upon which it is based, or not later than ninety days after the death of the victim whichever is earlier; provided, however, that upon good cause, the court may either before or after the expiration of said filing period extend the time for filing such claim.

11. *Id.* at § 2, para. 1: "The district courts of the commonwealth shall, pursuant to the provisions of this chapter, have jurisdiction to determine and award compensation to victims of crimes. Such claims shall be brought in a district court within the territorial jurisdiction in which the claimant lives...."

pensation to the Attorney General's office in Boston.[12] Upon receipt of the petition by the Attorney General, the Victim's Bureau in the Torts, Claims and Collection Division prepares an answer to the petition and simultaneously sends interrogatories to the claimant.[13] A claimant responds to the interrogatories and from this information, verification forms are sent to the police, physician, hospital and employer.[14]

Once all the verification forms have been gathered, the Attorney General's office marks the case for a hearing at the district court.[15] The clerk notifies the claimant of the date and time of the hearing.[16] At the hearing the Attorney General is statutorily bound to present any information he may have in support of, or in opposition to the claim.[17]

Following the hearing, the court's decision is sent to the state treasurer authorizing payment to the claimant in the amount determined by the court.[18] If dissatisfied with the legal aspects of the decision, a claimant has a right to appeal to the appellate division of the district court.[19]

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12. *Id.* at § 4, para. 3:

> Each claim shall be filed in the office of the clerk of the district court in person or by mail, and shall be accompanied by an entry fee of five dollars. Said clerk shall immediately notify the Attorney General of the claim. Such notification shall be in writing, with copies of such material as is included in the claim or in support thereof. The Attorney General shall investigate such claim, prior to the opening of formal court proceedings. Said clerk of court shall notify the claimant and the Attorney General of the date and time of any hearing on such claim.

13. H. EDELHERTZ & G. GEIS, PUBLIC COMPENSATION TO VICTIMS OF CRIME 122 (1974) [hereinafter referred to as EDELHERTZ & GEIS]. These interrogatories seek to obtain the amount of lost wages and earnings, the specific nature of the injuries received and the names of physicians and institutions which treated the claimant. A claimant has three weeks to respond to the interrogatories. *See generally* Attorney General's Report on ch. 258A on file with the Commonwealth of Massachusetts Legislative Research Bureau.

14. *Id.*

15. *Id.*

16. *See* note 12 *supra.*

17. MASS. GEN. LAWS ANN. ch. 258A, § 4, para. 4 (West 1968).

18. *Id.* at § 6, para. 1:

> For the purpose of determining the amount of compensation payable pursuant to this chapter, the administrative justice for the district court department and the administrative justice for the Boston municipal court department, for their respective departments shall, insofar as practicable, formulate standards for the uniform application of this chapter. The court shall take into consideration the provisions of this chapter, the rates and amounts of compensation payable for injuries and death under other laws of the commonwealth and of the United States, excluding pain and suffering, and the availability of funds appropriated for the purpose of this chapter. All decisions of the court on claims heard under this chapter shall be in writing, setting forth the name of the claimant, the amount of compensation and the reasons for the decision. The clerk of the court shall immediately notify the claimant in writing of the decision and shall forward to the state treasurer a certified copy of the decision. The state treasurer without further authorization shall, subject to appropriation, pay the claimant the amount determined by the court.

19. MASS. GEN. LAWS ANN. ch. 231, § 108 (West 1968): "There shall be an appellate division of each district court for the rehearing of matters of law arising in civil cases therein and in claims for compensation of victims of violent crimes."

C. Compensating a Violent Crime Victim

Let us suppose that *AZ* is a victim of an assault and battery, suffering multiple fractures of his ribs and other bones. To be eligible for compensation, *AZ's* physical injury must be reported to the police within forty-eight hours.[20] *AZ* must sustain out-of-pocket expenses of $100 or have lost two continuous weeks of earnings or support.[21] *AZ's* out-of-pocket expenses include those incurred for medical care or related services made necessary by the injury, whether reimbursed or not.[22]

Assuming *AZ* is aware of the compensation provided by the Commonwealth,[23] *AZ* will pay an entry fee of five dollars and file a Claim for Compensation form in the district court.[24]

The information on *AZ's* Claim for Compensation form[25] will be supplemented by his answers to the Attorney General's interrogatories, an informal hearing is then held at the district court.[26] If *AZ* qualifies, the court awards compensation for the actual loss sustained, but not in excess of ten thousand dollars.[27] *AZ's* award is reduced by reimbursement or collection from collateral sources, e.g. social security disability or private insurance coverage.[28] The decision granting *AZ's* award and authorizing payment is certified to the state treasurer.[29] Unless and until

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20. *See* note 9 *supra.*

21. *See* note 8 *supra.*

22. *Id.*

23. Note that the Massachusetts statute provides no duty to inform victims of crimes of their potential compensation. No state agency (that is, the judiciary, Attorney General, State Treasurer, and legislature) is charged with the responsibility to publicize the program nor to provide overall supervision of its various components.

24. *See* note 12 *supra.*

25. *See* note 13 *supra.*

26. *See* EDELHERTZ & GEIS, *supra* note 13, at 124. The Attorney General's report is made on a standard two page form. It briefly describes the crime, verifies the reporting to police requirement, describes the victim and injury. Part 5 of the form reports the damages sustained by the victim and sets forth an award recommendation. According to Edelhertz and Geis, "It is the most important single factor in determining whether or not there will be an award at the hearing, and in what amount." *Id.*

Edelhertz and Geis report that there is agreement beforehand in approximately eighty percent of the cases where awards are recommended, and these are usually settled instantly. Although claimant's counsel seeks to negotiate the terms of the recommendation, damages are limited to items easily subject to objective cost determination. *Id.*

27. MASS. GEN. LAWS ANN. ch. 258A, § 5, para. 4 (West 1968):

> Any compensation for loss of earnings or support shall be in an amount equal to the actual loss sustained; provided, however, that no award under this chapter shall exceed ten thousand dollars. If two or more persons are entitled to compensation as a result of a death of a person which is the direct result of a crime, the compensation shall be apportioned by the court among the claimants in proportion to their loss.

28. *Id.* at § 6, para. 2: "Any compensation paid pursuant to this chapter shall be reduced by the amount of any payments received or to be received as a result of the injury (a) from or on behalf of the offender (b) under insurance programs, or (c) from public funds."

29. *Id.* at para. 1.

the legislature appropriates money for the compensation program, *AZ* waits to be compensated.[30]

II. COMPARISONS WITH OTHER JURISDICTIONS

Unlike earlier CVVC programs, the Massachusetts plan has not received the critical analysis and periodic review that such social legislation requires.[31] Both California and New York, the only states to enact a CVVC prior to Massachusetts, have amended their CVVC schemes to better address the real needs of victims.[32] Nearly half of the other states with similar schemes have also amended their compensation provisions.[33]

A. New York

The New York State Crime Victims Compensation Board (CVCB) was established by statute to carry out the "legislature's intent that aid, care and support be provided by that state as a matter of grace, for such victims of crime."[34] Victim eligibility requirements are similar to the Commonwealth's, and before payment can be made the state Attorney General and the Department of Audit and Control must approve the CVCB decision.[35] However, whereas New York and Massachusetts have similar requirements for eligibility, they differ substantially in compensating the victim.

New York has no ceiling limiting the amount which CVCB may pay a claimant for medical expenses.[36] When a victim is permanently disabled and in need of intensive, lifetime medical care, the expense may be in the tens of thousands.[37] Medical expenses paid by the CVCB go well beyond those for physicians, hospitals and medication.[38]

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30. *Id.*

31. *But see* EDELHERTZ & GEIS, *supra* note 13, at 107-29; Vitali, *A Year's Experience with the Massachusetts Compensation of Victims of Violent Crime Law, 1968-1969*, 4 SUFFOLK L. REV. 237 (1970); Floyd, *Massachusetts Plan to Aid Victims of Crime*, 48 B.U. L. REV. 360 (1968).

32. CAL. GOV'T CODE §§ 13959-13974 (West Supp. 1977), and N.Y. EXEC. LAW §§ 620-635 (McKinney 1972 and Supp. 1972-1977).

33. *See, e.g.*, ALASKA STAT. §§ 18.67.010 - 18.67.180 (1974 & Supp. 1977); HAWAII REV. STAT. §§ 351-1 - 351-70 (1968 & Supp. 1975); MD. ANN. CODE art. 26A, §§ 1-17 (1973 & Supp. 1980).

34. *See* CRIME VICTIM COMPENSATION: HEARINGS BEFORE THE SUBCOMMITTEE ON CRIMINAL JUSTICE OF THE COMMITTEE ON THE JUDICIARY ON VICTIMS OF CRIME COMPENSATION LEGISLATION, H.R. DOC. NO. 39, 94th Cong., 1st & 2nd Sess. (1975-1976) (statement of Edward A. Morrison, on behalf of the New York State Crime Victims Compensation Board) [hereinafter H.R. DOC. NO. 39].

35. N.Y. EXEC. LAW § 629 (Consol. Supp. 1979).

36. *Id.* at § 631. Note that New York liberalized its law recently to allow awards for the treatment of emotional troubles stemming from a criminal assault. *See generally*, Forgotten Victims, Newsweek, October 2, 1978, at 91.

37. *See* H.R. DOC. NO. 39, *supra* note 34, at 303 (statement of Edward A. Morrison).

38. *Id.* For example, if the crime results in victim paraplegia, it may be necessary to widen hallways or remodel a lavatory at the claimant's residence to accommodate a wheelchair.

CVCB will pay loss of earnings or support up to $250.00 per week with a ceiling of $20,000.[39] As is the case with the Commonwealth's program, recovery from collateral sources reduces the victim's award.[40]

As do nearly half the CVVC programs now in effect, the New York plan provides an emergency award provision.[41] A comprehensive analysis of the New York program showed that 47.9 percent of the victims required immediate financial assistance.[42] The New York emergency award provision permits payment of up to $500 if undue hardship will result to the claimant unless immediate payment is made.[43] The amount paid is deducted from the final settlement.[44]

In an effort to increase public awareness of the CVVC program, the New York CVCB has distributed literature and made publicized announcements in newspapers, magazines and on the electronic media.[45] The enabling legislation provided the CVCB with the power to request assistance from other state agencies and authorized those agencies to provide the assistance.[46] Under the provision, the CVCB has requested the assistance of the Radio, Motion Picture Bureau of the State Department of Commerce in promoting the CVVC program.[47] Each week, the Bureau prepares a packet of written public service announcements which are sent to radio and television stations throughout the state to be read over the air.[48]

Besides using the mass media to publicize the CVVC program, New York amended its statute and created a duty to inform provision.[49] Every victim who reports a crime must be supplied by the law enforcement agent receiving the report with information relating the availability of crime victims compensation.[50] However, the amendment also removes law enforcement agents from potential tort liability for inadvertently failing to inform.[51] Prior to this amendment, the CVCB printed and distributed more than 610,000 brochures to State Police, Chiefs of Police, municipal police departments, Sheriff departments,

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39. N.Y. EXEC. LAW § 631 (Consol. Supp. 1979).

40. *Id.*

41. *Id.* at § 630. *See also* PA. STAT. AM. tit. 71, § 180-7.8 (1979) ($1,000); ALASKA STAT. § 18.67.120 (1975) ($1,500). These emergency awards are debited against the funds eventually awarded.

42. FINAL REPORT OF CRIME VICTIMS CONSULTATION PROJECT — 1975, *reprinted in* H.R. DOC. NO. 39, *supra* note 34, at 325.

43. N.Y. EXEC. LAW § 630 (Consol. Supp. 1979).

44. *Id.*

45. *See* H.R. DOC. NO. 39, *supra* note 34, at 1279 (excerpts from *Crime Victims Compensation Program Audit Summary and Conclusions,* State of New York, 1975).

46. N.Y. EXEC. LAW § 623 (Consol. 1976).

47. *See* note 45 *supra.*

48. *Id.*

49. *See* N.Y. EXEC. LAW § 625a (Consol. 1976).

50. *Id.*

51. *Id.*

District attorneys and hospitals.[52] All state and local policemen in New York receive information about the CVCB program when entering police training.[53]

New York has also adopted and revised a "victim rights card" designed by the Commission on Victim Witness Assistance.[54] The card is designed to be handed out by police officers to victims who seem to be in need of services furnished by the victims assistance program.[55]

The CVCB has the power to establish rules for the approval of attorney's fees for representation before the board.[56] The approved fee is paid out of the victim's award.[57] An analysis of the New York program showed that thirty percent of the victims had legal needs requiring a lawyer;[58] thirty percent needed help with court appearances (victim/witnesses) and twenty-six percent wanted legal help for protection and safety.[59]

The CVCB is a centralized administrative and supervisory agency endowed with broad duties and powers.[60] Yet, despite its efforts to inform victims of the availability of the program and the assistance of other public agencies, the CVCB has been criticized following a five year analysis of its operation.[61] The analysis was beneficial, for New York responded to the study with legislative amendments.[62] The membership of the CVCB was increased, provision for eligible victims in need of counseling and other supportive services was made, the filing procedure was streamlined to facilitate payment, and most importantly, a duty to inform was created.[63] These changes were enacted only after a careful study of the CVCB experience in responding to the needs of the crime victims.[64]

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52. *See* note 45 *supra.*

53. *Id.*

54. *See* J. BARKAS, VICTIMS 199 (1978).

55. *Id.* A sample card contains the language, "You have the right as a crime victim . . . to be told about compensation available to victims for their injuries . . . to be told about social services which can help you." The card includes a telephone number that a victim can use if he is in need of help. *See also* H.R. DOC. NO. 39, *supra* note 34, at 143 (testimony of Peter Bensinger, Director, Crime Victims Compensation Division, Illinois Attorney General).

56. *See* N.Y. EXEC. LAW § 623 (Consol. 1966).

57. *See* H.R. DOC. NO. 39, *supra* note 34, at 304.

58. *Id.* at 325.

59. *Id.*

60. *See* note 56 *supra.*

61. *See supra* note 34, at 328.

62. For example, the five year study recommended a widespread public information program; in 1976 New York enacted the duty to inform provision. *See* N.Y. EXEC. LAW § 625a (Consol. 1976).

63. *See* N.Y. EXEC. LAW art. 22 as amended by the acts of 1976.

64. *See* H.R. DOC. NO. 39, *supra* note 34, at 1271-85.

B. California

Besides New York, California was the only other state to have a CVVC program in operation when the Commonwealth of Massachusetts was considering its CVVC statute.[65] California indemnifies and assists in the rehabilitation of its residents "who as the result of a crime suffer a pecuniary loss which they are unable to recoup without suffering serious financial hardship."[66] Victim eligibility requirements were similar to the Commonwealth's.[67] Upon the state Attorney General's verification of the victim's claim, the State Board of Control was authorized to determine and pay the award.[68] But, just as the Massachusetts' plan materially differs from the New York plan, it also differs from the substantive aspects of the California program.[69]

California recently amended its statute's substantive aspects to provide for ceiling limits: $10,000 for loss attributable to medical expenses; $10,000 for pecuniary loss resulting from loss of wages; $3,000 for job retraining or similar employment-oriented rehabilitative services.[70] Further, California pays attorney fees in addition to the victim's award, not to exceed 10 percent of the amount of the award, or $500, whichever is less.[71]

In addition to increasing the financial compensation aspects of its program the California legislature, disturbed by the fact that less than one percent of the victims of violent crimes were applying under the statute, created provisions for publicizing the program.[72]

These provisions require every local law enforcement agency to inform victims of the availability of the program and provide application forms to interested persons.[73] Pursuant to the statute, the California Attorney General promulgated standards for law enforcement

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65. Initially, the California program was placed under the direction of the Department of Social Welfare. But study indicated this to be injudicious and the program was transferred to the State Board of Control, a board responsible to hear major claims for money or damages against the state. *See generally* H.R. DOC. NO. 39, *supra* note 34, at 384-400 (testimony of Eugene Veglia, Executive Secretary, California State Board of Control).

66. CAL. GOV'T CODE § 13959 (West 1974).

67. *Compare* CAL. GOV'T CODE § 13961 (West 1974) *with* MASS. GEN. LAWS ANN. ch. 258A, §§ 1-5 (West 1968); *see* notes 7-12 *supra*.

68. CAL. GOV'T CODE §§ 13961, 13963 (West 1974). The 1977 amendments to the California Code shifted the duty of verification of the victim's claim to the staff of the State Board of Control.

69. For example, California has a $10,000 medical payment ceiling provision and pays attorney's fees in addition to an award.

70. CAL. GOV'T CODE § 13965 (West 1979).

71. *Id.*

72. *See* H.R. DOC. NO. 39, *supra* note 34, at 505 (information regarding California's Victim of Violent Crime Program 1965-74, at 489-511).

73. CAL. GOV'T CODE § 13968(c) (West 1974).

officials.[74] Every law enforcement officer is required to provide victims or their families literature describing the victim program and explaining where to obtain application forms.[75] Compliance with this requirement must be noted on the police report.[76] Alternatively, the Attorney General advised, potential claimants may be notified by mail.[77]

Every law enforcement agency in California is required to appoint a Victims of Violent Crime Liaison officer.[78] This officer is responsible for coordinating local operation of the CVVC program.[79] New officers must be advised by their superiors upon entering service of the particulars of the Victims of Violent Crime Program.[80]

The impact of the 1974 amendment was significant and surpassed legislative expectations.[81] There was a 194 percent increase in filings.[82] Concomitant with the duty of the law enforcement agencies to inform victims of the program was the statutory requirement that all licensed hospitals and physicians be notified of the program's existence.[83] Additionally, the statute created the duty for every licensed hospital to display posters prominently in its emergency room giving notification of the general provisions of the CVVC program.[84]

Supervision of the CVVC program rests with the State Board of Control, a three member board composed of the director of the State Department of General Services, the State controller and a third member appointed by the Governor.[85] This administrative agency is endowed with quasi-regulatory and quasi-judicial functions.[86] When it takes action on a matter, the decision is subject to review by a court of law usually in the form of a writ of mandate.[87] Proceedings before the board are informal, usually conducted in a conversational manner and without sworn testimony.[88] In 1973, the board was authorized to make

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74. *See* Letter from California Attorney General Evelle J. Younger to all local law enforcement agencies in the state of California, H.R. DOC. NO. 39, *supra* note 34, at 505.

75. *Id.*

76. *Id.*

77. *Id.*

78. *Id.*

79. *Id.*

80. *Id.*

81. *See* H.R. DOC. NO. 39, *supra* note 34, at 489-90.

82. *Id.* at 490.

83. CAL. GOV'T CODE § 13968(b) (West 1974).

84. *Id.*

85. *See* H.R. DOC. NO. 39, *supra* note 34, at 385.

86. *Id.* at 390.

87. *Id.* Note that in California the name *mandate* has been substituted for *mandamus* as the formal title of that writ. Chrisman v. Superior Court in and for Fresno County, 63 Cal. App. 477, 479-80, 219 P. 85, 86 (1923). The claimant would seek to have the writ of mandate issued from a court of superior jurisdiction to the State Board of Control directing the restoration of the claimant's rights to indemnification for losses incurred as a result of victimization.

88. *See* H.R. DOC. NO. 39, *supra* note 34, at 392.

all necessary rules and regulations consistent with law for the purpose of carrying into effect the provisions of the CVVC program.[89]

III. COMPARING THE MASSACHUSETTS CVVC PROGRAM

A. Adequacy of Financial Assistance

Twelve years ago, the ceiling figure of $10,000 may have adequately reimbursed a victim for the costs incurred as a result of serious personal injury at the hands of a criminal.[90] Today however, rising medical costs cause serious question regarding the adequacy of the 1968 ceiling.[91] California and New York, with a more realistic understanding of the cost of victimization, have amended their compensation schemes by raising or eliminating ceilings.[92] In addition, state programs enacted subsequent to the Commonwealth's contain higher recovery limits.[93] Despite wide recognition of the inadequacy of a $10,000 limit, it remains the maximum recovery permitted under the statute.[94]

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89. CAL. GOV'T CODE § 13968(a) (West 1974).

90. *But see* Floyd, *supra* note 31. "[T]he hospital and medical expenses could consume the $10,000 in which event the victim or his dependents would be left with no financial aid. If financial aid is one of the motivating factors of the plan, a maximum figure should be set without taking medical expenses into account." *Id.* at 367.

In 1968, the legislature's social inclination to return victims to a financial status comparable to their previctimized status had to be restrained by pragmatic political considerations. Legislative documents indicate that considerable attention was given to the expense of financing a compensation program. To reduce the possible cost and also to broaden legislative and public support for the CVVC plan, minimum and maximum award figures were adopted. Although a minimum figure of $100 was employed to discourage frivolous claims, no record exists as to why a maximum limit of $10,000 was established. *See generally,* H. 5151, *supra* note 5, at 9-14; S. Vitali, *A Year's Experience with the Massachusetts Compensation of Victims of Violent Crime Law, 1968 to 1969,* 4 SUFFOLK L. REV. 237 (1970); G. Floyd, *Massachusetts' Plan to Aid Victims of Crime,* 48 B.U.L. REV. 360 (1968).

91. *See* STATISTICAL ABSTRACT OF THE UNITED STATES, 1979, U.S. Department of Commerce, Bureau of Census; Table 791, Consumer Price Indexes (since 1970, the cost of medical care has increased 96%; prescription drugs 39%; physicians services 98%; dental services 93% and hospital room 150%).

92. CAL. GOV'T CODE § 13965(a) (West 1974). *See also* Testimony of Eugene Veglia, Executive Secretary, California State Board of Control, H.R. DOC. NO. 39, *supra* note 34, at 385:

> Effective July 1, 1974, there was offered a rather substantial set of amendments raising the benefits from a total of $5,000 to up to $10,000 for loss of wages and support, up to $10,000 for medical and medically related expenses, and up to $3,000 for job reorientation and rehabilitation. And on top of that, attorney fees, up to 10 percent of the award, but not to exceed $500.

N.Y. EXEC. LAW § 631 (Consol. Supp. 1979). There is no ceiling limiting the amount the CVCB may pay a claimant for medical expenses. The 1976 amendments, effective January 1, 1977, raised compensation for loss of earnings or support to $250 from $135 with a ceiling of $20,000.

93. *See, e.g.,* ALASKA STAT. § 18.67.130(c) (1975) ($25,000); KY. REV. STAT. ANN. § 346.130(6) (1976 & Supp. 1980) ($15,000); N.D. CENT. CODE § 65-13-10(9) (Supp. 1977).

94. *See generally* MARQUETTE UNIVERSITY VICTIM/WITNESS PROJECT, *reprinted in* H.R. DOC. NO. 39, *supra* note 34, at 553-621:

> Seven states place the maximum at $10,000. The remaining states fail to converge at any other central figure. Proposed federal legislation appears more generous overall, ranging

The Massachusetts CVVC plan does cover the loss of future support when a victim is injured, and in the case of the victim's death, the loss of support is computed on the basis of life expectancy evidence and actuarial tables.[95] The "actual loss sustained" under the plan is determined by deducting the benefits received as a result of the injury from the total loss sustained.[96] Where the actual loss sustained exceeds the maximum award recoverable, the victim is entitled to no more than an award of $10,000 minus the statutory deduction of $100.00.[97]

Massachusetts, unlike New York, makes no provision for the permanently disabled or paralyzed victims of crime.[98] The statute defines out-of-pocket loss as "unreimbursed or unreimbursable expenses or indebtedness reasonably incurred for medical care or other services necessary as a result of the injury upon which such claim is based."[99] Thus, unless "other services necessary" is broadly construed, the refurbishing of a residence for a victim who has suffered paraplegia would be non-compensable.[100]

In contrast to California, Massachusetts has no rehabilitative counseling or job retraining services for the victims of violent crime.[101] California provides as much as $3,000 for job-retraining and also has a provision to refer victims to other supportive services.[102]

B. Adequacy of Publicity and Utilization

Public unawareness of the Massachusetts CVVC program is due to the judicial model employed to service the program.[103] The decentralized district court method was utilized to avoid creating still another

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from $25,000 to no upper limit. In the later instances, eligibility for reward reception is drawn very narrowly. The majority of bills pending in Congress suggest a $50,000 maximum, a figure at wide variance with what the states appear willing to accept. *Id.* at 600.

Note also that a bill was introduced in the Massachusetts legislature in 1971 to raise the maximum award to $25,000. It was defeated in committee. *See* EDELHERTZ & GEIS, *supra* note 13, at 116.

95. Gurley v. Commonwealth, 363 Mass. 595, 596, 296 N.E.2d 477, 479 (1973).

96. *Id.* at 597, 296 N.E.2d at 480.

97. *Id.*

98. *Compare* MASS. GEN. LAWS ANN. ch. 258A, § 6 (West 1968) *with* N.Y. EXEC. LAW § 631 (Consol. 1976) *and* H.R. DOC. NO. 39, *supra* note 34, at 303 (statement of Edward A. Morrison).

99. MASS. GEN. LAWS ANN. ch. 258A, § 5 (West 1968).

100. *See generally* H. 5151, *supra* note 5. A section-by-section analysis of the proposed legislation appears at 21-5; the Special Commission provided the analysis and a statement of legislative intent. A reasonable inference drawn from the Special Commission's own analysis, supported by the interrogatories addressed to the claimant by the Attorney General and further supported by the Claim for Compensation form is that "other services necessary" would not include refurbishment. The language probably includes X-ray charges, hospital costs, out-patient treatment, ambulance fees, dental work, funeral costs, etcetera.

101. *See* MASS. GEN. LAWS ANN. ch. 258A, §§ 1-7 (West 1968).

102. CAL. GOV'T CODE § 13965(a) (3) (West 1974).

103. *See generally* EDELHERTZ & GEIS, *supra* note 13, at 127.

state agency.[104] However, the method fails to assign any specific agency to supervise the program's operation.[105] This mechanical deficiency impairs the CVVC's effectiveness and is substantially responsible for the lack of public utilization of the program's benefits.[106]

Between fiscal 1969 and 1972, there were a total of 573 claims filed, 175 awards totalling $236,776 (an average of $1353 per award) were made.[107] During the same time frame, there were nearly 60,000 violent crimes reported in the Commonwealth.[108] Although every violent crime does not yield a compensable victim, and assuming that all victims do not meet the eligibility criteria,[109] the 105 to 1 ratio of violent crimes to filed claims and the 343 to 1 ratio of violent crimes to compensated victims nonetheless demonstrates the inadequate management of the CVVC program.

Recent data indicates that although the number of claims has increased, the number remains substantially below expectations.[110] During the period 1976-1979, there were 1,960 claims filed and 755 awards totalling $3,085,781 (an average award of $4087) were made.[111] Violent crimes during the same time frame exceeded 100,000.[112] Although the 51 to 1 violent crimes to claims filed and 79 to 1 violent crimes to compensated victims ratios are an improvement over the 1969-1972 ratios, they nevertheless indicate an underutilization by potentially compensable victims.

Expectations of the CVVC program as expressed by the Special Commission at the time of its enactment have never been achieved.[113] It was estimated that a CVVC plan would cost between $750,000 and $2,250,000 annually[114] and would require the processing of 400 to 1,000 claims in the first year, and 2,000 compensable claims in any year.[115]

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104. *See* H. 5151, *supra* note 5, at 19: "[I]f a separate administrative agency were established, 20 to 40% of the cost of awards would have to go toward operating expenses."

105. *See* note 103 *supra.*

106. *Id.* at 127-28.

107. *Id.* at 107.

108. *See* FEDERAL BUREAU OF INVESTIGATION, UNIFORM CRIME REPORTS, Table 4: Index of Crime by State, 1969-1972. For purposes of FBI classification, murder, forcible rape, robbery and aggravated assault are violent crimes.

109. *See* MASS. GEN. LAWS ANN. ch. 258A, § 3 (West 1968) (setting forth eligibility requirements).

110. Letter from Paul J. Donaher, Chief, Torts, Claims and Collections Division of the Department of the Attorney General to Edward W. McIntyre (September 13, 1979). *See also* note 113 *infra.*

111. *Id.*

112. *See* note 108 *supra,* for years 1976-79.

113. *See* H. 5151, *supra* note 5.

114. *Id.* at 20.

115. *See* EDELHERTZ & GEIS, *supra* note 13, at 107-108.

Neither of these estimates has been realized.[116] Clearly, the program has not achieved the magnitude its supporters envisioned.

The program has cost slightly more than $1,000,000 in two years, (fiscal year 1977 and fiscal year 1978 respectively).[117] In all other years but 1975, the cost has not exceeded $466,000.[118] Extrapolation of available data indicates that the total compensation awarded from 1969 to 1979 has not exceeded $5,000,000, and is probably closer to $4,500,000.[119] The wide disparity between preenactment expectations and the CVVC's performance has occurred not only because some victims are statutorily ineligible but also because of the lack of public awareness, the legislature's apathy and the reduction of award amounts due to recovery from collateral sources.[120]

Victim unawareness and underutilization of the CVVC benefits has been attributable to the fact that no Massachusetts official is responsible under the statute to publicize the program or inform the victim of entitlements.[121] No one helps the victim obtain relief to which he is entitled. New York and California experienced substantial increases in their CVVC program's utilization when they created statutory authorization for the agency supervising the program to publicize its availability.[122] Massachusetts has no comparable provision.[123] The benefits exist but only those fortunate enough to be informed take advantage of them. Claims also increased in California and New York when a duty to inform was imposed upon law enforcement agencies.[124] No similar duty is provided by the Massachusetts statute.[125]

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116. *See* note 110 *supra*. *See also* Letter from Thomas M. Cusack, Assistant Treasurer, Treasury Department to Edward W. McIntyre (Sept. 17, 1979).

117. *Id.* (In 1977 the cost was $1,124,972.18 and in 1978 it was $1,122,644.01.)

118. *Id.*

119. *Id. See also* EDELHERTZ & GEIS, *supra* note 13, at 108. Cusack provided the following data:

1975	amt paid	$ 987,997.14
1976	amt paid	$ 372,467.41
1977	amt paid	$1,124,972.18
1978	amt paid	$1,122,644.01
1979	amt paid	$ 465,697.64

and Edelhertz and Geis provide the following data:

1969	amt paid	$ 4,498.58
1970	amt paid	$ 60,885.76
1971	amt paid	$ 45,974.00
1972	amt paid	$ 125,418.31

Sums for 1973-74 were unavailable from the Treasury Department.

120. *See generally* EDELHERTZ & GEIS, *supra* note 13, at 107.

121. *Id.* at 120.

122. *See* N.Y. EXEC. LAW § 625a (Consol. 1976) and CAL. GOV'T CODE § 13968 (West 1974).

123. *See* MASS. GEN. LAW ch. 258A, §§ 1-7 (West 1968).

124. *See* CAL. GOV'T CODE § 13968(c) (1974) and N.Y. EXEC. LAW art. 22, § 625a (Consol. 1976). The normal growth rate of the California CVVC program was between 27% and 30%; but one year after § 13968 was enacted, filings increased by 194%. *See* H.R. DOC. NO. 39, *supra* note 34, at 490.

125. *See* note 123 *supra*.

C. The Attorney's Role

The proceeding in the district court on the victim's claim has at least some of the characteristics of a conventional tort claim action.[126] The adjudication process however, is intended to be conducted in a neighborhood atmosphere, to be personal, and to avoid the confusion and frustration that citizens experience in trying to fight an anonymous governmental bureaucracy.[127] In this type of proceeding, an attorney has a limited role.[128] Nevertheless, attorneys endeavor to negotiate what the terms of the Attorney General's recommendation on a claim might be, but under the statute the Attorney General has no authority to negotiate a settlement.[129] What a claimant's attorney can attempt is to obtain an agreed statement of facts.[130] This, however, is not analogous to a compromise reached in a usual tort suit. There is no provision in the statute to compensate a victim for pain and suffering. Therefore, the measuring of "actual loss sustained" is easily computed.[131] The margin for the claimant's attorney to bargain is very slim and the Victim's Bureau finds it difficult to convince attorneys of their respective roles in the CVVC program.[132] Attorneys in crime victim compensation cases do not clearly perceive the dimensions of their role.[133]

D. Adequacy of Supervision

Both New York and California utilize a centralized administrative agency to operate and supervise their CVVC programs.[134] Massachusetts elected to use the decentralized district court system instead of creating a separate administrative system.[135] This decision was partially premised on language in the Constitution of the Commonwealth of Massachusetts, in its Declaration of Rights:[136]

> Every subject of this Commonwealth ought to find a certain remedy, by having recourse to the laws, for all injuries or wrongs which he may receive in his person, property, or character. He ought to obtain right and justice freely, and without denial; promptly and without delay; conformably to the laws.[137]

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126. *See* EDELHERTZ & GEIS, *supra* note 13, at 125.

127. *See* H. 5151, *supra* note 5, at 19. "The decentralization of our District Court system would give the handling of these (CVVC) cases a localized character and make the adjudicating body more accessible to our citizenry."

128. *See generally* EDELHERTZ & GEIS, *supra* note 13, at 125-26.

129. *Id.* at 125.

130. *Id.*

131. *Id.* at 125-6.

132. *Id.* at 128.

133. *Id.*

134. *See* CAL. GOV'T CODE § 13960 (West 1974) and N.Y. EXEC. LAW § 623 (Consol. 1976).

135. *See* H. 5151, *supra* note 5, at 14-16.

136. *Id.* at 15.

137. MASS. CONST. pt. 1, art. XI.

The Special Commission contended that the district courts, "in keeping with the spirit of the language would be best suited to take jurisdiction of cases dealing with the (CVVC) plan."[138] But the commission advanced more economic grounds for placing the CVVC plan within the district courts' jurisdiction.

If an administrative agency were established, the commission reasoned, claimants would be forced to go to a central agency located in Boston which would result in great inconveniences for many.[139] Alternatively, a system of branch offices would have to be set up covering the entire state which would greatly increase the expense of putting the legislation into operation.[140] On the pragmatic consideration of cost, it was determined to place the CVVC plan in the courts. The cost would be minimal whereas if a separate administrative agency were created, twenty to forty percent of the cost of awards would have to go toward operating expenses.[141]

The California and New York administrative agency approaches indicate the fallacious conclusions of the Special Commission. Massachusetts assumed that a claimant would have to travel to Boston or that branch offices would have to be established.[142] Neither is the case in California. Claimants do not have to travel to Sacramento nor are there branch offices of the State Board of Control, although the Board does convene periodically in Los Angeles.[143]

To minimize cost, the State Board of Control adopted pre-hearing staff recommendation letters that are sent to the claimant.[144] The claimant is then aware of the staff's recommendation prior to the hearing of the claim.[145] This pre-hearing notification of recommendation on his claim allows the claimant to be prepared to address specific issues at the time of hearing, thereby reducing the time consumed at the hearing and

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138. *See* H. 5151, *supra* note 5, at 16-17. The Special Commission also noted four principal reasons for situating jurisdiction in the District Court: 1. Administrative agencies deal with complex, technical, problems arising in an industrial society. Compensation for victims of violent crimes does not involve intangible social and ethical factors. 2. The adjudicatory powers and the forms used have been customarily handled by the courts and have promoted public interest. 3. Courts are attuned more closely to the present and recognize the necessity in their work to consider contemporary social, industrial and political conditions. 4. "[The] District Courts would be fully capable of handling the case load in this particular field." *Id.* at 17.

139. *See* H. 5151, *supra* note 5, at 19.

140. *Id.*

141. *Id. But see* EDELHERTZ & GEIS, *supra* note 13.

> Much opposition was certainly abated by the stipulated capacity of the courts to absorb a relatively small increase in low-level-intensity proceedings and by assigning some additional work to the office of the commonwealth's attorney general.... On the balance, there seems to be little justification for the many theoretical arguments advanced in Massachusetts on behalf of the judicial model as opposed to the administrative model for delivering compensation to victims of crime. *Id.* at 114.

142. *See* H. 5151, *supra* note 5, at 19.

143. *See* H.R. DOC. NO. 39, *supra* note 34, at 491-92.

144. *Id.*

145. *Id.*

also reducing the number of claims continued.[146] Pre-hearing letters eliminate unnecessary travel and appearances, allowing the Board to process more applications per meeting.[147] California manages this efficacious system with a staff of nine and although there is some backlog, the Board monitors itself closely while responding to the meritorious needs of victims.[148]

In cost-conscious California, the CVVC program's administrative cost is sixteen percent of the total program budget and this budget varies depending on the number of claims awarded.[149] California is able to keep administrative expenses down because the Board meets part-time, convening semi-monthly, and members are salaried in other state positions.[150] Like Massachusetts, California uses the Attorney General's office to investigate a claim. This expense is charged to the Attorney General's budget account.[151]

New York manages to administer its CVVC program for about twenty percent of its overall budget and recently lowered administrative expenses to eighteen percent.[152] Claimants in New York need not travel to Albany, and no CVCB branch offices exist, although the CVCB does maintain a staff in New York City to assist in processing claims originating there.[153] There is no requirement that a claimant appear at a hearing on his claim.[154] A CVCB member may expeditiously decide a claim on the basis of the papers filed and the investigation report.[155] There may never be a hearing unless the board member is unable to reach a decision or a claimant is dissatisfied with the board member's decision.[156]

The CVCB has a staff of thirty-seven, including the five board members.[157] Nevertheless, the average length of time for an award to be made is from five to nine months.[158] However, the CVCB's annual self-analysis and other auditing factors make it conscious of its supervisory shortcomings, and the procedure to provide CVVC benefits is adjusted accordingly.[159]

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146. *Id.* at 492.
147. *Id.*
148. *Id.*
149. *See* H.R. DOC. NO. 39, *supra* note 34, at 389 (testimony of Eugene Veglia, Executive Secretary, California State Board of Control).
150. *Id.*
151. *Id.*
152. *See* PROGRAM AUDIT SUMMARY AND CONCLUSIONS, FINANCIAL AID TO CRIME VICTIMS, *reprinted in* H.R. DOC. NO. 39, *supra* note 34, at 1281.
153. *Id. See also* N.Y. EXEC. LAW § 625 (3) (Consol. 1966) (filing by mail).
154. N.Y. EXEC. LAW § 627 (Consol. 1966).
155. *Id.* at § 627 (4).
156. *Id.* at § 628 (1).
157. *See* H.R. DOC. NO. 39, *supra* note 34, at 302 (statement of Edward A. Morrison).
158. *See* FINAL REPORT OF CRIME VICTIMS CONSULTATION PROGRAM — 1975, *reprinted in* H.R. DOC. NO. 39, *supra* note 34, at 328.
159. *See, e.g.*, PROGRAM AUDIT *reprinted in* H.R. DOC. NO. 39, *supra* note 34, at 1271.

California and New York have each analyzed, rethought and amended their respective CVVC programs in order to service the needs of victims.[160] Plainly, the principal component of the Massachusetts program has neither the personnel nor the authority to provide oversight of the CVVC's functioning, to analyze its effectiveness in reaching the needy victims of violent crime, or to exercise the other component parts.[161] Consequently, the citizens of the Commonwealth are unserved or underserved by the CVVC program as it is managed by the district courts.[162]

IV. REVAMPING THE COMMONWEALTH'S CVVC PROGRAM

A. Supervision and Publicity

Although claims initiated under the CVVC program may still be heard in the district court, the legislature must consider delegating overall supervision of the program to a specific state agency.[163] This agency should be given the powers and duties similar to those of the New York CVCB in regard to adopting and promulgating rules and regulations to achieve the legislative intent of the CVVC.[164] Furthermore, the agency must be permitted to request the assistance of all other public agencies in carrying out the legislative intent.[165]

Importantly, this supervising agency must be granted the authority to widely publicize the availability of benefits and the method of initiating a claim for compensation.[166] The agency should establish and conduct a

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160. *See* H.R. DOC. NO. 39, *supra* note 34 (testimony of Edward A. Morrison on behalf of New York's Crime Victims Compensation Board at 301 and Eugene Veglia, executive secretary of California's State Control Board at 384).

161. *See* MASS. GEN. LAWS ANN. ch. 258A, §§ 1-7 (West 1968). The district court is ostensibly the principal component of the CVVC program but under the statute has only the authority to hear claims and make awards.

162. *See generally* EDELHERTZ & GEIS, *supra* note 13, at 128: "It is questionable whether the judicial model is a good one even if such additional [administrative machinery] is provided."

163. *Id.*

> The principal [reservation about the judicial model] is the lack of any central responsibility for operation of the program. No Massachusetts official has as his main responsibility the duty to see that all eligible victims of crime are made aware of their rights under the statute and are helped to obtain the relief they may be entitled.

Id. at 127.

164. N.Y. EXEC. LAW § 623 (4) (Consol. 1966). Under its provision, the CVCB of New York has the authority to request from the state police, county or municipal police and from any other state or municipal department or agency, or public authority, such assistance and data as will enable the CVCB to carry out its functions and duties. Furthermore, the provision authorizes other governmental units to comply with the CVCB's request.

165. *Id.*

166. *See, e.g.*, PROGRAM AUDIT *reprinted in* H.R. DOC. NO. 39, *supra* note 34, at 1271. The New York CVCB had brochures printed and distributed. CVCB's existence is made known to police during their training program and newspapers and electronic media disseminate information about the CVVC program. *Id.* at 1279-80.

public information program to assure extensive and continuing publicity and public awareness of the provisions of the CVVC statute.[167] Radio and television should be utilized to broadcast the availability of the program.

Besides publicizing the availability of benefits, the agency should also be authorized to conduct seminars for various state and local law enforcement agencies informing them of the CVVC program.[168] Annually, the agency should render to the governor and the legislature a written report of all relevant statistics and other information which reflect the extent of compensation and other activities generated by the operation of the CVVC program.[169] This yearly report will facilitate the continuing evaluation of the program and provide a better basis than is now available on which to assess the program's performance.[170] Of the twenty-five programs operating throughout the nation, seventy-five percent of them require the supervising state agency to prepare and present an annual report of the CVVC program's operation.[171] The state agency should also be authorized to disseminate the annual report to the media in a continuous effort to publicize the benefits available and to allow public scrutiny of the program's operation.[172]

To further publicize the CVVC plan, the supervising state agency should be given the statutory authority to direct every hospital licensed by the state to display posters notifying the public of the existence and general provisions of the CVVC statute.[173] The requirement for

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167. *Id.*

168. *See, e.g.*, H.R. DOC. NO. 39, *supra* note 34, at 505. All law enforcement agencies in California must periodically hold a general meeting to explain the CVVC program to law enforcement agencies. New officers must be advised of the CVVC program by their superiors upon entering service.

169. *See, e.g.*, TENN. CODE ANN. § 23-35-117 (Supp. 1979):

> Statistical Reports: The state Board of Claims shall compile, from records available to it and from those maintained by the circuit courts, all relevant statistics and other information which reflects the extent of compensation and other activities generated by operation of this chapter and § 40-3207. Within the first four (4) weeks of each legislative session, the board shall furnish to the judiciary committee of each house of the general assembly a report conveying such information compiled, to facilitate the continuing evaluation of the program established by the chapter and § 40-3207.

170. *See* MASS. GEN. LAWS ANN. ch. 258A, §§ 1-7 (West 1968). No state agency is charged with compiling a statistical report nor is any agency required to render a report outlining its role in the CVVC program.

171. *See, e.g.*, ALASKA STAT. § 18.67.170 (1974 & Supp. 1977); DEL. CODE ANN. tit. XI §§ 9004, 9013 (Supp. 1976); GA. CODE ANN. ch. 47, § 525 (Supp. 1976); HAWAII REV. STAT. §§ 351-70 (1968 & Supp. 1975); MINN. STAT. ANN. § 299B.06(1)(e) (West Supp. 1977).

172. *See* EDELHERTZ & GEIS, *supra* note 13, at 120.

173. *See* CAL. GOV'T CODE § 13968(b) (West 1974):

> It shall be the duty of every hospital licensed under the laws of this state to display prominently in its emergency room posters giving notification of the existence and general provisions of this chapter. The board shall set standards for the location of such display and shall provide positions, application forms and general information regarding the provisions of this chapter to each hospital and physician licensed to practice in the state of California.

hospitals to post notices should be extended to neighborhood medical clinics and other appropriate offices where potentially compensable victims may appear.[174] Providing physicians licensed by the Commonwealth with literature and posters for their offices will also enhance victim awareness of the program.[175]

It should be mandatory for every state and local law enforcement agency to incorporate into its training program instruction on the benefits available under the CVVC, the mechanism of initiating a claim, and the operation of the program.[176] But instruction alone is insufficient. Six states have explicitly created a duty-to-inform requirement for the law enforcement agent receiving the report of a crime. Massachusetts should also adopt such a requirement.[177]

As in New York, every police station, precinct house, or any appropriate location where a crime may be reported should have available information booklets, pamphlets and other pertinent written information, including application blanks.[178] To require a victim to travel to a district court in order to obtain an application form, as is presently the situation in Massachusetts, only serves to thwart the program's purpose.[179]

Supplementing these requirements, the supervising agency should make available to the police, hospitals and physicians a victim's assistance card.[180] The card should contain a WATTS telephone number and the name of the state agency trained to assist victim's witnesses in obtaining services and securing benefits.[181]

B. Benefits

Massachusetts must reconsider its ceiling on maximum awards recoverable under the CVVC program.[182] The national experience has

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174. *See generally* FINAL REPORT OF CRIME VICTIMS CONSULTATION PROGRAM — 1975 *reprinted in* H.R. DOC. NO. 39, *supra* note 34, at 307-82. This five year study advocates as wide a dissemination of information regarding a victim's right to CVVC benefits as possible.

175. *Id. See* note 173 *supra.*

176. *See* H.R. DOC. NO. 39, *supra* note 34, at 505. Standards regarding CAL. GOV'T CODE § 13968(c) (West 1974): "Instruction concerning the outlines of the [CVVC] program shall be made a part of the training curriculum of all trainee officers."

177. *See, e.g.,* ALASKA STAT. § 18.67.175(b) (1974 & Supp. 1977); MINN. STAT. ANN. § 299B. 15 (West Supp. 1977); N.Y. EXEC. LAW § 625(a)(*1*) (McKinney 1972 & Supp. 1972-77).

178. N.Y. EXEC. LAW § 625(a) (Consol. 1976): "[E]very victim who reports a crime in any manner whatsoever shall be supplied by the person receiving the report with information and application blanks, if the address of the victim and his name are supplied."

179. MASS. GEN. LAW ANN. ch. 258A, § 2 (West 1968). The first point of victim contact is with the police officer who hears the victim's complaint. "[I]t appears to be unusual for police voluntarily to advise a victim as to his right to file for compensation." EDELHERTZ & GEIS, *supra* note 13, at 120.

180. *See* note 55 *supra.*

181. *See* H.R. DOC. NO. 39, *supra* note 34, at 77 (testimony of James R. Unger, Prosecuting Attorney for Stark County, Ohio).

182. *See* Floyd, *supra* note 31, at 367.

been that $10,000 is inadequate.[183] Programs enacted subsequent to the Massachusetts plan contain higher compensable limits.[184]

The CVVC programs in Washington and Wisconsin, because of their unique tie-in with Workmen's Compensation provisions, provides an innovative alternative to establishing arbitrary ceilings.[185] Compensation in Wisconsin, for example, is computed on the basis of the victim's salary at the time of his injury or death by using computation formulae for workmen's compensation benefits described in that state's pertinent statute.[186] A victim is compensated for all medical costs, surgical and hospital treatment and medicines regardless of cost.[187] In addition, Wisconsin clearly provides reimbursement for prosthetic devices and rehabilitative therapy in the use of such artificial members.[188]

In addition to providing compensation for the real expenses to a victim as a result of being injured, Massachusetts needs to consider other types of assistance which victims require.[189] An exhaustive study of the New York CVVC program revealed that fifty-seven percent of the victims indicated a job need and wanted placement.[190] They had either lost their job or were unable to work at their old jobs as a result of the crime.[191] Twenty percent needed training or retraining in order to work.[192] The agency supervising a CVVC should include in its organization a bureau to counsel and assist victims in reentering the job market.[193] The agency should have the expertise to promptly refer a victim to another state agency which will then facilitate the victim's reemployment.[194] Follow-up on all such referrals should be part of the referring agency's operating procedures. Only through tracking and monitoring such referrals will the agency be able to assess its performance.[195]

In addition to an upward adjustment of the maximum award and a

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183. *See* MARQUETTE UNIVERSITY VICTIMS/WITNESS PROJECT, *reprinted in* H.R. DOC. NO. 39, *supra* note 34, at 553-621.

184. *See* note 93 *supra.*

185. WASH. REV. CODE ANN. §§ 7.68.010-7.68.910 (Supp. 1980); WIS. STAT. ANN. §§ 949.01-949.18 (West Supp. 1977-78).

186. WIS. STAT. ANN. §§ 949.01-949.18 (West Supp. 1977-78).

187. *Id.* at § 949.06.

188. *Id.*

189. *See* note 183 *supra.*

190. *See* note 174 *supra.*

191. *Id.*

192. *Id.*

193. *See generally* PROGRAM AUDIT *reprinted in* H.R. DOC. NO. 39, *supra* note 34, at 326. One of the immediate benefits of such a bureau would be to respond expeditiously to a victim's need.

194. *Id.*

195. *See* H.R. DOC. NO. 39, *supra* note 34, at 433 (statement of Gilbert Geis, Professor, Program in Social Ecology, University of California, Irvine): "These reports might well involve interviews with successful and unsuccessful applicants, with administrators, with law enforcement officials, and with other persons who have information and ideas about how the program has succeeded and in what ways it has fallen short." *Id.*

provision for rehabilitative and vocational training, other substantive changes should be made.[196] When the CVVC plan was proposed, a $500 Emergency Award provision was recommended but the provision was deleted before enactment.[197] Study of the New York CVVC program showed 47.9 percent of the victims required immediate financial assistance.[198] New York's Emergency Award provision permits payment if undue hardship will result to claimant unless immediate payment is made.[199] It has been recommended that the CVCB of New York be authorized to make emergency payments within forty-eight hours of a request.[200] Any emergency award made is deducted from the final settlement.[201]

C. Attorney's Role

The Attorney General under the present statute is charged with presenting any information he may have in support of or in opposition to the claim.[202] Furthermore, it is clear that the legislature intended to create a non-adversarial proceeding where a victim and the court, with the recommendation of the Attorney General, can agree on an award.[203] This is how a victim's compensation system should work. There should be no need for an attorney in this sort of proceeding.[204] Crime victims should not be made to feel that they are being manipulated.[205] They need to have their problems addressed without other middlemen getting involved and adding to their existing burdens.[206]

The legislative intent to keep things simple, however, is thwarted by the Claim for Compensation form prescribed by the Chief Justice of the District Courts and by the interrogatories propounded by the Attorney General.[207] The claim form clearly implies that the claimant ought to

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196. CAL. GOV'T CODE § 13965 (West 1974), authorizing $10,000 for medical expenses, $10,000 for loss of wages, and $3,000 for vocational services.

197. *See* H. 5151, *supra* note 5, at 25.

198. *See* H.R. DOC. NO. 39, *supra* note 34, at 325. "Almost half of the victims (47.9 percent) indicated that financial loss was their most important problem. Specifically, they need financial help for medical care and for food and living expenses as a result of their loss. These items make up 79.5% of the need for financial assistance." *Id.*

199. N.Y. EXEC. LAW § 630 (Consol. 1966).

200. *See* H.R. DOC. NO. 39, *supra* note 34, at 328.

201. *See* note 199 *supra*.

202. MASS. GEN. LAWS ANN. ch. 258A, § 4 (West 1968).

203. *See generally* H. 5151, *supra* note 5.

204. *See* H.R. DOC. NO. 39, *supra* note 34, at 231 (testimony of Dr. Richard D. Knudten, Project Director, Center for Criminal Justice and Social Policy, Marquette University): "I would opt for a law that is simple enough to lessen the need for an attorney to serve as intermediary in the benefit securing process." *Id.* at 234.

205. *Id.*

206. *Id.*

207. The Claim for Compensation is a one page standardized form. It requests personal information about the victim, his employer, the date and place of the crime and to whom it was

have an attorney.[208] The interrogatories are to be answered under oath and an unrepresented claimant could undoubtedly find them difficult.[209]

Both the form and the interrogatories are unnecessarily suggestive of the claimant's need for legal counsel.[210] The Chief Justice's form should be streamlined.[211] When a claimant obtains an application form, literature, explaining in simple terms the operation and benefits of the CVVC program, should be provided.[212] This literature should clearly inform the claimant that he has the right to be represented by counsel but that such representation is discretionary. The Attorney General's interrogatories can also be simplified and reduced to standardized forms which will lessen a claimant's reliance on legal counsel.[213] Furthermore, standardized forms will expedite the processing of claims, saving time and money and more immediately addressing the victim's needs.[214]

An attorney can be awarded as much as fifteen percent of the final

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reported, the names and addresses of the attending physician(s) and hospital(s), the total amount of medical bills and other expenses claimed and the total amount of lost wages or support claimed.

The claimant is asked to disclose any other source of reimbursement for the amounts claimed and also, in case of a victim's death, whether the victim was covered by life insurance. In addition the claimant is asked to provide a narrative as to the circumstances of the crime and damages; the names and addresses of witnesses are also sought from the claimant. The claimant then signs "under the pains and penalties of perjury."

208. Lines eleven and twelve of the Claim for Compensation form request the "Claimant's attorney's name," address and telephone number. If not otherwise informed, a claimant could infer from this request that an attorney's assistance in the process is required.

209. *See* EDELHERTZ & GEIS, *supra* note 13, at 122. Although the interrogatories are intended to supplement the information garnered by the Claim for Compensation form, they are duplicative. For example, the claimant again must provide his name, address, employment and employer's name and address. Again a claimant is asked the total amount of earnings and support lost as a result of an absence from work.

210. Note the Attorney General's interrogatories appear in the mail with the claimant's name versus the Commonwealth of Massachusetts as a heading. A claimant then reads, "Interrogatories propounded by the defendant to the plaintiff [claimant's name] to be answered under oath." So now the victim, who may also be the claimant, is addressed as "plaintiff"; furthermore, the "plaintiff" must now answer "interrogatories propounded" by the Attorney General of the Commonwealth of Massachusetts and must answer under oath. Where the Claim for Compensation suggests a need for an attorney, these interrogatories certainly support that suggestion.

211. *See generally,* EDELHERTZ & GEIS, *supra* note 13, at 122: "Where an attorney is not helping the victim, the task rests with the court clerk. Some clerks appear to be well-informed and helpful; others may be poorly informed or less supportive. While the petition seems simple, it can trouble victims and also their attorneys." *Id.*

212. *See* N.Y. EXEC. LAW § 625(a) (Consol. 1976).

213. The interrogatories seek more specific details of the claimant's petition. It would seem that, in a computerized word-processing society, both the Claim for Compensation and the interrogatories, in their current form are anachronistic. According to Edelhertz and Geis, the Attorney General has remarkably few resources to meet the responsibility of defending the state's interest, of dealing equitably with the Claimant/Adversary, and advising the court in the proceeding. He has no investigators, yet is charged with verifying a quantity of information which varies on a case by case basis. The burdensome and menial task of preparing three pages of interrogatories and of deciphering answers to those interrogatories can hardly expedite the benefit-securing process.

214. *See* H.R. DOC. NO. 39, *supra* note 34, at 502 (sample form used in California). California's administrative agency uses a one page standardized claim indemnification form. The reverse

settlement.[215] On a maximum recovery claim, an attorney could receive $1500, and with another $100 deducted automatically, the victim would receive only $8,400.00.[216] There is no justification for lawyers getting involved in the CVVC program, unless of course, a claim is denied and a claimant wants to appeal the decision.[217]

Alternatively, if the legislature decided to keep the attorney's provision, the bill for legal services involved in processing the claim should be sent by the attorney to the state agency supervising the CVVC.[218] The fee should be paid in addition to and not out of the claimant's award.[219] Failure to recognize that the legal fee is itself a financial loss to the claimant incurred by the victimization is inconsistent with the underlying principle of CVVC, which is to return the victim as near to pre-victimization status as possible.[220]

CONCLUSION

The original drafters of the Commonwealth's CVVC program intended to create a system which would assist innocent victims of violent crimes in mending their lives.[221] To that effect, the drafters designed a program which they believed would allow a victim to become whole in the aftermath of mayhem.[222] But it is unlikely that the present CVVC

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side of this form explains the eligibility requirements and indemnification process to an applicant. On the basis of the information obtained by this one-page form the State Board of Control may make an award.

215. MASS. GEN. LAWS ANN. ch. 258A, § 4 (West 1968).

216. *Id.*

217. *See generally* H. 5151, *supra* note 5, at 18. The Special Commission, although including an attorney provision, intended the proceeding to be neighborly, informal and expeditious.

218. *See, e.g.*, ALASKA STAT. § 18.67.050 (1974 & Supp. 1977):

> Attorney fees. The board may, as part of an order entered under this chapter, determine and allow reasonable attorney fees, which may not exceed 25 percent of the first $1,000 amount awarded as compensation, 15 percent of the next $9,000 amount awarded as compensation, and 7.5 percent of the amount awarded as compensation over $10,000 under sec. 70 of this chapter, to be paid in addition to the amount of compensation, to the attorney representing the applicant. It is unlawful for the attorney to ask for, contract for, charge, demand, collect or receive a larger sum than the amount allowed by the board in the award of attorney fees. An attorney who violates this section shall forfeit any fee awarded and shall repay the state the fee awarded under this section.

219. *Id.*

220. *See* H. 5151, *supra* note 5, at 10, *quoting* former Supreme Court Justice Arthur Goldberg:

> We would confront the problem of the victim directly; his burden is not alleviated by denying necessary services to the accused. Many countries throughout the world, recognizing that crime is a community problem, have designed systems for government compensation of victims of crime. Serious consideration of this approach is long overdue here. The victim of a robbery or an assault has been denied the 'protection' of the laws in a very real sense, and society should assume some responsibility for making him whole. (39 NYALR 204, citing Arthur J. Goldberg, Fifth Annual Madison Lectures, New York University).

221. *See* H. 5151, *supra* note 5, at 10.

222. *Id.* at 11:

> It is true, of course, that at law, if a violent crime has been committed, a tort has oc-

provisions would fully reimburse a victim for the cost of an organ transplant, prosthetic devices and rehabilitative therapy, cosmetic surgery to repair scarred tissue, psychiatric care for a rape victim, abortion, or pre-natal, delivery and post-natal support services.[223] Yet these are only some of the costs a person may incur as a result of being victimized.[224]

Fortunately, a number of effective CVVC plans are now in operation for the Commonwealth to study and emulate. Among the most commended and well reasoned programs include compensation for all actual and reasonable expenses incurred, including loss of earning power as a result of total or partial incapacity and pecuniary loss suffered by dependents of deceased victims.[225] In addition, all medical bills are paid for and a sum of money equivalent to the victim's loss of earning is made available until he or she dies or resumes gainful employment.[226] A sum of money equivalent to the loss of future earning power of a victim who dies is paid to the victim's dependents.[227] Finally, the government assumes all funeral and burial expenses.[228] Alternatively, the Wisconsin experience with the CVVC program's tie-in with workmen's compensation should be studied by the Commonwealth.[229]

Although it may still be possible to use the district court in administering the CVVC plan, there is substantial support for creating a supervising agency with overall operational control of the program.[230] This agency should be given the broad authority to request assistance from all other public agencies in achieving the statutory purposes of a CVVC program.[231] Moreover, the agency should possess the expertise to facilitate the victim's reintegration into a normal life (and to provide a victim access to other state supporting services).[232]

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curred also, and the victim has the right to recover civilly. But only if the perpetrator can be located and secured in a location which recognizes the tort; and only if the criminal is sufficiently affluent to possess assets which will remain after the State is finished exacting its due, in terms of fines and monopolization of the offender's time can the victim recover. In short, the state, and the state alone has the responsibility to protect citizens. . . .

223. Although § 5 of ch. 258A as amended by ch. 459 of the acts of 1980 provides compensation for out-of-pocket losses incurred as a result of rape, the recovery is limited to counseling and emergency funds for housing. The victim could not recover the cost of an abortion or funds for counseling for abortion, even though the pregnancy was the consequence of a rape.

224. *See* H.R. DOC. NO. 39, *supra* note 34, at 1255. California, New Jersey and Rhode Island will pay the costs of a pregnancy resulting from rape, including medical care for delivery or abortion. Maryland considers injury to the non-paid housewife a pecuniary loss and will make awards for lost services.

225. *See* H.R. 2748, 94th Cong., 1st Sess. (1975).

226. *Id.*

227. *Id.* at 9.

228. *Id.* at 9.

229. WIS. STAT. ANN. § 949.06 (West Supp. 1977-78).

230. *See* EDELHERTZ & GEIS, *supra* note 13, at 127-28.

231. *See* note 164 *supra.*

232. *See* note 193 *supra.*

As a matter of law, every victim of a violent crime should be informed of the right to receive compensation under the provisions of the CVVC plan.[233] A duty to inform should be statutorily created for every law enforcement officer in the Commonwealth.[234] Victim assistance cards should be provided to every law enforcement agency and distributed to every victim. In addition, a toll-free telephone number should be provided to facilitate a victim's communication with the assistance program.[235]

The role of attorneys in processing a claim for compensation should be deemphasized, and a statute should be drafted which will altogther lessen the need for legal aid in the benefit-securing process.[236] Additionally, if the need for an attorney arises in a particular instance, the legal services fee should be paid in addition to, and not out of, the claimant's award.[237]

Social legislation requires periodic review and assessment to determine whether its purposes are being achieved.[238] For a dozen years the Commonwealth's CVVC program has been neglected.[239] It needs study and evaluation. The petitions of 1966 and the enactment of the Massachusetts CVVC in 1968 were only a beginning. For too long they have been treated as an end. The citizens the program was intended to help are unassisted, and the victims it was intended to make whole remain in need. To adequately assist those victims of violent crimes who are in need, the Massachusetts legislature must now purposefully review, analyze and amend chapter 258A. In so doing the original legislative intent to the CVVC program can be more readily realized.

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233. *See, e.g.*, CAL. GOV'T CODE § 13968 (West 1974):

> It shall be the duty of every local law enforcement agency to inform victims of violent crimes of the provisions of this chapter and to provide application forms to victims who desire to seek assistance pursuant to this article. The board shall provide application forms and all other documents which local law enforcement agencies may require to comply with this section. The Attorney General shall set standards to be followed by local law enforcement agencies for this purpose and may require them to file with him a description of the procedures adopted by each agency to comply.

234. *Id.* Note the first point of contact a victim has with the state is the police officer who hears the victim's complaint. Yet Edelhertz and Geis, citing Stephen Schafer, "Victim Compensation Program in the Commonwealth of Massachusetts" (unpublished Report to Battelle, May 7, 1972), note that "it appears to be unusual for police voluntarily to advise a victim as to his right to file for compensation." EDELHERTZ & GEIS, *supra* note 13, at 120.

235. *See* note 55 *supra*.

236. *See* note 204 *supra*.

237. *See* note 218 *supra*.

238. *See* H.R. DOC. NO. 39, *supra* note 34, at 433.

239. Letter from Robert D. Webb, Assistant Director, Legislative Research Bureau to Edward W. McIntyre (Oct. 17, 1979). It seems that the last information compiled on ch. 258A was in 1974 and was done at the inquiry of the Assistant Minority Counsel for the Indiana State Senate.

NOTE

The Party Affiliation Requirement: A Constitutional Inquiry

In the 1978 Massachusetts Democratic gubernatorial primary, former Governor Michael Dukakis lost his party's nomination to run for re-election. Substantial numbers of his party's members changed their party affiliation, at least temporarily, so as to participate in the hotly contested Republican primary for the United States Senate seat of Edward Brooke.[1] Dukakis' misfortune was the result of the requirement that one must be a registered member of a political party to participate in that party's primary election. Therefore those wishing to vote in the Republican senatorial primary could not vote for Michael Dukakis in the Democratic gubernatorial primary.

The party affiliation requirement is common today throughout the fifty states. When examined closely, however, serious questions arise as to its constitutionality, particularly in the areas of the first, fourth, and fourteenth amendments. This Note will seek to define the status of the primary election within the electoral process and to evaluate the specific constitutional guarantees to which it is subject. The affiliation requirement will then be tested against these guarantees to determine both the appropriate level of judicial scrutiny when any challenges to the requirement are presented. Two recent decisions in this area, *Rosario v. Rockefeller,*[2] and *Nader v. Schaffer,*[3] will then be analyzed so as to suggest guidance to future courts' consideration of such matters.

I. The Right to Vote

Nothing is more basic to a free society than the right of its members to freely participate in the process by which its leaders are chosen.[4] This right is so basic that the Constitution in article 1, section 2 treats it as presupposed, and moves directly to instructions as to how the franchise is to be exercised in the selection of members of the House of Repre-

1. Boston Globe, Wed. Sept. 6, 1978, at 1 col. 1.
2. 410 U.S. 752 (1972).
3. 417 F. Supp. 837 (D. Conn. 1976).
4. *See* Williams v. Rhodes, 393 U.S. 23, 30 (1968); Wesberry v. Sanders, 376 U.S. 1, 17 (1964).

sentatives.[5] Yet this lack of specificity in the constitutional text created a situation where it was long considered that the Constitution did not confer the right of suffrage on anyone. Enunciated as doctrine in *Minor v. Happersett*,[6] this view that voting was entirely within the province of the states prevailed from the mid-nineteenth century until finally discredited by the *Baker v. Carr* decision in 1962.[7] Today, of course, there is no question as to the existence of a constitutionally guaranteed right of suffrage.[8] It is important to note, however, that this is a fairly recent development.

In its exercise, voting is essentially representative of all of our civil and political rights,[9] and yet, because of the nature of its treatment in the Constitution, appears not to be a fundamental right in the classic sense. Voting is, however, the preservator of *all* rights fundamental,[10] and thus it must, at the very least, be of similar status.[11] Personal in nature,[12] it is a right that must be exercised in a manner free from undue incursion by any regulatory body.[13] Further, since voting is a right that inheres to all qualified citizens,[14] it bears the additional requirement that each voter must be assured of equality in its exercise.[15]

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5. U.S. CONST. art. I, II, IV.

6. 88 U.S. (21 Wall.) 162 (1874). Upon a challenge by a native born, free, white, female citizen of both the United States and the State of Missouri, over the age of twenty-one, against one Happersett, Registrar of Voters, for his willful refusal to place her name on the list of registered voters, the Court held that the Constitution does not by its privileges and immunities clause, its due process clause of the fourteenth amendment, nor by its guaranty of a republican form of government, confer the right to vote on anyone. *See e.g.*, Pope v. Williams, 193 U.S. 621, 632 (1904); Breedlove v. Scuttles, 302 U.S. 277, 283 (1937); Snowden v. Hughes, 321 U.S. 1, 7 (1937). In *Snowden*, the most recent articulation of this doctrine, the Court held: "[t]he right to become a candidate,... like the right to vote for the election of state officers,... is a right or privilege of state citizenship, not of national citizenship which alone is protected by the privileges and immunities clause."

7. 369 U.S. 186, 222-23 n.48 (1962). Relegated to a footnote, the *Minor-Pope-Snowden* doctrine of state electoral autonomy is dispatched with a quote from *In re* Duncan, 139 U.S. 449, 461 (1891):

> By the Constitution, a republican form of government is guaranteed to every State in the Union, and the distinguishing feature of that form is the right of the people to choose their own officers for governmental administration ... but, while the people are thus the source of political power their governments, National and State, have been limited by written constitutions and they themselves thereby set bounds to their own power, as against sudden impulses of mere majorities.

8. *See* Reynolds v. Sims, 377 U.S. 533, 562 (1964).

9. *Id.*; *see also* Yick Wo v. Hopkins, 118 U.S. 356, 370 (1886).

10. *See* Reynolds v. Sims, 377 U.S. 533, 562 (1964).

11. In Williams v. Sclafani, 444 F. Supp. 906, 910 (S.D.N.Y. 1978) the court stated: "It is well settled that voting is a fundamental right, *Reynolds v. Sims*, which includes the right to vote in a primary election, *Smith v. Allwright*." (Citations omitted).

12. *See* United States v. Bathgate, 246 U.S. 220, 227 (1918) (concerning a criminal action upon a conspiracy to bribe voters). *See also* Reynolds v. Sims, 377 U.S. 533, 561 (1964).

13. *See* Elfbrandt v. Russell, 384 U.S. 11, 18 (1966); Reynolds v. Sims, 377 U.S. 533, 562 (1964).

14. *See Ex Parte* Yarborough, 110 U.S. 651, 663-65 (1884); Reynolds v. Sims, 377 U.S. 533, 562 (1964).

15. *See* Dunn v. Blumstein, 405 U.S. 330, 336 (1972). *See also* Evans v. Cornman, 398 U.S. 419, 421-22, 426 (1970); Kramer v. Union Free School Dist. No. 15, 395 U.S. 621, 626-28 (1969); Harper v. Virginia Bd. of Elections, 383 U.S. 663, 667 (1966).

There is a conflict here. Mankind has no history of equal treatment one to another and the guarantee of equality in the exercise of voting rights must therefore be accomplished through some form of government supervision. Yet this supervision must be most judiciously applied given the importance and fundamentality of the franchise.[16] Indeed, the sensitivity of this area is such that in assessing the validity of any form of electoral supervision, both fairness in *fact*[17] and an overriding *appearance* of fairness are requirements of equal importance.[18] This conflict between the need for supervision to assure equality and fairness and the demand for unfettered exercise is at the heart of the affiliation requirement issue. The need for electoral supervision must always be balanced against the burden it places upon this most sacred right.

II. VOTER REGISTRATION

Registration is the most pervasive form of electoral supervision, being the process by which one's qualifications are assessed, and eligibility to vote determined. "Although free and open participation lies at the core of the democratic institutions, the need to confer the franchise on all . . . is tempered by the recognition that completely unlimited voting could subvert the popular rule that democracy so ardently embraces."[19] The Constitution, in article 1, section 2, established the mandate for the governmental setting of voter qualifications, by instructing that voters for representatives have those qualifications requisite for voting for members of the most numerous branch of the state legislature.[20] Additionally, under article 1, section 4's grant of congressional authority to regulate the holding of elections,[21] the Federal government, as well as every state, has individually imposed restrictions on the franchise.[22] *United States v. Classic,*[23] the landmark case in this area, defines this grant of Congressional authority as the power to legislate concerning any and all elections affecting Federal officers whether by general, special, or primary election, so long as they are an integral part of the procedure of choice.[24] Certainly then, it is appropriate for voter registration to lie within the scope of the grant of control over the

16. *See* Kusper v. Pontikes, 414 U.S. 51, 57 (1973); Dunn v. Blumstein, 405 U.S. 330, 336 (1972); Kramer v. Union Free School Dist. No. 15, 395 U.S. 621, 626-28 (1969); Carrington v. Rash, 380 U.S. 89 (1965).

17. Anderson v. City of Boston, 578 Mass. Adv. Sh. 2297, 2319, 380 N.E.2d 628, 638-39 (1978).

18. *Id.*

19. L. TRIBE, AMERICAN CONSTITUTIONAL LAW 761 (1978).

20. U.S. CONST. art. I, § 2.

21. U.S. CONST. art. I, § 4.

22. L. TRIBE, AMERICAN CONSTITUTIONAL LAW 761 (1978).

23. 313 U.S. 299 (1941).

24. H.R. REP. No. 291, 85th Cong. 1st Sess. *reprinted in* [1957] U.S. CODE CONG. & AD. NEWS 1966, 1977.

"manner of holding elections" of article 1, section 4.[25] It is the sole process by which a citizen becomes certified as a voter qualified to participate in the electoral process.[26]

It is through the voter registration process that the party affiliation requirement is enforced. At this juncture, therefore, it must be noted that there are definite restrictions and guidelines which govern its operation. "The right to vote in Federal elections, a privilege of national citizenship secured by the United States Constitution, includes the right to register to vote. The right to register to vote includes the right to be free from public or private interference with activities rationally related to registering...."[27] In addition, because there is no separate registration for Federal elections, an interference with a voter's right to register is, at any electoral level, an interference with a Federal election.[28]

Basically, registration exists to ascertain whether potential voters possess the requisite qualifications for electoral participation. The qualifications themselves, however, are subject to strict limits. In an election of general interest, any restrictions upon registration beyond residence, age, and citizenship are clearly impermissible unless justified upon a showing of compelling state interest.[29] If, however, the election is for a special and limited purpose, additional requirements or qualifications may be imposed so as to limit the electoral body to only those in interest.[30] As elections for special purposes are rare, most of the recent decisions have found additional voting qualifications promulgated pursuant thereto to be invalid either upon a failure to show a compelling state interest or upon an insufficiently limited special purpose.[31]

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25. U.S. CONST. art. I, § 4. *See also* Van Alstyne, *The Administration's Anti-Literacy Test Bill: Wholly Constitutional But Wholly Inadequate*, 61 MICH. L. REV. 805, 815 (1963): "Any matter affecting the character or choice of the federal electorate is so integrally related to the election ultimately held as to come within the 'holding of the election' under Article I, section 4."

26. *See* United States v. Original Knights of the Ku Klux Klan, 250 F. Supp. 330, 351 (E.D. La. 1965).

27. *Id.* at 335.

28. *See* United States v. Manning, 215 F. Supp. 272, 284 (W. D. La. 1963).

29. *See* Hill v. Stone, 421 U.S. 289, 295 (1975) *quoted in* Mass. P.I.R.G. v. Secretary of Commonwealth, 1978 Mass. Adv. Sh. 1042, 1054, 375 N.E.2d 1175, 1181 (1978). *See also* Cipriano v. City of Houma, 395 U.S. 701 (1969); City of Phoenix v. Kolodziejski, 399 U.S. 204, 205 (1970); Hadley v. Junior College Dist., 397 U.S. 50, 56 (1970).

30. *See* Hill v. Stone, 421 U.S. 289, 295 n.5 (1975); Sayler Land Co. v. Tulane Water Dist., 410 U.S. 719, 728 (1973).

31. *See, e.g.*, Hill v. Stone, 421 U.S. 289, 295 n.5 (1975); Sayler Land Co. v. Tulane Water Dist., 410 U.S. 719 (1973); City of Phoenix v. Kolodziejski, 399 U.S. 204 (1970); Hadley v. Junior College Dist., 397 U.S. 50 (1970); Cipriano v. City of Houma, 395 U.S. 701 (1969); Kramer v. Union Free School Dist. No. 15, 395 U.S. 621 (1969); Mass. P.I.R.G. v. Secretary of Commonwealth, 1978 Mass. Adv. Sh. 1042, 1054, 375 N.E.2d 1175, 1181 (1978).

III. THE PRIMARY ELECTION

A. Evolution of the Nominating Process

The Constitution, while mentioning elections in article 1, section 4, is silent on the subject of nominations; so are most of the early state laws.[32] In colonial times, one became a candidate primarily by self-announcement, relying upon reputation and perhaps social status to solidify support for the candidacy.[33] Developing at this time, however, simultaneously with urban growth, was the informal caucus, a vehicle by which support for a candidacy might be more effectively consolidated.[34] As villages and towns became established, the caucus represented an opportunity for local leaders to confer about the potential choices and ultimately to place their selection before the voters.[35] Without legal status the caucus nonetheless flourished and was, until the Jacksonian era, the only nominating procedure to receive extensive use.[36] As party organization formalized in the early nineteenth century, so did the nominating caucus, as its use at the local level spread upward to state and national parties. This rapid expansion of the use of the caucus naturally necessitated substantial change. No longer an informal gathering of local leaders, the caucus became a meeting of representatives from each of the local constituencies, charged with the task of nominating those candidates who would receive the support of the party. The natural outgrowth of this process, the nominating convention, was in truth no more than an aggregation of nominating caucuses, but it was a form that dominated the political scene as the principal mode of selecting candidates from 1825 until about 1910.[37] The convention, however, was by nature highly susceptible to domination and abuse by party leadership. As reform movements swept the country in the late nineteenth and early twentieth centuries an ever more sophisticated electorate began increasingly to demand a voice in the nominating process. The nominating convention, unable to respond in the hands of resisting party leadership, toppled of its own weight.

The primary election, first seen in Pennsylvania in the 1840's, has become the most widely adopted of all nominating schemes and is used today in all fifty states.[38] As political parties yielded to reform pressure

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32. J. FERGUSON & D. MCHENRY, THE AMERICAN FEDERAL GOVERNMENT 280 (12th ed. 1973).

33. C. ADRIAN & C. PRESS, THE AMERICAN POLITICAL PROCESS 327 (2d ed. 1969).

34. *Id.*

35. W. YOUNG, OGG & RAY'S ESSENTIALS OF
ed. 1969).

36. *Id.*

37. *Id.*

in the early twentieth century and gradually adopted primary elections as replacement nominating vehicles for the discredited convention process, they naturally restricted participation therein to their own members. Most states thus chose this closed form of primary when they incorporated the party primary by statute as an integral part of their electoral machinery. Several states, however, have more recently adopted an open primary format wherein the voter may decide in the privacy of the voting booth which party's primary he will vote in, without having to register or otherwise publicly disclose his party affiliation.[39] The states of Washington and Alaska have gone even further, providing a voter with a "blanket" ballot bearing the names of the nominees of all the parties for each office.[40] The voter may then select the nominee of his choice for each office, irrespective of the party to which that candidate belongs.

B. Status of Primaries within the Electoral Framework

Despite some early controversy as the primary election gained statutory incorporation in the state electoral process, it is today a full and equal part of that process, subject to all the rights, duties, privileges, and powers attendant thereto.[41] Indeed as the primary is now, at law, an integral part of the electoral process, the right of the qualified voter to participate therein is held to be embraced by the right to vote as protected by article 1, section 2, of the United States Constitution.[42] This is without ambivalence and establishes no additional stratum of electoral rights. There is no "sub-right" of primary franchise. Mr. Justice Stone, speaking for the Court in *United States v. Classic,* was most specific:

> [T]his right of participation is protected just as is the right to vote at the election where the primary is by law made an integral part of the election machinery, whether the voter exercises his right in a party primary which invariably, sometimes, or never determines the ultimate choice of the representative.[43]

This guaranty to participate in the selection process is entitled to the same level of scrupulous protection.

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39. *See, e.g.,* ILL. REV. STAT. ch. 46, § 17-11 (West 1965); MICH. STAT. ANN. ch. 6, § 6.1576 (Callaghan 1972); MINN. STAT. ANN. ch. 203, § 203.35 sub. 7 (West 1962); WIS. STAT. ANN. ch. 6, § 6.80 (2) (e) (West 1969).

40. *See* ALASKA STAT. § 5 ch. 1 15.25.060 (1967); WASH. REV. CODE ANN. ch. 9, § 29.30.010 (West 1965).

41. *See* State *ex rel.* Merrill v. Gerow, 79 Fla. 804, 806, 85 So. 144, 146 (1920).

42. *See* United States v. Classic, 313 U.S. 299, 318 (1941); United States v. Malphurs, 46 F. Supp. 903, 903-04 (S.D. Fla. 1942). The word election as used in article I section 4 of the United States Constitution is held to include primaries which form an integral part of the election process.

43. United States v. Classic, 313 U.S. 299, 318 (1941).

Two additional rules are applicable to the status of the primary within the electoral framework. Defined as the method by which voters may select the candidates for office[44] the primary election must not be subverted by statutory construction that is inconsistent with this purpose.[45] Furthermore, as the selection of nominees by the voters is the fundamental element in the process, it must prevail whether or not in concert with the wishes of the leadership of the party conducting the primary.[46]

C. *Constitutional Posture*

The primary operates in an area of the political process which is most sensitive. It affords the voter a chance to participate in the election of the slate of nominees and thereby to help shape the character and posture of the party's image in the general election. This participation is perhaps a modern equivalent of the very result our Founding Fathers envisioned when they so judiciously protected the freedom of open and robust debate[47] through enactment of the first amendment. Thus, political parties exist primarily to facilitate the process whereby candidates are selected by the voters.[48] Indeed, at this most sensitive stage of the political process there may be imposed a higher overall standard of constitutional protection resulting from the fundamentality of the freedoms of association and expression involved.[49]

D. *Regulation of Primaries*

There can be no doubt that the legislature may regulate the process by which candidates are nominated for political office.[50] In those limited areas where the state has chosen not to legislate, the party conducting the primary, although clothed with state authority,[51] may make such reasonable rules and regulations as are necessary for its orderly con-

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44. Anderson v. Cook, 102 Utah 265, 270, 130 P.2d 278, 283-84 (1942). In *Anderson* the court stated, "The general purpose of the legislature in enacting mandatory primary laws was to preclude the making of nominations by conventions, party committees, and the like, and to require that the people themselves, by their direct votes, should name party nominees." *Id.* at 290.

45. *Id.*

46. Kooperstein v. Power, 153 N.Y.S.2d 908, 909-10, *aff'd*, 2 A.D.2d 655, 153 N.Y.S.2d 541, *aff'd sub nom.* Anderson v. Power, 1 N.Y.2d 868, 154 N.Y.S.2d 633, 136 N.E.2d 708, *motion granted*, 1 N.Y.2d 917, 154 N.Y.S.2d 972, 136 N.E.2d 914 (1956).

47. Kucinich v. Forbes, 432 F. Supp. 1101, 1111 (N.D. Ohio 1977).

48. Kusper v. Pontikes, 414 U.S. 51, 58 (1973).

49. *See, e.g.*, Baldwin v. Redwood City, 540 F.2d 1360, 1366-67, *cert. denied sub nom.* Leipzig v. Baldwin, 413 U.S. 913 (1976). *See also* Monitor Patriot v. Roy, 401 U.S. 265, 272 (1971).

50. *See, e.g.*, Ray v. Blair, 257 Ala. 151, 153, 57 So.2d 395, 397 (1952), *rev'd on other grounds*, 343 U.S. 154 (1952). *See also* McDougall v. Green, 335 U.S. 281, 283 (1948); Newton County Republican Comm. v. Clark, 311 S.W. 774 (Ark. 1958).

51. *See, e.g.*, Gray v. Sanders, 372 U.S. 368, 374-75 (1963).

duct.[52] Article 1, section 4, specifically empowers Congress to regulate the time, place, and manner of the holding of elections.[53] Assuming *arguendo* that it has been established that a primary election conducted under the auspices of state law is an election within the meaning of article 1, section 4, those limits that have been imposed upon the regulation of the general elections will equally limit the regulation of primary elections. Essentially these limits upon the regulation of elections may be summarized as providing that no qualified voter may ever be prevented from voting for whomever he chooses.[54]

In the first major judicial attempts to deal with the regulation of primary elections a line of cases from 1927 through 1944 examined the power to exclude voters from participation therein. Concerned principally with exclusion based on race, these cases nonetheless are relevant to the party affiliation issue. In 1927 the United States Supreme Court in *Nixon v. Herndon*[55] struck a Texas statute[56] which barred otherwise qualified black voters from participating in the Democratic primary, as violative of the fourteenth amendment. In 1930, *Love v. Wilcox* affirmed a remedial amendment to another Texas statute[57] which limited a party committee's power to prescribe voter qualifications such that, "[n]o person shall ever be denied the right to participate in a primary in this state because of former political views or affiliations."[58] Following these decisions Mr. Justice Cardozo in *Nixon v. Condon* recognized a duty upon the Court to remove the barriers to open participation in primary elections that had been imposed by the Texas Democratic State Committee.[59] It was found that the Committee invidiously discriminated against black party members by denying them a vote in the primary election based solely on race, since they possessed all of the other requisite voter qualifications. This abridgement violated the equal protection clause of the fourteenth amendment.[60] *Smith v. Allwright,* decided in 1944, drew from each of the holdings above in ruling that the same tests regarding either discrimination or the transgression upon any constitutional rights applied equally to primary and general elections.[61] The salient point made by this line of cases is that neither the state legislature nor the party leadership may impose such qualifications

52. *See, e.g.*, Faherty v. Board of Election Comm'rs, 5 Ill.2d 519, 126 N.E.2d 235 (1953).

53. U.S. CONST. art. I, § 4.

54. Sadlock v. Allen, 25 N.J. 118, 135 A.2d 173 (1957). *See also* Wene v. Meyner, 13 N.J. 185, 98 A.2d 573 (1953); Stevenson v. Gilfert, 13 N.J. 496, 100 A.2d 490 (1953).

55. Nixon v. Herndon, 273 U.S. 536, 540 (1927).

56. TEX. STAT. ANN., art. 3093-a (1923).

57. TEX. STAT. ANN., art. 3107 (1927).

58. Love v. Wilcox, 119 Tex. 256, 277, 28 S.W.2d 515 (1930). In *Love,* a realtor challenged his denial of participation in the Democratic primary because of his having voted for Republican Presidential electors in the previous election.

59. Nixon v. Condon, 286 U.S. 73, 89 (1932).

60. *Id.*

61. Smith v. Allwright, 321 U.S. 649, 654 (1944).

upon primary election participation as would exceed established constitutional limits. More specifically, an otherwise qualified voter may not be denied participation in a primary election because of either race or previous political belief or affiliation.

E. A Comparison of Some Representative Statutes

Although the election codes in all fifty states provide for publicly funded primary elections, and most establish some form of party affiliation requirement, the methods chosen for the fulfillment of such requirement vary widely.[62] In consequence, three statutes[63] have been selected for comparison as representative samples, covering a fairly broad range of enforcement mechanisms. This comparison, however, is undertaken purely for the purpose of demonstrating the range of possibilities available under the affiliation requirement being examined. Two of the statutes to be discussed have been chosen upon the additional criterion that they were the subject of recent litigation[64] and the third statute was chosen because it appears to represent an attempt to deal with the constitutional difficulties inherent in the requirement of affiliation.

The most rigorous of the three statutes is New York Election Law 5-302, upheld upon a constitutional challenge in *Rosario v. Rockefeller.*[65] In addition to a basic requirement that no unenrolled voter may vote in a party primary[66] is included the provision that enrollment with a party must occur before the general election which precedes the primary wherein participation is sought.[67] This imposes a substantial "lock" on voter preference as party affiliation must be established as much as ten months prior to actual primary participation.

The Connecticut statutory scheme[68] upheld in *Nader v. Schaffer,*[69] operates with somewhat less stringency. Imposing an enrollment requirement[70] similar to that of New York, the Connecticut scheme pro-

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62. *Compare* ARK. STAT. ANN. § 3-102 (1969) which leaves to political parties the definitions of membership and primary voting requirements *with* OHIO REV. CODE ANN. § 3513.19 (Anderson 1972) which requires any person attempting to vote at a primary to state the name of the party with which he intends to affiliate.

63. MASS. GEN. LAWS ANN. ch. 53, §§ 37, 38 (West 1975); N.Y. ELEC. LAW § 5-100 (McKinney 1978); CONN. GEN. STAT. ANN. § 9-56 (West 1967).

64. Rosario v. Rockefeller, 458 F.2d 649 (2d Cir. 1972), *cert. granted,* 406 U.S. 957, *aff'd,* 410 U.S. 752, *rehearing denied,* 411 U.S. 959 (1973); Nader v. Schaffer, 417 F. Supp. 837 (D. Conn. 1976).

65. Rosario v. Rockefeller, 458 F.2d 649 (2d Cir. 1973), *cert. granted,* 406 U.S. 957, *aff'd,* 410 U.S. 752, *rehearing denied,* 411 U.S. 959 (1973).

66. N.Y. ELEC. LAW § 5-100 (McKinney 1978).

67. *Id.* § 5-302.

68. CONN. GEN. STAT. ANN. §§ 9-56, 9-59, 9-431 (West 1967).

69. Nader v. Schaffer, 417 F. Supp. 837 (D. Conn. 1976).

70. CONN. GEN. STAT. ANN. § 9-431 (West 1967).

vides that application for enrollment may be made at any time although such will not be entered on the voting rolls until the next semi-annual enrollment session.[71] Changes of affiliation, although allowable at any time, will bar the voter from primary participation for a period of six months following the application for change.[72]

Massachusetts does not impose a pre-primary enrollment requirement per se[73] and gives the appearance of allowing independent voters to participate in party primaries. This is not the case, however, as non-enrolled voters must make a declaration at the polling place as to which party's ballot they wish. This declaration is promptly recorded and remains on the voting rolls as a party enrollment.[74] Those already enrolled with a party obviously may not vote in another party's primary.[75] For both enrolled and declared voters, however, applications for change of affiliation are to be available at the polling place and may be filed immediately after casting one's ballot.[76] Thus, while not imposing stringent advance enrollment provisions, Massachusetts does maintain the affiliation requirement with its attendant potential constitutional difficulties.

IV. THE CONSTITUTIONAL TESTS

A. General Safeguards of the First Amendment

It is well settled that laws which operate to chill the assertion of constitutional rights by penalizing those who exercise them are patently unconstitutional.[77] Indeed, even legitimate legislative goals may not be pursued by means which encroach upon fundamental personal liberties absent a compelling state interest.[78] There has developed, therefore, a public policy of protecting the first amendment against chilling influences[79] and in consequence, a state may not, no matter what justification is offered, inquire into a person's opinions or associations when the ultimate purpose is the withholding of a right or benefit as a result of that inquiry.[80] It should be noted, at this juncture, especially as further examination of the "chilling effect" concept is contemplated, that although any disclosure a party does not wish to make involves

71. *Id.* § 9-56.
72. *Id.* § 9-59.
73. MASS. GEN. LAWS ANN. ch. 53, § 37 (West 1975).
74. *Id.*
75. *Id.*
76. *Id.*
77. Shapiro v. Thompson, 394 U.S. 618, 634 (1969).
78. Elfbrandt v. Russell, 384 U.S. 11, 18 (1966).
79. Garvin v. Rosenau, 455 F.2d 233, 239 (6th Cir. 1972).
80. Baird v. State Bar Ass'n, 410 U.S. 1, 7 (1971).

some chilling effect, not all such disclosures reach a level of constitutional dimension.[81]

B. The First Amendment Freedom of Expression

"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 ... or force citizens to confess, by word or act, their faith therein."[82] This language, which goes to the heart of the concept of free political expression, was promulgated by Mr. Justice Jackson in *West Virginia State Board of Education v. Barnett,* involving a successful challenge by Jehovah's Witnesses to a West Virginia State Board of Education regulation requiring children in public schools to salute the American flag.[83] What is crucial here is that freedom of expression embraces the freedom to remain silent, to refuse to speak or espouse a belief, and to do so free from governmental sanction.[84] Thus there appears to be an inherent freedom of thought or belief attendant to free expression, of which the rights to speak or refrain from speaking according to one's beliefs are complementary components.[85] Clearly contemplated within the scope of the first amendment are the rights of individuals to refuse to foster an idea that they find morally objectionable.[86]

Against these concepts the affiliation requirement seems to run afoul. Enrollment with a political party, either in advance by registration or at the polling place by declaration, is a form of political expression that must be afforded protection,[87] as party membership indicates the embrace of a political philosophy.[88] Yet in a closed primary state, such membership is a condition precedent to participation in the primary election.[89] Failure to espouse a political philosophy by refusing to indicate party membership either by registration or declaration will

81. *In re* Michaelson, 511 F.2d 882, 892 (9th Cir. 1975).

82. West Virginia State Bd. of Educ. v. Barnett, 319 U.S. 624, 642 (1943).

83. *Id.* at 624-25.

84. Wooley v. Maynard, 430 U.S. 705, 714 (1977); West Virginia State Bd. of Educ. v. Barnett, 319 U.S. 624, 633-34 (1943).

85. Wooley v. Maynard, 430 U.S. 705, 714 (1977); West Virginia State Bd. of Educ. v. Barnett, 319 U.S. 624, 637 (1943).

86. Wooley v. Maynard, 430 U.S 705, 715 (1977); West Virginia State Bd. of Educ. v. Barnett, 319 U.S. 624, 642 (1943).

87. United States v. Original Knights of the Ku Klux Klan, 250 F. Supp. 330, 355 (E.D. La. 1965).

88. Swindall v. State Bd. of Elections, 168 Okla. 97, 101, 32 P.2d 691, 695 (1934). The court defined political party as a number of persons united in opinion and organized in a manner usual to the then existing political parties. *Cf.* Robinson v. Holman, 181 Ark. 428, 26 S.W.2d 66, 68 (1930) which defined a political party as an unincorporated, voluntary association of persons sponsoring certain ideas of government or maintaining certain political principles or beliefs in public policies of government, but neither a governmental agency nor instrumentality.

89. *See, e.g.,* N.Y. ELEC. LAW § 5-100 (McKinney 1978).

operate to bar the exercise of the franchise[90] at the primary election level. The state, by such a statutory posture, is thus effectively inquiring into one's political beliefs by requiring declaration thereof, made as a matter of public record, solely for the purpose of withholding a particular right or benefit.[91] This is unconstitutional.[92]

C. *The First Amendment Freedom of Association*

At the root of our electoral process, and at the basis of all the first amendment freedoms is the free competition of ideas regarding governmental policies.[93] Involved therein is certainly the right to engage in association for the advancement of such ideas and policies.[94] This right to associate in political organizations and participate in political activities, while not absolute,[95] is, as it relates to the association with the political party of one's choice, an integral part of the basic constitutional freedom of association.[96] It is also considered a form of expression entitled to first amendment protection.[97]

It is necessary here, however, to consider whether this right exists in a negative sense, asking whether freedom of association embraces a freedom not to associate, to remain free from association with a group or organization that one finds repugnant. The affiliation requirement

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90. *See* note 39 and accompanying text *supra*.

91. The Court in both Shapiro v. Thompson, 394 U.S. 618 (1969) and Garvin v. Rosenau, 455 F.2d 233 (6th Cir. 1972) found that there is a policy of protecting the first amendment against chilling influences. *See also* Baird v. State Bar Ass'n, 401 U.S. 1 (1971). The Court stated: "whatever justification may be offered, a state may not inquire about a man's views or associations solely for the purpose of withholding a right or benefit because of what he believes." *Id.* at 7.

92. *Id.*

93. Williams v. Rhodes, 393 U.S. 23, 32 (1968).

94. N.A.A.C.P. v. Button, 372 U.S. 415, 430 (1962); N.A.A.C.P. v. Alabama, 357 U.S. 449, 460 (1958); Briscoe v. Kusper, 435 F.2d 1046 (7th Cir. 1970).

95. United States Civil Service Comm'n v. National Ass'n of Letter Carriers, 413 U.S. 548, 567 (1973). *See also* Rosario v. Rockefeller, 410 U.S. 752, 758-59 (1973) (the New York preenrollment requirement was held not to deprive voters of their right under the first and fourteenth amendments to associate with the party of their choice or to subsequently change to another party, provided that the statutory time limit for doing so was observed); Dunn v. Blumstein, 405 U.S. 330, 336 (1972) (the equal right to vote is not absolute, as the states have power to impose vote qualifications and to regulate access to the franchise in other ways); Bullock v. Carter, 405 U.S. 134, 140-41 (1972) ("The breadth of power enjoyed by the states in determining voter qualifications and the manner of elections must be exercised in a manner consistent with the Equal Protection Clause of the Fourteenth Amendment."); Jeness v. Fortson, 403 U.S. 431 (1971) (a state may regulate access to the ballot within first and fourteenth amendments' limit); Williams v. Rhodes, 393 U.S. 23, 30, 31 (1968) (the Ohio state laws here involved heavily burden the right of individuals to associate for the advancement of political beliefs and the right of qualified voters to cast their votes effectively).

96. Kusper v. Pontikes, 414 U.S. 51, 57 (1973). The Court found that, "... unduly restrictive state election laws may so infringe upon the freedom of association as to run afoul of the First and Fourteenth Amendments." *See also* Williams v. Rhodes, 393 U.S. 23, 30-32 (1968).

97. Oregon Socialist Workers' 1974 Campaign Comm. v. Paulus, 432 F. Supp. 1255, 1257 (D. Or. 1977).

encompasses interference with two overlapping rights, that of individuals to associate for the advancement of political beliefs and the right of all qualified voters, regardless of their political persuasion, to freely and fully participate in the electoral process.[98]

Instructive in this area is the recent treatment of patronage dismissals by the courts. Upon a challenge by non-Civil Service Republican employees, dismissed at the arrival of the newly elected Democratic Sheriff, the United States Supreme Court, on certiorari to the United States Court of Appeals for the Seventh Circuit in *Elrod v. Burns* found such dismissals, although restricted to non-policy-making personnel, violative of the first and fourteenth amendments.[99] Essentially, the cost of the patronage process is the restraint it places on the freedoms of both belief and association[100] by severely restricting political belief and the right to associate to advance such belief.[101] Patronage dismissals also operate to block support for competing political interests and clearly tip the electoral balance in favor of the incumbent party.[102] These dismissals, which infringe upon otherwise qualified employees' rights to earn a living based solely upon their political association, or more importantly their lack of political association, are violative of the first and fourteenth amendments.[103] Upon this reasoning, a similar denial of the right to vote in primary elections, based upon a voter's choice of non party affiliation, is a far more egregious incursion, given the fundamentality of voting in the overall scheme of constitutional guaranties.[104] If it is unconstitutional to deny a citizen employment because of a lack of political association,[105] it must be unconstitutional to similarly deny an otherwise qualified citizen the right to vote for the same reason. The holding that patronage dismissals are unconstitutional, therefore, establishes the existence of a freedom of non-association, a freedom against which the requirement of party affiliation must fail.

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98. Williams v. Rhodes, 393 U.S. 23, 30, 31 (1968). *See also* Note, *Primary Elections: The Real Party in Interest,* 27 RUTGERS L. REV. 303 (1974).

99. Elrod v. Burns, 427 U.S. 347 (1976).

100. *Id.* at 355.

101. *Id.* at 372.

102. *Id.* at 356.

103. *See* notes 99-102 and accompanying text *supra. See also* Elrod v. Burns, 427 U.S. 347, 356 (1976) ("Our concern with the impact of patronage on political belief and association does not occur in the abstract, for political belief and association constitute the core of those activities protected by the First Amendment."); Buckley v. Valeo, 424 U.S. 1, 15 (1976) ("The First Amendment protects political association as well as political expression."); N.A.A.C.P. v. Button, 371 U.S. 412, (1962) (freedom of association for the common advancement of political beliefs is a form of group activity protected by the first and fourteenth amendments); Kusper v. Pontikes, 414 U.S. 51, 56-57 (1973) (right to associate with the political party of one's choice is a basic constitutional freedom).

104. *See* notes 8-10, 42-43, and accompanying texts *supra.*

105. *See* provisions of the Hatch Act, 5 U.S.C. §§ 7321-7325 (1976) which limit the partisan political activities of non-elected federal employees.

D. Privacy

1. Development of the Concept

In support of the premise that freedoms of silence and non-association are included among the several fundamental first amendment guaranties is the somewhat amorphous concept of the right of privacy. The Constitution does not specifically mention a right of privacy,[106] yet it has long been recognized as a principle affecting the very essence of constitutional liberty and security.[107] Derived in part from the intimate relation between the fourth and fifth amendments,[108] it applies not only to the invasions of the sanctity of a man's home but secures to every citizen the "privacies of life."[109]

But privacy has, as its source, more than just the fourth and fifth amendments and seems to "[e]manate from the totality of the constitutional scheme under which we live."[110] While the fourth and fifth amendments operate to express "[s]upplementing phases of the same constitutional purpose — to maintain inviolate large areas of personal privacy,"[111] all the specific guaranties in the Bill of Rights have penumbras to give them life and substance.[112] Various of these rights, with their attendant penumbras are now considered to create zones of privacy;[113] specifically the first,[114] fourth and fifth,[115] and ninth[116] amendments. Thus it appears that a right of personal privacy, as a guaranty of certain areas or zones into which governmental intrusion is impermissible, does exist under the Constitution.[117] It should also be

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106. *See* Roe v. Wade, 410 U.S. 113, 152 (1973).

107. *See, e.g.,* Boyd v. United States, 116 U.S. 616, 626-30 (1886), *citing* Entick v. Carrington, 19 Howell's State Trials 1029 (1765).

108. *See, e.g.,* Boyd v. United States, 116 U.S. 616, 630 (1886).

109. *Id.* (The essence of the offense is, "the invasion of [the] indefeasible right of personal security, personal liberty and private property, where that right has never been forfeited by [the] conviction of some public offense ...").

110. Poe v. Ullman, 367 U.S. 497, 521 (1961) (dissenting opinion).

111. Mapp v. Ohio, 367 U.S. 643, 657 (1961) *quoting* Feldman v. United States, 322 U.S. 487 (1944).

112. *See* Griswold v. Connecticut, 381 U.S. 479, 484 (1965).

113. *Id.*

114. Stanley v. Georgia, 394 U.S. 557, 564-66 (1969). The Constitution, through the first amendment protects the right to receive information and ideas and to be generally free from governmental intrusion into one's privacy and control of one's thoughts.

115. Katz v. United States, 389 U.S. 347, 351 (1967) (the fourth amendment right against unreasonable searches and seizures protects people, not places); *Id.* at 350 n.5. The fifth amendment somewhat reflects the Constitution's concern for "the right of each individual 'to a private enclave where he may lead a private life ....' " *Id., quoting* Tehan v. Shott, 382 U.S. 406, 416 (1965). *See also* Boyd v. United States, 116 U.S. 616, 630 (1886).

116. Griswold v. Connecticut, 381 U.S. 479, 484 (1969).

117. Roe v. Wade, 410 U.S. 113, 152 (1973) "The Constitution does not explicitly mention any right of privacy. In a line of decisions, however, going back as far as ... [1891], the Court has recognized that a right of personal privacy, or a guaranty of certain areas or zones of privacy, does exist under the Constitution."

evident that this right, by the nature of that which it secures, is personal unto the individual, is fundamental, and implicit in the concept of ordered liberty.[118]

2. Political Privacy

If a freedom of non-association in the area of political affiliation truly exists, its most cogent expression is as a right of political privacy. Given the "[v]ital relationship between freedom of association and privacy in one's associations,"[119] the associational freedoms discussed above merge at this juncture with the general right of privacy and create an area, or zone, of political privacy. Within this area compelled disclosure of one's affiliation with a group engaged in political advocacy of any sort may constitute an effective restraint on the freedom of association.[120] As such, the inviolability of privacy in group affiliation is, in many instances, necessary to the preservation of that freedom.[121]

Buttressing the sanctity of this zone of political privacy is the right of the individual citizen to vote secretly.[122] Indeed, this inviolate right to a secret ballot has been extrapolated so as to embrace not merely a right of personal privacy in political association but also a right to contribute, with privacy, to the candidate of one's choice.[123] Underscoring the fundamentality of the franchise, however, to the extent that one moves away from voting and approaches other activities within the political arena, the right of privacy in political association becomes diminished in force when weighed against other societal values.[124]

The party affiliation requirement intrudes into this zone of political privacy. One must be a member of a political party, enrolled as a matter of public record, before participation in a primary election of that party will be permitted.[125] Exercise of the franchise[126] is thus made conditional upon a public disclosure and recording of one's political affiliation. In our relatively stable political environment this appears to be of little consequence. There are no overt sanctions or reprisals attendant to a recorded membership in a particular political party. With very little

118. *Id.* Palko v. Connecticut, 302 U.S. 319, 325 (1937).

119. N.A.A.C.P. v. Alabama, 357 U.S. 449, 462 (1958).

120. *Id.* ("Inviolability of privacy in group disclosure may in many circumstances be indispensable to preservation of freedom of association, particularly where a group espouses dissident beliefs."); *see also* United States v. Rumley, 345 U.S. 41, 56-58 (1953) (concurring opinion).

121. Bates v. Little Rock, 361 U.S. 516, 523 (1960), *citing* N.A.A.C.P. v. Alabama, 357 U.S. 449, 462 (1958).

122. Buckley v. Valeo, 519 F.2d 821 n.114, *aff'd in part, rev'd in part,* 424 U.S. 1 (1976).

123. *Id.*

124. *Id.*

125. *See* notes 62-72 and accompanying text *supra.*

126. *See* notes 38-39 and accompanying text *supra.*

imagination, or upon a brief glance at recent history, however, the political abuses of such a requirement are at once apparent. Woe to the "card carrying" Communist Party member in pre-World War II Germany and Italy when the Fascists came to power,[127] or to Kerensky's moderate Mensheviks in Bolshevik Russia in 1918.[128] Closer to home, Senator Joe McCarthy shattered careers with impunity through the mere allegation of association with the Communist Party.[129] In those situations the enrolled members of parties which found themselves in disfavor paid dearly for their party affiliation. Thus a zone of political privacy which may, at present, have value only in the abstract is a concept whose preservation is essential to the continuation of free political choice.

E. Equal Protection

A statutory classification which by its operation touches an area of human rights that is both sensitive and fundamental will be subject to the strictest judicial scrutiny when challenged.[130] Voting, both in general and primary elections, appears to embrace this requisite sensitivity and fundamentality.[131] What must be determined, therefore, is whether the party affiliation requirement in limiting primary election participation by denial of the right to vote to unaffiliated but otherwise qualified voters will withstand such scrutiny when measured against the fourteenth amendment's guaranty of equal protection of the laws.

Enforcement of the guaranty of equal protection has had its most common application in two areas, one in which a certain class has experienced a history of invidious discrimination,[132] and the other where a particular statute operates in an area that involves infringement upon the exercise of fundamental rights.[133] In both of these areas, the statutes, if challenged, will be subjected to strict judicial scrutiny and may be upheld only upon a showing of compelling state interest.[134]

No attempt is being made here to suggest that unaffiliated voters are a suspect class. A fundamental right, however, is at issue.[135] Nonaffiliated voters, qualified in all other respects, are denied the fundamental right to vote[136] by the requirement of party enrollment. Arti-

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127. 11 ENCYCLOPEDIA BRITANNICA, 546-48 (1972).
128. 13 ENCYCLOPEDIA BRITANNICA, 313 (1972).
129. 14 ENCYCLOPEDIA BRITANNICA, 498 (1972).
130. Skinner v. Oklahoma, 316 U.S. 535, 541 (1942).
131. *See* notes 10-12 and accompanying text *supra* (regarding general elections); notes 42-43 and accompanying text *supra* (regarding primary elections).
132. *See* G. GUNTHER, CONSTITUTIONAL LAW, 658 (1975).
133. *Id.*
134. *Id.*
135. *See* notes 10-12 and 42-43 and accompanying texts *supra.*
136. *Id.*

cle II, section I of the United States Constitution[137] has been interpreted as granting the states broad regulatory powers over the electoral process by mandating that the individual state legislatures determine the manner in which presidential electors are chosen.[138] This clause, however, does not give the states the power to limit the franchise in a manner expressly forbidden by constitutional provision.[139] Thus, a state may not pass laws to regulate elections in a manner that denies any citizen equal protection of the laws.[140] Such laws, creating invidious distinctions, would contravene both the letter and spirit of the fourteenth amendment.[141] Therefore, where the fundamental rights of free expression, free association, and privacy, as secured by the right to vote, are burdened by a requirement of party affiliation, unaffiliated voters barred thereby from primary election participation are denied their constitutional guaranty of equal protection of the laws as secured by the fourteenth amendment. Therefore, upon a judicial review of the affiliation requirement, the burden upon the exercise of fundamental rights can be justified only upon a showing of the most compelling state interest.[142]

A review of several decisions in this area is illuminating. In *Williams v. Rhodes* the Court found the right to vote heavily burdened if the choice could be limited to only one of two parties when others were clamoring for a place on the ballot.[143] A filing fee system for candidates wishing to participate in a primary election was held to engender an impermissible disparity in voting power based on wealth in *Bullock v. Carter,*[144] as it fell with unequal weight on voters according to their economic status.[145] In *Jeness v. Fortson,* however, a requirement that candidates from minority political parties or groups make a showing of support to qualify for placement on the ballot was found valid as it imposed no heavier a burden upon them than the winning of a major party's primary imposed upon the majority candidates.[146] But in *Webster v. Mesa,* a local ordinance which required that once a voter signed the nomination petition for a partisan candidate he would be

137. U.S. CONST. art. II, § 1.

138. The Constitution states: "Each state shall appoint, in such manner as the legislature thereof may direct a Number of Electors ...." U.S. CONST. art. II, § 1.

139. *Id.*

140. *Id.*

141. *See* Williams v. Rhodes, 393 U.S. 23, 30 (1968); Skinner v. Oklahoma, 316 U.S. 535, 539-41 (1942). *See also* Loving v. Virginia, 388 U.S. 1 (1967); Brown v. Board of Educ., 347 U.S. 483 (1954); Yick Wo v. Hopkins, 118 U.S. 356 (1886).

142. *See* Skinner v. Oklahoma, 316 U.S. 535, 541 (1942).

143. Williams v. Rhodes, 393 U.S. 23, 31 (1968).

144. Bullock v. Carter, 405 U.S. 134, 144 (1972).

145. *Id.*

146. 403 U.S. 431 (1971) (a minority candidate needed to exhibit signatures representing 5% of the total registered voters in the previous election to have his name placed on the ballot).

barred from signing the petition of any independent candidate, was held to be invalid as discriminating against the independent candidate as well as depriving voters of the right to nominate candidates of their choice.[147]

What is crucial here is equality of treatment, whether it be for placement on the ballot or participation in either the primary or general elections. Indeed, the Court in *Dunn v. Blumstein,* canvassing the voting rights cases, found that a citizen has a constitutionally protected right to participate in elections on an equal basis with all other citizens.[148] It is thus essential that the requisite qualifications for either ballot placement or voter participation do not create a class against which the laws invidiously discriminate.[149] The right to vote is extended to all qualified citizens,[150] and subject to limited requirements, must be freely and equally exercised.[151] To require, as a condition precedent to that exercise, that an otherwise qualified voter indicate, as a matter of public record, his or her party affiliation discriminates impermissibly against those who choose not to make the disclosure.

V. The Level of Scrutiny

The right to vote, as we have seen, suffers no loss of force or substance in its extension to primary elections.[152] Therefore the level of judicial scrutiny applied to a challenge of any regulation of primary elections should be the same as applied to a similar challenge in the area of general elections. Ever mindful of the fundamental nature of the right to vote,[153] Mr. Chief Justice Warren articulated the basic judicial inquiry in *Reynolds v. Sims* as, "[t]he judicial focus must be concentrated upon whether there has been any discrimination against certain of the state's citizens which constitutes an impermissible impairment of their constitutionally protected right to vote."[154] Drawing a parallel to *Skinner v. Oklahoma,*[155] the Chief Justice continued:

> Like Skinner v. Oklahoma, such a case touches a sensitive and important area of human rights, and involves one of the basic civil rights of man, '... Undoubtedly the right of suffrage is a fun-

147. 521 F.2d 442, 443 (9th Cir. 1975).

148. 405 U.S. 330, 336 (1972) *in* San Antonio School Dist. v. Rodriguez, 411 U.S. 1, 17, 74 (1972).

149. Reynolds v. Sims, 377 U.S. 533, 562 (1964) ("The relative weight of each citizen's vote, its impact on the overall electoral process, must not be diluted through a manipulation of election districts.")

150. *See generally* notes 19-31 and accompanying text *supra.*

151. Dunn v. Blumstein, 405 U.S. 330, 336 (1972).

152. *See* notes 42-43 and accompanying text *supra.*

153. *See* notes 10-12 and accompanying text *supra.*

154. Reynolds v. Sims, 377 U.S. 533, 562 (1964).

155. Skinner v. Oklahoma, 316 U.S. 535, 541 (1942).

damental matter in a free and democratic society ... [and] any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized.'[156]

A. *The Impact Required*

It is axiomatic that where fundamental first amendment liberties are at issue, close scrutiny must be applied to any regulations affecting them.[157] Certainly, if a law operates to chill the assertion of constitutional rights by penalizing those who exercise them it will be unconstitutional unless supported by a compelling state interest.[158] It is also recognized that such regulations may be challenged even when they act only indirectly upon the exercise of such rights.[159] This impact or chill must, however, be more than subjective, as injury may not be hypothesized.[160] Thus, "allegations of subjective chill are not an adequate substitute for a claim of presently existing harm or threat of specific future harm to plaintiff...."[161] What is required is injury in fact.[162] Assuming that the requisite burden upon fundamental rights has been imposed by the challenged statute an actual injury must be shown before judicial relief will be available.

Strict scrutiny, in most applications, has an outcome determinative result[163] with only a rare statute surviving this most exacting analysis.

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156. *Id.* at 561-62 (citations omitted).

157. McGowan v. Maryland, 366 U.S. 420, 449 (1961).

158. Shapiro v. Thompson, 394 U.S. 618, 634 (1969).

159. Laird v. Tatum, 408 U.S. 1, 12-13 (1972) ("Government action may be subject to constitutional challenge even though it has only an indirect effect on the exercise of the First Amendment Rights.") *See also* Baird v. State Bar of Ariz., 401 U.S. 1 (1971); Keyishian v. Board of Regents, 385 U.S. 589 (1971); Lamont v. Postmaster General, 381 U.S. 301 (1965); Baggett v. Bullitt, 377 U.S. 360 (1964).

160. Nader v. Schaffer, 417 F. Supp. 837, 844 (D. Conn. 1976); Laird v. Tatum, 408 U.S. 1, 12, 13 (1972); *Ex parte* Levitt, 302 U.S. 633, 634 (1937).

161. Nader v. Schaffer, 417 F. Supp. 837, 844 (D. Conn. 1976). Summarizing the holding in *Laird,* the *Nader* court held that a private individual must still show that as a result of the legislative action challenged he has sustained either direct injury or is immediately threatened with such injury if the power of the courts is to be invoked to determine the validity of the government action.

162. *Id.*

163. *See* Note, *Nominating Petition Requirements for Third Party and Independent Candidate Ballot Access,* 11 SUFFOLK U.L. REV. 974-83 (1977). The standard of review applied in the access to the ballot cases in the *Williams v. Rhodes* progeny, while enunciated as strict scrutiny, involved more of a balancing test. Thus, a strict scrutiny analysis has become less outcome determinative when candidates' rights are involved. It is offered that, as the franchise itself is not at issue, a wholesale disruption of state electoral law is not warranted. *See e.g.,* Jenness v. Fortson, 403 U.S. 431 (1971); Storer v. Brown, 415 U.S. 724 (1974). *Compare* Comment, *A New Dimension to Equal Protection and Access to the Ballot: American Party v. White, and Storer v. Brown,* 24 AM. U.L. REV. 1307 (1975) (the *Jenness* standard was between strict scrutiny and rational relation) *with* Note, *The Emerging Federally Secured Right of Political Participation,* 8 IND. L. REV. 629 (1975) (a rational basis test was used in *Jenness*) *and* Comment, *Discrimination in State Election Laws Against Third Party and Independent Candidates,* 6 COLUM. HUMAN RIGHTS L. REV. 172 (1974) (minimum scrutiny was applied in *Jenness*).

This is because in areas involving the most fundamental rights few, if any, state interests will be sufficiently compelling so as to support a statutory incursion thereof.[164] Such an analysis is appropriate for the review of a challenged statute requiring party affiliation as a precondition to primary voting[165] for the following reasons. Voting is a fundamental right,[166] of which the participation in primary elections is a full and equal component.[167] This right, however, is burdened by the requirement that a qualified citizen must publicly declare his membership in a political party before being granted access to the primary franchise. As discussed above, this burden places a chill upon the fundamental rights of expression,[168] association,[169] and privacy,[170] as well as upon the exercise of the franchise. This is not mere subjective chill. We live, not accidentally, in a moderately stable political environment without substantial persecution of citizens for their political beliefs. Our constitutional guaranties, however, are primarily what prevent the degeneration of the present political structure into one of oppression. The guaranty against the forced disclosure of political beliefs and associations, perhaps the single most important preservator of our free society, must therefore be scrupulously protected. This can be accomplished only by subjecting such statutes to the strictest judicial scrutiny so as to assure their continued existence only upon a showing of the most compelling state interest.

B. Rosario Distinguished and Nader Criticized

Unfortunately the two principal cases in this area have chosen a less rigorous standard of judicial scrutiny. In both *Rosario v. Rockefeller*[171] and *Nader v. Schaffer*[172] the affiliation requirement, as promulgated by statute in New York[173] and Connecticut[174] respectively, was addressed and upheld upon a level of scrutiny that falls short of what seems to be required.

Rosario, arising from a challenge to New York's delayed enrollment scheme,[175] found that a compelling state interest need not be shown in

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164. *Id.*

165. Mass. P.I.R.G. v. Secretary of Commonwealth, 78 Mass. Adv. Sh. 1042, 1054, 375 N.E.2d 1175, 1181 (1978).

166. *See* notes 10-11 and accompanying text *supra.*

167. *See* notes 42-43 and accompanying text *supra.*

168. *See* notes 82-92 and accompanying text *supra.*

169. *See* notes 93-105 and accompanying text *supra.*

170. *See* notes 106-130 and accompanying text *supra.*

171. Rosario v. Rockefeller, 458 F.2d 649 (2d Cir. 1972), *cert. granted,* 406 U.S. 957, *aff'd,* 410 U.S. 752, *rehearing denied,* 411 U.S. 959 (1973).

172. Nader v. Schaffer, 417 F. Supp. 837 (D. Conn. 1976).

173. N.Y. ELEC. LAW § 5-100 (McKinney 1978).

174. CONN. GEN. STAT. ANN. § 9-431 (West 1978).

175. Rosario v. Rockefeller, 458 F.2d 649 (2d Cir. 1972), *cert. granted,* 406 U.S. 957, *aff'd,* 410 U.S. 752, *rehearing denied,* 411 U.S. 959 (1973).

justification of the statute.[176] It was not, however, the affiliation requirement that was challenged or scrutinized but rather only the time deadline imposed between enrollment and primary participation.[177] As such, the Court found the incursion upon voting rights to be sufficiently slight so as to render a strict scrutiny analysis unnecessary.[178] The statute did not absolutely disenfranchise the class to which the challengers, by the nature of their suit, belonged. Rather, it "merely imposed a time deadline on their enrollment, which they had to meet in order to participate in the next primary."[179] Thus in *Rosario,* the affiliation requirement was not actually tested. The level of scrutiny employed in that case should, therefore, be limited in its future application to challenges of a similar nature.

The challenge in *Nader v. Schaffer* was, in contrast to that in *Rosario,* directed at the affiliation requirement itself.[180] Yet the *Nader* Court found this insufficient to demand strict scrutiny of the Connecticut statute at issue.[181] Taking pains to establish that not every burden on the exercise of the franchise is subject to a "stringent standard of review,"[182] the *Nader* Court indicated that it would require more than a minimal infringement of first amendment rights before it required the state to justify its statute upon a compelling interest.[183] Drawing upon the *Rosario* holding the *Nader* Court, then applying a "middle tier" analysis found the Connecticut party affiliation requirement to be "reasonably related to the accomplishment of legitimate state goals,"[184] and granted the state's motion to dismiss the complaint.[185]

While it is clear that "neither the right to associate nor the right to participate in political activities is absolute,"[186] the *Nader* decision is flawed in two respects. First, the infringement here is far from minimal. Properly qualified voters are, by the operation of the Connecticut statute, being denied the franchise based upon their refusal to adopt a

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176. *Id.* at 757.

177. *Id.* at 760 ("The only remaining question then, is whether the time limitation imposed by Section 186 is so severe as itself to constitute an unconstitutionally onerous burden upon the petitioners' exercise of the franchise or on their freedom of political expression.").

178. *Id.*

179. *Id.*; it should be noted here that the challenge as defined by the Court seems an attempt to overly limit the issue and thereby side step the more serious voting rights question.

180. Nader v. Schaffer, 417 F. Supp. 837, 840 (D. Conn. 1976) (plaintiffs refused to enroll with a political party pursuant to CONN. GEN. STAT. ANN. § 9-56 or § 9-59 (West 1967) and were therefore prohibited from voting in any party primary elections).

181. *Id.* at 849.

182. Bullock v. Carter, 405 U.S. 134, 143 (1972).

183. Nader v. Schaffer, 417 F. Supp. 837, 849 (D. Conn. 1976); Buckley v. Valeo, 519 F.2d 821, *aff'd in part rev'd in part,* 424 U.S. 1, 15 (1976); United States Civil Serv. Comm'n v. National Ass'n of Letter Carriers, 413 U.S. 548, 567 (1973).

184. Nader v. Schaffer, 417 F. Supp. 837, 849 (D. Conn. 1976); Rosario v. Rockefeller, 458 F.2d 649, *cert. granted,* 406 U.S. 957, *aff'd,* 410 U.S. 752, *rehearing denied,* 411 U.S. 959 (1972).

185. Nader v. Schaffer, 417 F. Supp. 837, 850 (D. Conn. 1976).

186. Kusper v. Pontikes, 414 U.S. 51, 58 (1973).

partisan political philosophy. Associational rights of the various parties[187] notwithstanding, the violations of these voters' important fundamental rights of expression, association, privacy and equal protection of the laws seem apparent. They should be justified upon a meticulous scrutiny of only the most compelling state interests. Secondly, in choosing its level of analysis the *Nader* Court has failed to explain the distinction between the nature of the *Rosario* challenge and that of the challenge before it. This substantially diminishes the logic in its reasoning. In *Rosario* the rights in question fail to approach, in fundamentality and importance, those asserted in *Nader* (assuming the validity of this Court's approach in that case). This distinction begs a difference in treatment, yet there is none.

CONCLUSION

This Note has attempted to determine whether the requirement of party affiliation, as it pertains to voting in primary elections, is susceptible to constitutional challenge. As such it has articulated an argument much as a plaintiff might formulate its case, and has led the author to reach the conclusion that such a prima facie case is clearly within the realm of constitutional protections. As with many things that we as a society now question, however, this requirement, a product of our political evolution, long existed in a condition where it was taken for granted. Yet it is an issue that begs challenge, if only for clarification of its impact on the fundamental rights it touches.

Upon such a challenge, it is hoped that the reviewing court will comprehend the intensity of the rights at issue and will bring to bear its most exacting scrutiny. As to the outcome of such review, no prediction will be made for that is beyond the scope of this article. As to the existence of a sufficiently compelling state interest, only the reviewing court can decide. But it must make its determination with a full view towards all of the fundamental rights involved.

JOHN H. SCHIERING

187. Nader v. Schaffer, 417 F. Supp. 837, 844 (D. Conn. 1976).

Salem Orthopedic Surgeons, Inc. v. Quinn: Express Contract Actions — A Fitting Subject For Tribunal Review?

The theory of negligence[1] in medical malpractice suits[2] has as a basis for its development in Massachusetts (as elsewhere) the contractual liability of physicians.[3] If the professional standards[4] of medical skill and knowledge are not maintained, the implied contractual duty of the physician is breached.[5] Many courts have recognized that an element of tortious conduct is also involved in these cases.[6] Massachusetts law recognizes a cause of action in tort to recover for negligence[7] or in contract to recover for breach of a physician's implied duty.[8] The harmoni-

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1. "*Negligence* on the part of a physician has been said to consist in his doing something which he should not have done or omitting to do something which he should have done, or his failure to exercise the required degree of care, skill, and diligence." 70 C.J.S. *Physicians & Surgeons* § 40 (1951) (emphasis original) (footnotes omitted).

2. Malpractice has been defined as "the improper treatment or culpable neglect of a patient by a provider of service of health care. It is based on the notion that the provider of services does not live up to the standard to which he is held." INTERIM REPORT OF THE SPECIAL COMMISSION ESTABLISHED TO MAKE AN INVESTIGATION AND STUDY OF MEDICAL PROFESSIONAL LIABILITY INSURANCE AND THE NATURE AND CONSEQUENCES OF MEDICAL MALPRACTICE, MASS. H.R. REP. NO. 4380, 4-5 (1976). [hereinafter cited as MASS. INTERIM REPORT ON MALPRACTICE].

3. *See generally* Miller, *The Contractual Liability of Physicians and Surgeons,* 1953 WASH. U.L.Q. 413.

4. These standards were considered the reasonable and ordinary qualifications of members of the medical profession in the community and in similar specializations and also took regard of professional advances. Force v. Gregory, 63 Conn. 167, 27 A. 1116 (1893).

5. Force v. Gregory, 63 Conn. 167, 27 A. 1116 (1893); Small v. Howard, 128 Mass. 131, 135 (1880) (physician's contract was implied by law that he possesses that reasonable degree of learning, skill, and experience which is ordinarily possessed by others of his profession).

6. Roush v. Wolfe, 243 Ky. 180, 47 S.W.2d 1021 (1932); Reinhardt v. Friedrich, 58 Ind. App. 421, 108 N.E. 258 (1915); Carpenter v. Walker, 170 Ala. 659, 54 So. 60 (1910).

7. Mallen v. Boyton, 132 Mass. 443 (1882).

8. *See, e.g.,* Riggs v. Christie, 342 Mass. 402, 405-406, 173 N.E.2d 610, 613 (1961) (physician's failure to diagnose peritonitis did not violate implied contractual duty as it was a reasonable exercise of his professional judgment); Small v. Howard, 128 Mass. 131, 135 (1880) (physician fulfilled contract duty in that he possessed the requisite skill to treat the wound properly).

zation[9] of these independent actions[10] has resulted in the common malpractice action of today.[11]

Currently, Massachusetts retains an action for breach of an express contract[12] by a physician to achieve a specific result or cure[13] as distinguished from an implied contract.[14] Following the 1976 legislative creation of a medical malpractice tribunal in Massachusetts, which mandated the appearance of malpractice plaintiffs before a screening panel,[15] the Commonwealth's courts were faced on several occasions[16] with the opportunity to explore and define the substantive and procedural provisions of the enabling legislation. This Comment will deal with the Massachusetts Supreme Judicial Court's decision in the case of

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9. The technicality of pleading in contract or tort in some jurisdictions has proved exceedingly bothersome if not fatal. Ericson v. Charles, 108 Kan. 205, 194 P. 652 (1921) (action for malpractice pleaded in implied contract found to sound in tort and tolled by the statute of limitations); Finch v. Bursheim, 122 Minn. 152, 142 N.W. 143 (1913) (malpractice action properly pleaded in contract was not barred despite the tort statute of limitations having run); Randolph v. Snyder, 139 Ky. 159, 129 S.W. 562 (1910) (an election to sue in tort or contract affects damages in malpractice suit); Higgins v. McCabe, 126 Mass. 13 (1878) (midwife not liable in tort for negligence in rendering gratuitous services of the ordinary scope of her duties under her employment contract).

10. A duty grows out of the contractual relationship between a physician and patient. It is the breach of this duty, this legal obligation, by negligent physician conduct which gives rise to a malpractice action. The action, therefore, is essentially in tort and the contractual nature incidental. Carpenter v. Walker, 170 Ala. 659, 54 So. 60 (1910); 41 AM. JUR. *Physicians & Surgeons* § 120 (1942).

11. *See* Miller, *supra* note 3, at 416; Note, *Contractual Liability in Medical Malpractice-Sullivan v. O'Connor,* 24 DE PAUL L. REV. 212, 214 (1974) [hereinafter cited as Sullivan].

12. Express contracts are, where the terms of the agreement are openly avowed and uttered at the time of the making of it. Implied contracts are such as reason and justice dictate from the nature of the transaction, and which therefore, the law presumes, that every man undertakes to perform.

J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1371 (Boston 1833).

13. Salem Orthopedic Surgeons, Inc. v. Quinn, 79 Mass. Adv. Sh. 661, 386 N.E.2d 1268 (1979); Sullivan v. O'Connor, 363 Mass. 579, 296 N.E.2d 183 (1973); Gabrunas v. Miniter, 289 Mass. 20, 193 N.E. 551 (1935); Annot., 43 A.L.R. 3d 1221 (1972).

14. Sullivan v. O'Connor, 363 Mass. 579, 296 N.E.2d 183 (1973) (the court's finding in *Sullivan* in 1973 of contractual liability of a physician for breach of promise differed significantly from the conventional form of malpractice action existing at that time, which was an action in negligence). *See* notes 24-35 and accompanying text *infra.*

15. MASS. GEN. LAWS ANN. ch. 231, § 60B (West Supp. 1979). *See* text accompanying notes 36-57 *infra.*

16. McMahon v. Glixman, 79 Mass. Adv. Sh. 2277, 393 N.E.2d 875 (1979) (issue of statute of limitations not proper for consideration by the malpractice tribunal); Salem Orthopedic Surgeons, Inc. v. Quinn, 79 Mass. Adv. Sh. 661, 386 N.E.2d 1268 (1979). *See* Little v. Rosenthal, 78 Mass. Adv. Sh. 2793, 382 N.E.2d 515 (1978) (MASS. GEN. LAWS ch. 93A action for unfair trade practice within the jurisdiction of the tribunal); Austin v. Boston Univ. Hosp., 372 Mass. 654, 363 N.E.2d 515 (1977) (statute dealing with substantive rights operates prospectively and a malpractice action brought in a Massachusetts state court other than the Superior Court must be referred to a tribunal in the Superior Court); Paro v. Longwood Hosp., 77 Mass. Adv. Sh. 2353, 369 N.E.2d 985 (1977) (tribunal procedure does not violate equal protection, due process, or separation of powers provisions of the Massachusetts or United States Constitution); *see* notes 74-93 and accompanying text *infra.*

Salem Orthopedic Surgeons, Inc. v. Quinn[17] which determined that an express contract action[18] was within the jurisdiction of the Massachusetts medical malpractice screening tribunal.[19] Section I will address the judicial recognition of express contract actions in Massachusetts[20] and the historical background of the legislative enactment of the medical malpractice tribunal.[21] The facts, procedure, and holding in *Salem Orthopedic Surgeons, Inc. v. Quinn*[22] will be detailed in section II. Section III will analyze the *Quinn* decision and the resulting problems associated with the necessity of presenting all treatment-related claims to the tribunal.[23]

I. Medical Malpractice — Historical Perspective

A. Sullivan v. O'Connor

Even in this day of remarkable medical advances, it is difficult to imagine a physician guaranteeing specific medical results. Because of the problems involved in differentiating the statement made as a therapeutic reassurance, transformed in the mind of the unsophisticated patient into a guarantee, from an express promise made by a physician, courts have carefully screened such actions. Until *Sullivan v. O'Connor,*[24] express contract actions had been considered a "little suspect and thus we find courts straining sometimes to read the pleadings as sounding only in tort for negligence and not in contract for breach of promise. . . ."[25]

The court in *Sullivan*[26] recognized an action based on a contractual relationship[27] between physician and patient based on an alleged promise by a physician to achieve a specific result.[28] Ms. Sullivan was a pro-

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17. 79 Mass. Adv. Sh. 661, 386 N.E.2d 1268 (1979).

18. *See* note 12 *supra.*

19. Salem Orthopedic Surgeons, Inc. v. Quinn, 79 Mass. Adv. Sh. 661, 670, 386 N.E.2d 1268, 1273 (1979).

20. *See* notes 26-39 and accompanying text *infra.*

21. *See* notes 37-57 and accompanying text *infra.*

22. 79 Mass. Adv. Sh. 661, 386 N.E.2d 1268 (1979). *See* notes 58-93 and accompanying text *infra.*

23. *See* notes 94-128 and accompanying text *infra.*

24. 363 Mass. 579, 296 N.E.2d 183 (1973).

25. *Id.* at 582, 296 N.E.2d at 185. *See also* Forman v. Wolfson, 327 Mass. 341, 98 N.E.2d 615 (1951) where the court invoked the doctrine of *res judicata,* stating that an action in tort for alleged failure of an operation to correct the condition of the plaintiff's nose and subsequent finding for defendant was identical to a cause of action for breach of warranty.

26. 363 Mass. 579, 296 N.E.2d 183 (1973). *See also* Sullivan, *supra* note 11.

27. The payment for services was generally considered the necessary consideration for the contract. *See also* Rogala v. Silva, 16 Ill. App. 3d 63, 305 N.E.2d 571 (1973) which required a separate consideration for the warranty.

28. Sullivan v. O'Connor, 363 Mass. 579, 583, 296 N.E.2d 183, 186 (1973).

fessional entertainer, who agreed to undergo cosmetic surgery to change the shape of her nose. Dr. O'Connor, in two separate operations, undertook to reduce the prominence of Ms. Sullivan's nose. Three operations later, Ms. Sullivan's facial appearance had been changed for the worse. Her nose had a concave line and was bulbous and asymmetrical.[29]

Ms. Sullivan filed suit on two counts — the first in contract for failure to achieve the desired result, and the second in tort, alleging negligence.[30] The jury found for the physician on the negligence count but held him liable for breach of contract.[31] Damages foreseeable from the physician's breach of promise were awarded, including damages for pain and suffering from the originally uncontemplated third operation.[32]

Sullivan recognized the possibility of increased exposure to charlatans[33] and a subsequent loss of confidence in the medical profession if express contract actions were not recognized by the court.[34] Not only did *Sullivan* allow recovery against a physician who promised a specific result and absent negligence failed to perform, but the court also extended contract damages to include compensation for pain and suffering foreseeably following from defendant's failure to carry out his promise.[35]

B. Malpractice Tribunal

Sullivan was decided some three years before the initiation of the malpractice tribunal system in Massachusetts.[36] In response to the malpractice "crisis,"[37] the Massachusetts legislature took comprehensive legislative action[38] on June 19, 1975, when it became apparent that,

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29. *Id.* at 580, 296 N.E.2d at 185.

30. *Id.* at 579-80, 296 N.E.2d at 184.

31. *Id.* at 580, 296 N.E.2d at 184.

32. *Id.* at 588-89, 296 N.E.2d at 189-90.

33. Frequent accounts of quackery and promised miracle "cures" are recorded in popular magazines. *See, e.g., Warning These Health "Cures" Can Hurt You,* GOOD HOUSEKEEPING, Nov. 1974, at 225-27; *The Arthritis Book,* GOOD HOUSEKEEPING, Sept. 1979, at 75 (a Florida snake farmer and doctor treat arthritis with cobra venom); *The Scalpers,* TIME, Sept. 3, 1979, at 49.

34. Sullivan v. O'Connor, 363 Mass. 579, 583, 296 N.E.2d 183, 186 (1973).

35. *Id.* at 579, 296 N.E.2d 185.

36. *See* notes 2 & 14 and accompanying text *supra.*

37. *See* HEW, MEDICAL MALPRACTICE: REPORT OF THE SECRETARY'S COMMISSION ON MEDICAL MALPRACTICE, PUB. NO. (OS) 73-88 (1973) for a general discussion of causes behind the medical malpractice problem. Characterization of the problem as a crisis may have been an exageration without a conclusive basis. *E.g.,* MASS. INTERIM REPORT ON MALPRACTICE, *supra* note 2, at 18-19; T. LOMBARDI, JR., MEDICAL MALPRACTICE INSURANCE, 13 (1978).

38. 1975 Mass. Acts ch. 362. *See* Miike, *State Legislatures Address the Medical Malpractice Situation,* 3 J. LEGAL MEDICINE 25, 25-27 (Sept. 1975) (a list of various legislative responses to the malpractice crisis); Comment, *An Analysis of State Legislative Responses to the Medical Malpractice Crisis,* 6 DUKE L.J. 1417 (1975).

based on existing state law governing the area,[39] liability coverage for the medical professional would become unavailable[40] or undesirable[41] in the Commonwealth. The legislation included the guarantee of the availability of medical malpractice insurance through the establishment of a Joint Underwriting Association[42] and the control of the rating mechanism by the Commissioner of Insurance.[43] The legislation also established a new Board of Registration in Medicine.[44] With the addition of section 60B of chapter 231 of the Massachusetts General Laws,[45] the appearance of a plaintiff is mandated before a tribunal[46] in every action for malpractice, error, or mistake against a health care provider.[47]

The tribunals are composed of a Superior Court Judge, a lawyer, and a health care provider from the same field of medicine as the defendant.[48] At the hearing the plaintiff is obliged to present an offer of proof.[49] The tribunal then determines whether the evidence presented,

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39. *See* notes 2 & 13 and accompanying text *supra*.

40. "Following a then-growing national trend, a major malpractice insurer announced its intention to withdraw abruptly from the Massachusetts market, and other carriers requested large rate increases or changes in underwriting policies from occurrence-based to claims-made policies." ANNUAL REPORT OF THE SPECIAL COMMISSION RELATIVE TO MEDICAL PROFESSIONAL LIABILITY INSURANCE AND THE NATURE AND CONSEQUENCES OF MEDICAL MALPRACTICE, MASS. H.R. REP. NO. 5631, 7 (1978).

41. MASS. INTERIM REPORT ON MALPRACTICE, *supra* note 2, at 9. The New York Medical Malpractice Insurance Association had, in June 1975, requested a substantial rate increase depending on locality. For example, they requested a 150.2 percent increase in Greater New York and 226.8 percent increase in the remainder of the state. *See The Problems of Insuring Medical Malpractice: Hearing Before the Subcomm. on Health of the Senate Comm. on Labor and Public Welfare on Examination of the Continuing Medical Malpractice Insurance Crisis,* 94th Cong., 1st Sess. 184, 187 (1975) where it was documented that premiums collected nationwide increased from $20,545,602 in 1969 to $75,877,878 in 1973.

42. 1975 Mass. Acts ch. 362, § 6. The Joint Underwriting Ass'n generally (1) require that mandatory participation of all carriers who write liability insurance, (2) have a defined period of existence, (3) set maximum coverages, and (4) have a "claims-made" or "occurrence" basis. The Joint Underwriting Ass'n authority existed in 24 states in 1975. Miike, *supra* note 38, at 26.

43. 1975 Mass. Acts ch. 362, § 4 (amending MASS. GEN. LAWS ch. 175A, § 5).

44. 1975 Mass. Acts ch. 362, § 1 (amending MASS. GEN. LAWS ch. 13, § 10).

45. MASS. GEN. LAWS ANN. ch. 231, § 60B (West Supp. 1978).

46. Numerous states have instituted screening panels in one form or another. FLA. STAT. ANN. § 768.44 (West Supp. 1979); IND. CODE ANN. § 16-9.5-9-3 (Burns Supp. 1980); N.Y. JUD. LAW § 148-a (Consol. Supp. 1979); PA. STAT. ANN. tit. 40, § 1301.308 (Purdon Supp. 1979-1980).

47. 1975 Mass. Acts ch. 362, § 5 (amending MASS. GEN. LAWS ch. 231, § 60). The Indiana plan provides that no action against a health care provider may be commenced in court before the proposed complaint has been presented to a medical review panel. IND. CODE ANN. § 16-9.5-9-2 (Burns Supp. 1980).

48. MASS. GEN. LAWS ANN. ch. 231, § 60B (West Supp. 1979). Indiana's panel is composed of three physicians and a nonvoting attorney chairman. IND. CODE ANN. § 16-9.5-9-3 (Burns Supp. 1980).

49. "Admissible evidence shall include, but not be limited to, hospital and medical records, nurses' notes, x-rays and other records kept in the usual course of the practice of the health care provider without the necessity for other identification or authentication, statements of fact or opinion on a subject contained in a published treatise, periodical, book or pamphlet or statements by experts without the necessity of such experts appearing at said hearing." MASS. GEN. LAWS ANN. ch. 231, § 60B (West Supp. 1979).

if properly substantiated, is sufficient to raise a legitimate question of liability appropriate for judicial inquiry or whether the evidence shows that the plaintiff's injury is merely an unfortunate medical result.[50] Hearsay is admissible evidence at the tribunal stage of proceedings.[51]

If a tribunal determines that a question of liability exists, the plaintiff may pursue the case in the normal judicial manner.[52] The decision of the tribunal, as well as testimony of a court appointed witness, is admissible as evidence at a subsequent trial.[53] If, however, plaintiff's injury is found to be merely an unfortunate medical result, the plaintiff, in order to pursue his/her claim, must post a two thousand dollar bond payable to the defendant for costs, should the plaintiff be unsuccessful at trial.[54] The bond may be increased at the judge's discretion.[55] The bond may also be reduced if the plaintiff is indigent but it cannot be eliminated.[56] If not posted within thirty days of the tribunal's finding, the action is dismissed.[57]

II. SALEM ORTHOPEDIC SURGEONS, INC. v. QUINN

A. Factual Background

The difficulty in harmonizing the issues in *Sullivan,*[58] with the statutory jurisdiction of the malpractice tribunal system,[59] was illustrated by the case of *Salem Orthopedic Surgeons, Inc. v. Quinn.*[60] Patricia Quinn suffered severe injuries[61] in an automobile accident and was admitted to the hospital on October 4, 1974. On October 21, 1974, Dr. Richard E. Conway operated on Patricia's left thigh and knee in order to repair the fracture of the femur. This operation[62] left Patricia's leg

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50. MASS. GEN. LAWS ANN. ch. 231, § 60B (West Supp. 1979).

51. *See* note 49 and accompanying text *supra.*

52. After a tribunal hearing the case proceeds to a trial on the merits in the usual fashion. *See* MASS. GEN. LAWS ANN. ch. 231, § 60B (West Supp. 1979).

53. MASS. GEN. LAWS ANN. ch. 231, § 60B (West Supp. 1979). The conclusion of the Florida hearing panel on the issue of liability may be admitted into evidence at trial. FLA. STAT. ANN. § 768.47 (West Supp. 1979).

54. MASS. GEN. LAWS ANN. ch. 231, § 60B (West Supp. 1979).

55. *Id.*

56. MASS. GEN. LAWS ANN. ch. 231, § 60B (West Supp. 1979). *But see* ANNUAL REPORT OF THE SPECIAL COMMISSION RELATIVE TO MEDICAL PROFESSIONAL LIABILITY INSURANCE AND THE NATURE AND CONSEQUENCES OF MEDICAL MALPRACTICE, MASS. H.R. REP. NO. 6534, 18 (1979). [hereinafter cited as SPECIAL COMMISSION REPORT] where a recent survey indicates the amount of bond actually filed indicates that in one case the bond requirement was waived.

57. MASS. GEN. LAWS ANN. ch. 231, § 60B (West Supp. 1979).

58. *See* notes 26-28 and accompanying text *supra.*

59. *See* notes 49-50 and accompanying text *supra.*

60. 79 Mass. Adv. Sh. 661, 386 N.E.2d 1268 (1979).

61. The injuries included various lacerations, a cerebral concussion, a ruptured spleen and a compound fracture of the femur. *Id.* at 662, 386 N.E.2d at 1269.

62. "An open reduction of a fracture is one in which there is a surgical incision. This procedure may be either necessary or elective. Some closed fractures cannot be reduced by manipulation, while others may, but the surgeon prefers to perform open reduction with internal fixation

noticeably shorter and more crooked than her right leg. A second operation attempting to straighten the bone and fix it with a plate was performed on May 14, 1975, by Dr. Conway. He determined that the bone tissue was too soft for the anchoring of the plate so he used a number of pins and a bone graft and achieved some but not complete improvement. William Quinn, Patricia's father, alleged that he had a conversation with Dr. Conway sometime in December of 1974, wherein Dr. Conway agreed to perform the 1975 operation and stated that such an operation would straighten Patricia's leg.[63] This alleged statement was the foundation of Quinn's breach of contract action.[64]

The Salem Orthopedic Surgeons' organization,[65] of which Dr. Conway was a professional employee, filed suit against Patricia's father to recover unpaid medical bills for services rendered to Patricia Quinn.[66] Defendant Quinn filed a counterclaim alleging breach of an express promise made by Dr. Conway to produce a specific result by operating upon his daughter.[67] The defendant's daughter, Patricia, was joined as a plaintiff in the counterclaim action.[68] The case was removed from the state district court to the superior court. Salem Orthopedic then moved to refer the case to the malpractice tribunal pursuant to the Massachusetts medical malpractice statute.[69] The judge denied this motion and reported[70] the question of law presented by the motion to the Massachusetts Court of Appeals, as whether the malpractice statute applied to Quinn's counterclaim.[71] Salem Orthopedic petitioned the

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using screws, plates, or other devices. Some arguments for open reduction are that convalescence is easier and shorter and union of the bone is more certain. Disadvantages include a greater chance of infection and the possibility that the internal fixation may have to be removed later." C. FRANKEL, LAWYERS' MEDICAL CYCLOPEDIA OF PERSONAL INJURIES AND ALLIED SPECIALTIES § 41.15 (rev. ed. 1977).

63. Salem Orthopedic Surgeons, Inc. v. Quinn, 79 Mass. Adv. Sh. 661, 663, 386 N.E.2d 1268, 1270 (1979).

64. *Id.* Patricia had two subsequent operations by other surgeons aimed at further improvement of her leg. Neither was completely successful. In June 1977, she still had some deformity and lateral instability of the knee.

65. MASS. GEN. LAWS ANN. ch. 156A, § 2 (West Supp. 1979) provides that one or more individuals, each of whom is licensed to perform the same professional service, may organize a professional corporation by filing articles of organization with the Secretary of State. Such organizations are subject to the provisions of ch. 156A.

66. Salem Orthopedic Surgeons, Inc. v. Quinn, 79 Mass. Adv. Sh. 661, 386 N.E.2d 1268 (1979).

67. *Id.* at 662, 386 N.E.2d at 1269.

68. MASS. R. CIV. P. 13(h) (West Supp. 1980).

69. Salem Orthopedic Surgeons, Inc. v. Quinn, 79 Mass. Adv. Sh. 661, 662, 386 N.E.2d 1268, 1269 (1979); MASS. GEN. LAWS ANN. ch. 231, § 60B (West Supp. 1979). *See also* note 5 *supra.*

70. A report of a case is treated as the equivalent of notice to appeal pursuant to the Massachusetts Rules of Civil Procedure. A judge may report an order if he considers it to so affect the merits of the controversy that it ought to be determined by the appropriate appellate court. Scandura v. Trombly Motor Coach Serv., Inc., 76 Mass. Adv. Sh. 1752, 351 N.E.2d 202 (1976).

71. "The court, after verdict or after a finding of facts under Rule 52, may report the case for determination by the appeals court. If the trial court is of [the] opinion that an interlocutory finding or order made by it so affects the merits of the controversy that the matter ought to be deter-

Massachusetts Supreme Judicial Court for direct appellate review, which was granted pursuant to the Massachusetts Rules of Appellate Procedure.[72] The facts stated in the pleadings and the answers of the parties to interrogatories were summarized by the Massachusetts Supreme Judicial Court, which treated uncontradicted statements as true and resolved conflicts in favor of Quinn.[73]

B. Holding

The Massachusetts Supreme Judicial Court in *Quinn* found the counterclaim for breach of contract subject to the jurisdiction of the malpractice tribunal pursuant to the statute.[74] It was uncontroverted that after the decision in *Sullivan,* Massachusetts recognizes an action allowing recovery against a physician who expressly promises a certain medical result and then, without fault, fails to perform.[75] The difficult question for the court was whether an action for breach of an express medical contract is one of "malpractice, error, or mistake" within the meaning of the malpractice statute.[76] The court in its analysis of the question had little guidance from either legislative history or its prior decisions construing the statute.[77]

The court concluded that the legislature had not considered the impact of express contract actions when it devised its plan for the control of the "crisis" in malpractice insurance costs.[78] The language of the in-

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mined by the appeals court before any further proceedings in the trial court, it may report such matter, and may stay all further proceedings except such as are necessary to preserve the rights of the parties. The court, upon request of the parties, in any case where the parties agree in writing as to all the material facts, may report the case to the appeals court for determination without making any decision thereon. In an action commenced before a single justice of the supreme judicial court, the court may report the case in the circumstances above described to either the appeals court or the full supreme judicial court; provided further that a single justice of the supreme judicial court may at any time reserve any question of law for consideration by the full court, and shall report so much of the case as is necessary for understanding the question reserved." MASS. R. CIV. P. 64 (West Supp. 1980).

72. Any party may apply in writing for direct appellate review provided that: "the question presented by the appeal are: (1) questions of first impression or novel questions of law which should be submitted for final determination to the Supreme Judicial Court; (2) questions of law concerning the Constitution of the Commonwealth or questions concerning the Constitution of the United States which have been raised in a court of the Commonwealth; or (3) questions of such public interest that justice requires a final determination by the full Supreme Judicial Court." MASS. R. APP. P. 11(a) (West Supp. 1980).

73. Salem Orthopedic Surgeons, Inc. v. Quinn, 79 Mass. Adv. Sh. 661, 662, 386 N.E.2d 1268, 1269 (1979).

74. *Id.* at 670, 386 N.E.2d at 1273.

75. *Id.* at 664, 386 N.E.2d at 1270. *See* notes 12-14, 24-35 and accompanying text *supra.*

76. Salem Orthopedic Surgeons, Inc. v. Quinn, 79 Mass. Adv. Sh. 661, 664, 386 N.E.2d 1268, 1270 (1979).

77. *See* note 16 and accompanying text *supra* and notes 94-98 and accompanying text *infra.*

78. Salem Orthopedic Surgeons, Inc. v. Quinn, 79 Mass. Adv. Sh. 661, 665-66, 386 N.E.2d 1268, 1271 (1979).

itial bill, requiring the tribunal screening of "[e]very action of tort or breach of contract for malpractice, error or mistake. . . .,"[79] was later redrafted and the words "of tort or breach of contract" excised.[80] The court in *Quinn* suggested that although there were several possible inferences to be drawn from the legislature's deletion, the most probable reason for excluding the phrase was to conform the adopted legislative language to the newly effective Massachusetts Rules of Civil Procedure which recognized only one form of civil action.[81]

The court recognized that three issues are presented in an express contract action as alleged in *Sullivan* or *Quinn:* (1) whether the physician made an absolute promise,[82] (2) whether the physician failed to perform the obligation,[83] and (3) what damages are traceable to the contractual breach.[84] These are factual issues which are not treatment-related[85] and thus differ from the usual malpractice action based on negligence.

In an effort to further the apparent legislative purpose of section 60B "to discourage frivolous claims whose defense would tend to increase premium charges for medical malpractice insurance,"[86] the *Quinn* court reasoned that cases alleging the existence of express contracts must be submitted to tribunal screening.[87] The court noted several reasons for submitting such cases to the tribunal process. One reason is that initially, the existence of an express contract is usually a question of fact and may not be readily separable from a negligence claim until a late stage in the proceedings when the differences between the two actions become apparent.[88] The court further reasoned that since it was highly unlikely that a physician of even average integrity would in fact make such a promise,[89] most cases would ultimately turn on the ordinary question of

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79. 1976 MASS. HOUSE DOC. NO. 196, § 6 (initial version in legislative history).

80. 1976 MASS. HOUSE DOC. NO. 196, § 6. The remaining language "[e]very action for malpractice, error, or mistake. . . ." was subsequently adopted.

81. Salem Orthopedic Surgeons, Inc. v. Quinn, 79 Mass. Adv. Sh. 661, 666, 386 N.E.2d 1268, 1271 (1979). The court further reasoned that the wording of the statute was inconclusive of the question before them.

82. *Id.* at 667, 386 N.E.2d at 1271.

83. *Id.*

84. *Id.*

85. *Id. See* Little v. Rosenthal, 1978 Mass. Adv. Sh. 2793, 382 N.E.2d 1037 (1978). The court in *Little* reasoned that the plaintiff relied on the same factual allegations to support her ch. 93A claim and negligence claim; therefore, both her claims were "treatment-related" and referrable to the § 60B tribunal. *See* note 16 *supra. See also* Mass. Gen. Laws Ann. ch. 93A, §§ 2, 9 (West Supp. 1979).

86. Austin v. Boston Univ. Hosp., 372 Mass. 654, 655 n.4, 363 N.E.2d 515, 516 n.4 (1977).

87. Salem Orthopedic Surgeons, Inc. v. Quinn, 79 Mass. Adv. Sh. 661, 669, 386 N.E.2d 1268, 1272 (1979).

88. *Id.* at 668, 386 N.E.2d at 1272.

89. The number of cases pleaded in express contract somewhat belies this point. *See* note 13 *supra.*

negligent treatment and, therefore, would be proper for submission to the tribunal.[90]

It was the feeling of the court in *Quinn* that the legislature intended that the tribunal should evaluate only the medical aspects of a malpractice claim and thus decide whether the evidence was sufficient to raise a question of liability or was "merely an unfortunate medical result."[91] The question of whether the parties made the express agreement alleged in Quinn's counterclaim was considered beyond the purview of the tribunal.[92] The court, therefore, decided that the inquiry of the tribunal was limited to whether the evidence presented in the plaintiff's offer of proof "is sufficient to raise a legitimate question ... appropriate for judicial inquiry" on the issue of whether the medical result obtained is consistent with the medical result the physician promised.[93]

III. Problems Associated With Tribunal Screening of Express Contract Actions

A. Legislative Intent

1. Substantive Aspect of the Statute

Section 60B of Massachusetts General Laws, chapter 231 prohibits a plaintiff who has failed to persuade the tribunal he has a meritorious claim, from proceeding with his action without first assuming the risk of liability for the costs of each defendant (to the amount of the bond) should they later prevail in the action. Section 60B, therefore, is more than procedural in nature.[94] The Massachusetts Supreme Judicial Court in *Austin v. Boston University Hospital*[95] stated, "because section 60B has a substantive aspect, we shall construe section 60B as applicable only to those medical malpractice actions to which it clearly appears the Legislature intended that it apply."[96]

The court in *Quinn,* by including express contract actions within the jurisdiction of the malpractice tribunal, has interfered with the expecta-

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90. Salem Orthopedic Surgeons, Inc. v. Quinn, 79 Mass. Adv. Sh. 661, 669, 386 N.E.2d 1268, 1272 (1979).

91. *Id.* at 670, 386 N.E.2d at 1272.

92. *Id.*

93. *Id.* at 670, 386 N.E.2d at 1272-73.

94. Austin v. Boston Univ. Hosp., 372 Mass. 654, 657, 363 N.E.2d 515, 517 (1977).

95. The plaintiffs in *Austin* alleged that the defendant hospital and defendant physicians violated their contractual obligations, were negligent, committed a battery on the plaintiff and breached a warranty. The United States District Court for the District of Massachusetts certified questions to the Supreme Judicial Court of Massachusetts regarding the application and interpretation of the malpractice screening tribunal statute. Austin v. Boston Univ. Hosp., 372 Mass. 654, 363 N.E.2d 515 (1977) (*citing* Mass. Gen. Laws Ann. ch. 231, § 60B (West Supp. 1979)).

96. The court in *Austin,* therefore, reasoned that any uncertainty in statutory language must be resolved against retroactive application of section 60B. *Id.* at 658, 363 N.E.2d at 518.

tions of the parties without legislative mandate.[97] The absence of language expressly including express contract cases within the purview of the tribunal should be literally interpreted, not allowing for their inclusion.[98]

2. Malpractice Liability Coverage

In deciding *Austin v. Boston University Hospital*[99] the Massachusetts Supreme Judicial Court determined that the legislative purpose in enacting section 60B was to discourage frivolous claims as to malpractice insurance premium increases.[100] The court in *Austin* further suggested that "the scope of the coverage normally available under a malpractice insurance policy may provide some guidance in determining the intended meaning of the words malpractice, error, or mistake"[101] and, therefore, whether an express contract action was within the purview of section 60B.[102] The court in *Quinn,* though it did not investigate the scope of present malpractice insurance coverage, reasoned that express contract actions must be subject to tribunal screening in order to discourage frivolous claims and prevent premium increases.[103]

When the Massachusetts legislature established the Joint Underwriting Association[104] to provide medical malpractice insurance coverage, it defined the coverage so as to cover liability for damages resulting from negligence or malpractice.[105] Currently, the Medical Malpractice Joint Underwriting Association of Massachusetts writes insurance coverage for physicians' and surgeons' professional liability.[106] If a physi-

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97. The legislatures of several states have dealt with this problem by clear statutory language. *See* 1977 TEX. REV. CIV. STAT. ANN. art. 4590i (Vernon Supp. 1979) which provides specifically for changes in the theory of oral warranties. In Pennsylvania, the absence of a special contract in writing precludes a health care provider from liability on the theory that he/she is neither a warrantor nor a guarantor of a cure. 40 PA. CONS. STAT. ANN. § 1301.606 (Purdon Supp. 1979).

98. It is the function of the court to construe a statute as written and if no provision is made for a particular event judicial legislation is not justified. Prudential Ins. Co. v. City of Boston, 369 Mass. 542, 547, 340 N.E.2d 858, 861 (1976) (statute dealing with public grants); Harry Alan Gregg, Jr. Family Foundation, Inc. v. Commissioner of Corps. and Taxation, 330 Mass. 538, 544, 116 N.E.2d 146, 150 (1953) (taxing statute); King v. Viscoloid Co., 219 Mass. 420, 425, 106 N.E. 988, 989 (1914) (compensation statute).

99. 372 Mass. 654, 363 N.E.2d 515 (1977).

100. *Id.* at 655 n.4, 363 N.E.2d at 516 n.4.

101. *Id.*

102. The court in Austin did not reach the question of whether an action for breach of warranty or battery was an action "for 'malpractice, error, or mistake.' " *Id.*

103. Salem Orthopedic Surgeons, Inc. v. Quinn, 79 Mass. Adv. Sh. 661, 669, 386 N.E.2d 1268, 1272 (1979).

104. MASS. H.R. REP. NO. 4380, 34 (1976).

105. *Id.*

106. "The company will pay on behalf of the *insured* all sums which the *insured* shall become legally obligated to pay as *damages* because of: injury arising out of the rendering of or failure to render, during the policy period, professional services by the individual *insured* . . . ." Physicians' and Surgeons' Professional Liability Coverage Form, The Medical Malpractice Joint Underwriting Association of Massachusetts.

cian's assurances were made as part of his/her professional service, it appears that the current policy language of the Joint Underwriting Association would cover the resulting liability.[107]

Because of the interest of the Special Commission Relative to Medical Professional Liability and the Nature and Consequences of Medical Malpractice in encouraging private insurers to reenter the professional liability market in Massachusetts,[108] a problem may result if express contract liability must be covered. Malpractice insurance agreements customarily contain exclusionary provisions asserting no liability for any agreement guaranteeing the results of an operation or treatment.[109] By including express contract actions as a proper subject for the malpractice tribunal, the court may discourage the re-entrance of private insurers, who would be reluctant to extend their coverage.[110]

B. Are More Sophisticated Cases Appropriate For Tribunal Screening?

1. Difficult Standard of Proof

According to the decision in *Quinn,*[111] the question of whether the parties made an agreement characterized as an express contract is beyond the scope of inquiry of the tribunal.[112] The tribunal's decision is, therefore, limited to the issue of whether the medical result allegedly promised by the health care provider is consistent with the result obtained.[113] Substantial evidence to support such a finding is evidence such as a reasonable person might accept as adequate to support a conclusion.[114]

By withdrawing the issue of a statute of limitations problem from the malpractice tribunal, the Massachusetts Supreme Judicial Court further delineated what was acceptable evidence for the purview of the tribunal

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107. *Id. Contra* note 109 *infra.*

108. *See* SPECIAL COMMISSION REPORT, *supra* note 56, at 8-9.

109. *See* E. HAYT, L. HAYT & A. GROESCHEL, LAW OF HOSPITAL, PHYSICIAN, AND PATIENT 394 (1972); *See also* Safian v. Aetna Life Ins. Co., 260 A.D. 765, 24 N.Y.S.2d 92 (1940).

110. Few insurers could be expected to voluntarily undertake coverage of express contracts by physicians, even at increased premiums, because of the unpredictable inherent risk exposure which makes rational rate setting impossible. Tierney, *Contractual Aspects of Malpractice,* 19 WAYNE L. REV. 1457, 1474-75 (1973). *See also* Guilmet v. Campbell, 385 Mich. 88 n.6, 188 N.W.2d 601, 616 n.6 (1971) (Black, J. dissenting). Another alternative to the extension of coverage to express actions by private insurers is the statutory elimination or the necessity of written qualification of express contracts. *See* note 97 *supra.*

111. Salem Orthopedic Surgeons, Inc. v. Quinn, 79 Mass. Adv. Sh. 661, 386 N.E.2d 1268 (1979).

112. *Id.* at 670, 386 N.E.2d at 1272.

113. *Id.* at 669, 386 N.E.2d at 1273.

114. *See* MASS. GEN. LAWS ANN. ch. 231, § 60B (West Supp. 1979).

in *McMahon v. Glixman.*[115] The court in *McMahon* reasoned that the limitation of the tribunal to "purely medical questions"[116] is necessary in order to keep the tribunal procedure from becoming a pre-trial of all the issues.

The existence of an express contract is a question of fact and, therefore, a proper subject for jury determination,[117] where the resolution of the issue depends on the credibility of the parties. However, by requiring submission of the ancillary issue to the tribunal (whether the medical result obtained is consistent with the medical result allegedly promised) the court in *Quinn* has prejudiced the outcome of an express contract action.[118]

Even if the tribunal finds that the injury is merely an unfortunate medical result, the liability of the physician is not vitiated in an express contract action. The breach of an express contract gives rise to a cause of action irrespective of any negligence.[119] If plaintiff should receive an adverse finding at the tribunal, not only might he/she be prejudiced by subsequent admission of the tribunal decision at trial,[120] but the plaintiff would then be required to post a bond in order to proceed[121] to trial. This seems inconsistent with the court's statement in *Quinn* that the existence of the express contract is not a proper question for the tribunal.[122]

2. Possible Alternatives

If an express contract action remains subject to the jurisdiction of the malpractice tribunal, procedural steps can be taken to insure that the further prosecution of plaintiff's case to the trial stage is not impeded. An immediate appeal of the tribunal decision as a matter of law follow-

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115. McMahon v. Glixman, 79 Mass. Adv. Sh. 2277, 393 N.E.2d 875 (1979) (issue of statute of limitations not proper for consideration by the malpractice tribunal).

116. *Id.* at 2288, 398 N.E.2d at 880.

117. Note, *Express Contracts to Cure: The Nature of Contractual Malpractice,* 50 IND. L.J. 361, 376 (1975). *See also* Guilmet v. Campbell, 385 Mich. 57, 188 N.W.2d 601, 606 (1971); Beebe v. Koshnie, 55 Mich. 604, 22 N.W. 59, 60 (1885).

118. Admission of the tribunal decision at trial results in unfair prejudice to the party losing at the hearing. Of course, it is only conjecture what the impression of the jurors is with regard to this evidence and whether detailed instructions by the trial judge can remedy any unfair circumstances. SPECIAL COMMISSION REPORT, *supra* note 56, at 48.

119. *See* note 31 and accompanying text *supra. See also* Note, *supra* note 117, at 376.

120. *See* note 118 *supra.*

121. The bond requirement may also create an impediment to further prosecution of the plaintiff's case. It is uncertain as to whether an appellate procedure from tribunal decisions exists. A plaintiff, filing an appeal without first posting a bond and having judgment filed after a full trial on the merits, risks a forfeiture of his right to appeal. *See* SPECIAL COMMISSION REPORT, *supra* note 56, at 46-47.

122. *See* note 112 and accompanying text *supra.*

ing an adverse decision is one alternative.[123] Particularly applicable to express contract actions is the alternative that tribunal decisions not be admissible as evidence at trial.[124]

Another alternative is that the legislature draft a statute requiring that all express contract agreements be in writing in order to be enforceable.[125] This would eliminate the uncertainty of oral guarantees.

Another statutory alternative is the specific inclusion or exclusion of express contract actions within the purview of the malpractice tribunal. It has been argued that express contracts should be declared unenforceable.[126] However, such action would not protect the right of the physician and patient to contract freely,[127] protect society's interest in a responsible medical profession, or maintain the patient's cause of action against unethical medical practitioners.[128]

CONCLUSION

Massachusetts courts, as a result of the decision in *Sullivan,*[129] clearly recognize a cause of action against a physician for breach of an express contract.[130] Following the creation of the malpractice tribunal,[131] the Supreme Judicial Court, in *Salem Orthopedic Surgeons v. Quinn,*[132] determined that such express contract actions were within the jurisdiction of the screening tribunal.[133] The tribunal's inquiry, however, was limited to the issue of whether the medical result promised was consistent with the result obtained.[134] Tribunal purview of express contract actions was not specifically contemplated by the legislature,[135] but the *Quinn* court felt it necessary to include express contract actions to

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123. *See* notes 118 & 121 and accompanying text *supra.*

124. The evidence, placed before the tribunal as to whether the medical result obtained is consistent with the medical result promised, is vastly different than the evidence as to the existence of the contract.

125. *See* note 97 *supra.* Some would question whether the relationship between the physician and patient has now become so adversarial that statements must be relegated to writing. Some possible reasons for the growing number of suits are the absence of family relationship ties with the physician, a more businesslike manner now that many physicians specialize, and that most physician visits are just referrals and the financially secure position of a physician. Tierney, *supra* note 110, at 1478-79.

126. Comment, *An Analysis of State Legislative Responses to the Medical Malpractice Crisis,* 1975 DUKE L.J. 1417, 1451.

127. *See* Note, *supra* note 117, at 378.

128. *Id.*

129. Sullivan v. O'Connor, 363 Mass. 579, 296 N.E.2d 183 (1973).

130. *See* notes 24-35 and accompanying text *supra.*

131. *See* notes 36-57 and accompanying text *supra.*

132. 79 Mass. Adv. Sh. 661, 386 N.E.2d 1268 (1979).

133. *See* notes 74-93 and accompanying text *supra.*

134. *See* note 93 and accompanying text *supra.*

135. *See* notes 94-98 and accompanying text *supra.*

discourage the prosecution of frivolous claims.[136] Whether plaintiffs in express contract actions will be unduly prejudiced[137] by this expansion of tribunal jurisdiction, as evidenced by *Quinn,* or whether new insurers will accept liability for this increased risk,[138] remains to be seen. Only future actions before the tribunal will determine if the possible difficulties raised by the *Quinn* decision will present further problems.[139]

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136. *See* notes 86-87 and accompanying text *supra.*

137. *See* note 120 and accompanying text *supra.*

138. *See* notes 99-110 and accompanying text *supra.*

139. If in fact difficulties are presented by subjecting express contract actions to tribunal screening, one of the alternatives discussed may prove helpful. *See* notes 123-128 and accompanying text *supra.*

Boston Waterfront Development Corporation v. Commonwealth:[1] Title To Land Seaward of the Historic Low-water Line[2]

On August 3, 1979, the Massachusetts Supreme Judicial Court handed down its decision on *Boston Waterfront Development Corp. v. Commonwealth,*[3] but the controversy the case addressed, and the ramifications the decision has generated, may continue for many decades to

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1. No. 32973 (Land Court, Mass., decided February 11, 1975), *modified,* 78 Mass. App. Ct. Adv. Sh. 354, 374 N.E.2d 598 (1978), *aff'd,* 79 Mass. Adv. Sh. 1992, 393 N.E.2d 356 (1979).

Boston Waterfront Dev. Corp. v. Commonwealth shall hereinafter be cited as the "*BWDC*" case. The petitioner in the *BWDC* case shall be referred to as "BWDC" and the respondent shall be referred to as the "Commonwealth."

2. *See* 79 Mass. Adv. Sh. 1992, 1993 n.1, 393 N.E.2d 356, 357 n.1 (1979). Reference to "historic [or primitive] low-water mark [or line]" means the primitive extreme low-water mark. Sewall & Day Cordage Co. v. Boston Water-Power Co., 147 Mass. 61, 64, 16 N.E. 782, 783-84, 786 (1888) (opinion of Holmes, J.), *citing* Sparhawk v. Bullard, 42 Mass. (1 Met.) 95 (1840) *and* Attorney Gen. v. Boston Wharf Co., 78 Mass. (12 Gray) 553, 558 (1859).

In Massachusetts, the extreme low-water line is the dividing line between public and private ownership of land (special acts of the legislature and the colonies excepted) due to the Colonial Ordinance of 1641-47, deduced to be the Ordinance of 1647. *See* Commonwealth v. Alger, 61 Mass. (7 Cush.) 53, 67 (1853). This ordinance altered the common law of England by granting the flats between the mean high-water mark and the extreme low-water mark (or 100 rods from mean high-water mark if a lesser distance) to the then owners of the upland.

> SECT. 3. It is declared, that in all creeks, coves, and other places about and upon salt water, where the sea ebbs and flows, the proprietor of the land adjoining shall have the propriety to the low water mark, where the sea doth not ebb above a hundred rods, and not more wheresoever it ebbs further: provided, that such proprietor shall not by this liberty have power to stop or hinder the passage of boats or other vessels, in or through any sea, creeks, or coves, to other men's houses or lands.

Commonwealth v. Alger, 61 Mass. (7 Cush.) 53, 67-68 (1853), *quoting* ANCIENT CHARTERS 148; THE BOOK OF GENERAL LAWS AND LIBERTIES 50 (1649).

In other states which have followed the common law of England, the line of private ownership extends only to the mean high-water line.

For an in-depth examination of this ordinance, *see* Commonwealth v. Alger, 61 Mass. (7 Cush.) 53 (1853).

3. 79 Mass. Adv. Sh. 1992, 393 N.E.2d 356 (1979).

come.[4] The proceedings began when Boston Waterfront Development Corporation (BWDC) petitioned the Land Court[5] to register and confirm its title to certain parcels of waterfront property within the city of Boston and Boston Harbor. The Commonwealth answered, in effect, claiming title to particular portions of the property.[6] The only parcel remaining in dispute before the Supreme Judicial Court was a small strip of land located at the end of Lewis Wharf and to which BWDC claimed title by virtue of the "Lewis Wharf statutes."[7] This disputed land lies seaward of the historic low-water line and consists of fill which rests on previously submerged land, title to which had been held by the Commonwealth.[8] The Lewis Wharf statutes, *inter alia,* give the Lewis Wharf Company the power to hold a specifically described parcel of land in fee simple, and authorize the proprietors of Lewis Wharf to extend and maintain their wharf into Boston Harbor as far as a certain line.[9]

To ascertain the effect of the Lewis Wharf statutes, the Supreme Judicial Court first reviewed prior judicial interpretations of several wharfing statutes[10] which were very similar to the Lewis Wharf

4. The controversy continues: (1) because there exist many similarly situated parcels which were filled pursuant to similar wharfing statutes and other legislative acts; (2) because the Supreme Judicial Court has not yet determined the effect of MASS. GEN. LAWS ANN. ch. 260, § 31A (West Supp. 1979), which is a statute of limitations that appears to apply to the Commonwealth, and which limits the time within which any action based upon a right of entry for condition broken may be maintained in any court in the Commonwealth of Massachusetts; (3) because there is proposed legislation which, if enacted and constitutional, will grant area B to the proprietors of Lewis Wharf in fee simple subject only to the conditions expressed in the Lewis Wharf statutes. The Massachusetts Senate is currently in the process of seeking from the Supreme Judicial Court an advisory opinion as to the constitutionality of the proposed legislation. Furthermore, the decision leaves the ownership of the disputed land uncertain due to the fact that the court did not decide whether the present use of the land comports with the purpose for which it was granted. The decision has the same effect on hundreds of similarly situated parcels.

5. BWDC was substitute petitioner, having filed its petition April 25, 1966. *See* notes 23 and 24 and accompanying text *infra. See also* 79 Mass. Adv. Sh. 1992, 1993, 393 N.E.2d 356, 357 (1979).

6. 79 Mass. Adv. Sh. 1992, 1993, 393 N.E.2d 356, 357 (1979). In the Statement of the Case as and for the Record on Appeal Pursuant to Appellate Rule 8(d), at 2, 78 Mass. App. Ct. Adv. Sh. 354, 374 N.E. 2d 598 (1978), the parties agreed in paragraph 8 that the answer filed by the Commonwealth claimed "in effect title to the land below the 'Baldwin Low Water Mark of 1846.' " *See* Appendix A-1.

7. 79 Mass. Adv. Sh. 1992, 1993, 393 N.E.2d 356, 357 (1979). In a stipulation filed with the Land Court on December 4, 1973, the parties agreed that "[t]he Petitioner, Boston Waterfront Development Corporation is the owner in fee simple, of the land to the west of the 'original low water line as determined by Baldwin, 1846,' indicated as such on the 'Plan of Land in Boston, Mass., May 25, 1962,' by Whitman and Howard Engineers, Inc." *See* Appendix A-1.

8. *See* Appendix A-1.

9. *See* the Lewis Wharf statutes (1832 Mass. Special Laws ch. 102; 1834 Mass. Special Laws ch. 115; 1835 Mass. Special Laws ch. 76; 1840 Mass. Special Laws ch. 18). *See* Appendix A-2, A-3.

10. So-called "wharfing statutes" such as 1841 Mass. Special Laws ch. 35; 1851 Mass. Special Laws ch. 26; 1855 Mass. Special Laws ch. 481, § 1 and the statutes cited by the court in 79 Mass. Adv. Sh. 1992, 2002, 393 N.E.2d 356, 361 (1979), which granted the right to wharf out below the extreme low-water line, were, in Massachusetts, generally held to convey a fee to the land encompassed by the grant, until 1869 Mass. Special Laws ch. 432, which declared that thenceforth all such grants would be construed as revocable licenses. For a case construing 1869

statutes.[11] The court concluded that BWDC had acquired fee simple title to the disputed land, but, in a substantial expansion of the prior cases,[12] held that this fee was "subject to a condition subsequent that it be used for the public purpose for which it was granted."[13] The public purpose underlying the Lewis Wharf statutes was ruled by the court to be "to promote trade and commerce by enabling and encouraging the owners of flats to build wharves, warehouses, and other structures thereon for the use and convenience of those [who make use of] . . . the ports and harbors."[14]

Restricting the use of Lewis Wharf to conformity with this purpose severely encumbers the land because this purpose was conceived at a time when Boston was a booming shipping port. Shipping, or "commerce marine,"[15] no longer constitutes a large part of the demand for waterfront property in Boston. Recently, this land has been in much greater demand for residential and business purposes, but the *BWDC* decision potentially prevents this land from being utilized for the purposes for which it is currently in demand. Furthermore, the decision may preclude certain dilapidated waterfront areas from ever being beautified or developed by the private sector. This is due to the court's conclusion that "[t]he land below [the] low-water line can be granted by the State only to fulfill a public purpose, and [that] the rights of the grantee to that land are ended when that purpose is extinguished,"[16] and voidable when that purpose is not being carried out.[17]

The holding of the Supreme Judicial Court in *BWDC* assumes critical

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Mass. Special Laws ch. 432, *see* Comm'rs of Pub. Works v. Cities Serv. Oil Co., 308 Mass. 349, 32 N.E.2d 277 (1941).

11. *See* cases and statutes reviewed in Boston Waterfront Dev. Corp. v. Commonwealth, 79 Mass. Adv. Sh. 1992, 2006, 393 N.E.2d 356, 362-63 (1979).

12. *See* notes 37-44 and accompanying text *infra.*

13. 79 Mass. Adv. Sh. 1992, 2017, 393 N.E.2d 356, 367 (1979). For a discussion of fees subject to conditions subsequent, *see* note 17 *infra.*

14. 79 Mass. Adv. Sh. 1992, 2015, 393 N.E.2d 356, 366 (1979), *quoting* Bradford v. Mc Questen, 180 Mass. 80, 82, 64 N.E. 688, 689 (1902).

15. This phrase is a short-hand summarization of the purpose for these type of grants. *See* 79 Mass. Adv. Sh. 1992, 2018, 393 N.E.2d 356, 367 (1979), *quoting* A. McCordic and W. Crosby, *The Right of Access and the Right to Wharf Out to Navigable Water,* 4 HARV. L. REV. 14, 24 (1890).

16. 79 Mass. Adv. Sh. 1992, 2013, 393 N.E.2d 356, 365 (1979).

17. *See* Boston Waterfront Dev. Corp. v. Commonwealth, 79 Mass. Adv. Sh. 1992, 2013-18, 393 N.E.2d 356, 365-67 (1979). One authority states:

> A fee simple subject to a condition subsequent exists when the fee simple is subject to a power in the grantor to terminate the estate granted on the happening of a specified event. A fee simple on a condition subsequent is a qualified fee and is defeasible. On the happening of the specified event, that is, on breach of the condition, the granted estate continues in existence until the grantor effectively exercises his option to terminate by making an entry or bringing an action to recover the land.

C. MOYNIHAN, INTRODUCTION TO THE LAW OF REAL PROPERTY 36 (1962).

Furthermore, the same authority states: "[T]he modern trend is to refuse to construe the conveyance as creating an estate or condition in the absence of a provision that the transferor shall have a right to re-entry on the happening of a specified event or words to that effect." *Id.* at 105. *See also* RESTATEMENT OF PROPERTY § 45 (1936).

importance when it is realized that within the city of Boston alone, substantial parts of Charlestown, South Boston, East Boston, the downtown waterfront area and the Back Bay consist of filled land which lies below (seaward of) the historic low-water line.[18] The original land area of Boston (783 acres), and the land which was filled pursuant to statute has added between three and four times that amount.[19] Many conveyancers and landowners alike, relying on past decisions of the Supreme Judicial Court, considered this filled land to be held in fee simple absolute.[20] Consequently, this is land upon which buildings have been built and improvements made,[21] but land which nevertheless may have its title determined by the holding of the *BWDC* case, and therefore be subject to defeasance.[22]

The holding of the *BWDC* case raises serious questions about the current state of the title to privately held real property which is located below the historic low-water line and which was formerly vested in the Commonwealth. Section I of this Comment reviews the factual background of the *BWDC* case. Sections II and III discuss the history of the law pertaining to tidelands in general, and to Massachusetts in particular. Sections IV and V analyze the *BWDC* court's application of Massachusetts case law and the reasoning used in reaching its holding. This Comment concludes with an examination of the anticipated future course of tideland law in Massachusetts.

I. FACTS OF THE CASE

In 1964, the Commercial and Lewis Wharf Corporation, predecessor to BWDC, petitioned the Land Court to register title to a parcel of waterfront land under Lewis Wharf in the city of Boston.[23] As substitute petitioner, BWDC desired originally to register title to areas A, B, C and F, all as shown on the plan included in the appendix hereto.[24] The Commonwealth objected to the registration of these parcels, but years later stipulated that BWDC was owner in fee simple of area A, the land upland of the low-water mark. BWDC in turn agreed to withdraw without prejudice its petition to register areas C and F.[25] The Land

18. *See* note 19 *infra*.

19. *See* The Filled-In Areas of Boston (Boston Conservation Commission).

20. *See* Address by Loring P. Jordan, Jr., Remarks to the Boston Society of Civil Engineers (October 26, 1960).

21. Bradford v. McQuesten, 182 Mass. 80, 82, 64 N.E. 688, 689 (1902).

22. *See* note 17 *supra*.

23. 79 Mass. Adv. Sh. 1992, 1993, 393 N.E.2d 356, 357 (1979); MASS. GEN. LAWS ANN. ch. 185, § 1 (West Supp. 1979), confers exclusive original jurisdiction of petitions for the confirmation and registration of title to land on the Land Court.

24. Appendix A-1. 79 Mass. Adv. Sh. 1992, 1993, 393 N.E.2d 356, 357 (1979).

25. *See* Stipulation (No. 32973 Land Court, Mass., filed Dec. 4, 1973); 79 Mass. Adv. Sh. 1992, 1993, 393 N.E.2d 356, 357 (1979).

Court was then called upon to resolve the dispute as to area B, which consists of filled land and extends seaward from the historic low-water mark to the currently existing seawall.[26] Partially occupying area B is the corner of a six-story granite building which has recently been renovated into condominiums, restaurants, offices and retail stores.[27] The parties stipulated that the sole issue to be decided by the Land Court was whether the BWDC acquired fee simple title to the soil beneath the fill pursuant to the Lewis Wharf statutes.[28]

The Land Court, after an exhaustive review of the relevant case law and the interpretation of similar grants, ruled that, as a result of the Lewis Wharf statutes, BWDC's predecessor in title had obtained fee simple title to the disputed area B. A decree registering the land was then entered.[29] The Commonwealth appealed and the Appeals Court reversed the decision of the Land Court in part. The Appeals Court held that BWDC's predecessors had obtained fee simple title to the land beneath the fill (area B), but that this fee was held subject to the condition subsequent that the land be used in accordance with the purpose expressed in the Lewis Wharf statutes.[30] BWDC appealed to the Supreme Judicial Court and the Appeals Court's decision was affirmed.[31]

II. HISTORY OF THE LAW PERTAINING TO TIDELANDS[32]

The shore has always been recognized as a unique form of property of unusual value, and therefore subject to legal rules different from those applicable to inland property.[33] For example, under Roman law, all citizens held and had access to the seashore as a resource in common.[34] But after the collapse of the Roman Empire and its ordered system of law, public ownership of tidal areas was lost to a multitude of

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26. 79 Mass. Adv. Sh. 1992, 1993, 393 N.E.2d 356, 357 (1979). BWDC and the Commonwealth stipulated that area B was filled prior to 1850 by BWDC's predecessors in title and that they had the right to do so pursuant to 1832 Mass. Special Laws ch. 102, 1834 Mass. Special Laws ch. 115, and 1840 Mass. Special Laws ch. 18.

27. 79 Mass. Adv. Sh. 1992, 1993, 393 N.E.2d 356, 357 (1979). The Lewis Wharf Condominium Master Deed was recorded with the Suffolk Registry of Deeds on November 9, 1973.

28. *Id.* at 1993, 393 N.E.2d at 357 (1979). *See* Statement of the Case as and for the Record on Appeal Pursuant to Appellate Rule 8(d), 78 Mass. App. Ct. Adv. Sh. 354, 374 N.E.2d 598 (1978), *quoting* Stipulation (No. 32973 Land Court, Mass., filed Dec. 4, 1973).

29. 79 Mass. Adv. Sh. 1992, 1993, 393 N.E.2d 356, 357 (1979).

30. 78 Mass. App. Ct. Adv. Sh. 354, 373, 374 N.E.2d 598, 606 (1978).

31. 79 Mass. Adv. Sh. 1992, 1994, 393 N.E.2d 356, 358 (1979).

32. Tidelands are herein defined as the lands which are subject to submersion by ordinary tides, meaning that land which lies below the ordinary or mean high-water mark.

33. 79 Mass. Adv. Sh. 1992, 1994, 393 N.E.2d 356, 357 (1979), *quoting* JUSTINIAN, INSTITUTES, 2.1.1 - 2.1.6 (4th Ed. J. B. Hoyle trans. 1889) *cited in* Note, *The Public Trust in Tidal Areas: A Sometimes Submerged Traditional Doctrine,* 79 YALE L.J. 762, 763-64 (1970) [hereinafter cited as *Public Trust*].

34. 79 Mass. Adv. Sh. 1992, 1994-95, 393 N.E.2d 356, 357-58 (1979).

private fiefdoms.[35] During the English feudal period which followed, the Crown claimed title to the shore and granted exclusive ownership rights in portions of it to private subjects.[36] However, since this exclusive private ownership interfered with navigation and marine commerce, it was opposed by the commercial classes and was one of the grievances which led to the signing of the Magna Carta.[37]

After the Magna Carta, a legal theory developed in England which divided the Crown's title to land below mean high water into two distinct interests. The first was a proprietory *jus privatum* interest, or right of property in the soil, which the King could grant to a private party subject to the *jus publicum.* The second was called the *jus publicum,* or royal prerogative, by which the King held this land in his sovereign capacity in trust for all subjects and their free exercise of the common rights of navigation and fishing.[38] The *jus publicum* could not be granted to a subject by mere royal grant without an act of Parliament, so it was eventually understood to be under the sole control of Parliament, while the *jus privatum* remained vested in the King.[39] It

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35. *Id.* It is ironic to note that the notion that all lands below high water were vested in the King by the prerogative of the Crown was first advanced by Thomas Diggs, who desired that these lands be vested in the King, not for the benefit of the public but to enable title hunters like himself to then secure from the Crown exclusive grants of this land for themselves; *see* Fraser, *Title to the Soil Under Public Waters — A Question of Fact,* 2 MINN. L. REV. 314, 317 (1918), which cites S. Moore, A HISTORY OF THE FORESHIRE, 169-87 (1888).

36. 79 Mass. Adv. Sh. 1992, 1995, 393 N.E.2d 356, 357-58 (1979), *citing Public Trust, supra* note 33, at 765.

37. 79 Mass. Adv. Sh. 1992, 1995, 393 N.E.2d 356, 358 (1979).

38. *Public Trust, supra* note 33, at 765; Commonwealth v. Alger, 61 Mass. (7 Cush.) 53, 90-91 (1853); 79 Mass. Adv. Sh. 1992, 1995, 393 N.E.2d 356, 358 (1979).

The public trust doctrine, as it has arisen from the *jus publicum,* is presently a very confused area of the law. This has resulted primarily because the doctrine has never clearly defined exactly what rights, in what degree, and for what duration, it covers. At various times, in various states, at least ten different rights have been claimed to be protected by this doctrine, including navigation, fishing, fowling, commerce, bathing, free passage and conservation, among others. *See, Public Trust, supra* note 33, at 778. These rights are considered by the doctrine to be protected absolutely or not at all, but the unrestricted exercise of some are likely to conflict with the exercise of others, such as navigation and commerce with fishing and bathing, which has led to some confusion over the degree of protection afforded. *Id.* at 778.

Furthermore, many of the cases on the public trust subject are contradictory. Many have held that the *jus publicum* may be alienated to the owners in fee, thereby extinguishing the public trust. Others have held that the public trust is extinguished upon the filling or enclosing of the tideland. *See* notes 39 and 100 and accompanying text *infra.* However, a recent trend holds, contrary to the common law practice in England, that this public trust is inextinguishable. *See* Newburyport Redev. Auth. v. Commonwealth, 80 Mass. App. Ct. Adv. Sh. 287, 318, 401 N.E.2d 118, 141 (1980).

The *BWDC* court apparently considers the title to the disputed area B, which lies below the historic low-water line, to be subject to some unspecified public rights, as well as subject to the condition subsequent that it be used for the purpose for which it was granted. The *BWDC* court also implies that the public trust applicable to area B is inextinguishable. *See* Boston Waterfront Dev. Corp. v. Commonwealth, 79 Mass. Adv. Sh. 1992, 2014, 393 N.E.2d 356, 366 (1979).

39. Commonwealth v. Alger, 61 Mass. (7 Cush.) 53, 90 (1853); Boston Waterfront Dev. Corp. v. Commonwealth, 79 Mass. Adv. Sh. 1992, 1995, 393 N.E.2d 356, 358 (1979). Many of the

became a familiar practice for the Crown to make grants of the *jus privatum* in the land over which the tide ebbed and flowed, which would warrant the grantee in constructing wharves and warehouses thereon to facilitate navigation and commerce; provided, however, that such improvements should not hinder or obstruct navigation or become a nuisance. If such a structure substantially interfered with the common right of navigation, it would be held by the common law to be either a public or a private nuisance, and could not be justified, even by the King's grant unless sanctioned by an act of Parliament.[40] Thus, this separation of title became a convenient method by which to limit private ownership in this land because grants from both the King and of the *jus privatum* and from the Parliament of the *jus publicum* were necessary for a private landholder to develop lands below mean high-water to the exclusion of the public.[41]

III. Historical Review of Massachusetts Waterfront Development Up to the Passage of the Lewis Wharf Statutes

The Crown of England claimed title to what is now Massachusetts by right of discovery.[42] The first settlers of this territory obtained their titles through grants from James I and Charles I. These grants transferred to the companies chartered to settle Plymouth and Massachusetts Bay Colonies title to the land encompassed by the charter, the power to make laws to govern the colony and "full dominion over all the ports, rivers, creeks, and havens, etc. in as full and ample a manner as they

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early decisions dealing with public versus private rights in tidelands were authored by Chief Justice Lemuel Shaw. Shaw recognized that for the previous 600 years in England the title to the tidelands was split into the *jus privatum* or right to the soil, which was vested in the King, and the *jus publicum*, or dominion over the tidelands which parliament held in a fiduciary capacity to preserve for the public the common rights of fishing and navigation. *See, e.g.*, Commonwealth v. Alger, 61 Mass. (7 Cush.) 53, 90-91 (1853); Commonwealth v. City of Roxbury, 75 Mass. (9 Gray) 451, 478 (1857).

40. Commonwealth v. Alger, 61 Mass. (7 Cush.) 53, 94 (1853). *Accord,* Shively v. Bowlby, 152 U.S. 1, 11, 13 (1894). "In England, from the time of Lord Hale, it has been treated as settled . . . that this title, jus privatum, whether in a king or in a subject, is held subject to the public right, jus publicum, of navigation and fishing." *Id.* at 13. The public rights of fishing and navigation were in the nature of easement rights; therefore, if the tidelands were built upon or enclosed without authorization and the wharf or other erection essentially interfered with the public right of navigation, it would be held by the common law to be a common nuisance, the remedy for which would be a suit for an injunction or for damages. Commonwealth v. Alger, 61 Mass. (7 Cush.) 53, 94 (1853).

41. The King could grant his *jus privatum* rights to a subject in fee but this fee would be subject to the *jus publicum* or public trust which protected the public rights of fishing and navigation. The parliament could also grant its *jus publicum* rights to that subject, if to do so was deemed to be in the public interest, thereby uniting the *jus privatum* and *jus publicum* and vesting a fee simple absolute title in the grantee. Commonwealth v. Alger, 61 Mass. (7 Cush.) 53, 90 (1853).

42. Commonwealth v. City of Roxbury, 75 Mass. (9 Gray) 451, 478 (1857); the theory adopted by the English was that the Indians found upon the continent had no legal title to the soil, no fee in the land, but only a temporary right of occupancy. *Id.*

were before held by the Crown of England."[43] The effect of the charters was to grant to the companies both the *jus privatum* which could be conveyed to corporations and individuals in fee, and the *jus publicum* which was to be held in trust for the public use of all the inhabitants of said territory.[44] These grants were regulated and governed by the common law of England which the English immigrants claimed as their birthright and brought with them.[45] Therefore, by the common law of England the colonists could hold title to littoral property only to the mean high-water line. But to encourage persons to construct wharves below the high-water mark which were necessary for shipping, the common law was altered by the colonial Ordinance of 1647.[46] This ordinance basically extended the line of private ownership to the extreme low water line.[47] More specifically, the Massachusetts courts have consistently construed this ordinance as vesting the flats[48] in the owner of the upland in fee, but subject to public easement rights of navigation and fishing.[49] In addition, only the legislature can authorize an interruption of the public's easement rights.[50]

Upon the signing of the Declaration of Independence in 1776, all of the *jus privatum* and *jus publicum* rights of both the colonial government and of the Crown and Parliament of England to the land included in the Plymouth and Massachusetts Bay Colonies, became vested in the sovereign state of Massachusetts.[51] While Massachusetts acquired title to the tidelands subject to the same public trust upon which the Crown of England had held them, it also acquired the power to grant out portions of the tidelands in fee subject to the public trust.[52]

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43. *See* Commonwealth v. Charlestown, 18 Mass. (1 Pick.) 180, 182 (1822); *see also* Commonwealth v. Alger, 61 Mass. (7 Cush.) 53, 65-66, 82-83, 93 (1853); Commonwealth v. City of Roxbury, 75 Mass. (9 Gray) 451, 478-79, 481, 483 (1857).

44. Commonwealth v. City of Roxbury, 75 Mass. (9 Gray) 451, 483 (1857).

45. *See* Storer v. Freeman, 6 Mass. (6 Tyng) 435, 438 (1810).

46. *Id.*

47. *See* note 2 *supra.*

48. The "flats" refers to the land between the high and low water marks.

49. Commonwealth v. Alger, 61 Mass. (7 Cush.) 53, 79 (1853).

50. *See* Commonwealth v. Charlestown, 18 Mass. (1 Pick.) 180, 185-86 (1822), *quoting* Arundel v. M'Culloch, 10 Mass. 70 (1813); Commonwealth v. Alger, 61 Mass. (7 Cush.) 53, 79 (1853), and cases cited therein.

51. Massachusetts became a sovereign state upon the signing of the Declaration of Independence on July 4, 1776. Title to the tidelands then held by the Massachusetts Bay Colony and the Plymouth Colony, which had not previously been granted, passed to the Commonwealth on that date. Commonwealth v. Alger, 61 Mass. (7 Cush.) 53, 82, 93 (1853). *See* Shively v. Bowlby, 152 U.S. 1, 14-15 (1894); Marvin v. Waddell, 41 U.S. (16 Pet.) 367, 410 (1842); Storer v. Freeman, 6 Mass. (6 Tyng) 435, 437 (1810); Commonwealth v. City of Roxbury, 75 Mass. (9 Gray) 451, 478 (1857).

52. Commonwealth v. Alger, 61 Mass. (7 Cush.) 53, 82-83, 93-94 (1853); Martin v. Waddell, 41 U.S. (16 Pet.) 367, 410 (1842).

In the early 1800's, the shipping industry in the port of Boston was developing rapidly and the Commonwealth could not afford to build the necessary improvements required to service the tremendous increase in trade.[53] In response, the legislature devised a vehicle by which to obtain the construction of the needed improvements which were anticipated to be of "immense and certain utility to the state."[54] The method employed by the legislature was to grant interests in this land (which lay below low water) to private parties to induce them to construct these improvements that Massachusetts could not afford.[55] During the thirty-year period from 1810 to 1840, literally hundreds of these acts were passed granting various interests in this land to private landowners.[56]

In the instant case, the relevant acts of the legislature which granted an interest in this disputed land to the then owners of the upland are collectively known as the "Lewis Wharf statutes," and were signed into law in the years 1832, 1834, 1835 and 1840.[57] By Chapter 102 of the Acts of 1832 the first proprietors of Lewis Wharf, predecessors in title to BWDC, were authorized to extend and maintain their wharf into Boston Harbor to a line which lies to the east of the disputed area B.[58] Two years later, the owners of Lewis Wharf were incorporated, by Chapter 115 of the Acts of 1834, into the "Lewis Wharf Company with power to hold, in fee simple or otherwise, all or any part of that real estate" which lies within certain bounds and encompasses area B.[59] The Act also authorized the said proprietors to construct docks and wharves, erect buildings, lay out streets, and "improve and manage the said property, as to them shall seem expedient": provided that this act not be understood as authorizing said corporation to interfere with the legal rights of any person(s).[60]

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53. Annual Report of the Board of Harbor Commissioners (1810).

54. Boston & Roxbury Mill Dam Corp. v. Newman, 29 Mass. (12 Pick.) 467, 481 (1832).

55. *See* note 53 *supra*.

56. These interests ranged from revocable licenses to title in fee. 79 Mass. Adv. Sh. 1992, 2002, 393 N.E.2d 356, 361 (1979).

57. *See* the Lewis Wharf statutes (1832 Mass. Special Laws ch. 102; 1834 Mass. Special Laws ch. 115; 1835 Mass. Special Laws ch. 76; 1840 Mass. Special Laws ch. 18) (app. A-2 *et seq.*).

58. *See* 1832 Mass. Special Laws ch. 102 (app. A-2).

59. *See* 1834 Mass. Special Laws ch. 115 (app. A-2).

60. *Id.* A year later the Lewis Wharf Company was "authorized and empowered to purchase and hold" the "land, wharf, and flats" of nearby Snow's Wharf by 1835 Mass. Special Laws ch. 76.

The inducement of private profit in conjunction with public benefit, brought on by the hundreds of wharfing statutes passed in the 1810's, 1820's and 1830's, led to such rapid development of Boston Harbor that the legislature passed 1837 Mass. Special Laws ch. 229, which established a line beyond which no wharves could be extended. In 1840, the legislature gave the Lewis Wharf Company authority to extend their wharves as far as this line, and this line lies to the east of area B. *See* 1840 Mass. Special Laws ch. 18 (app. A-3).

IV. THE *BWDC* COURT'S APPLICATION OF MASSACHUSETTS CASE LAW AND THE REASONING USED TO REACH ITS HOLDING

To decide the issue of whether the Lewis Wharf statutes granted the Lewis Wharf Company a fee simple title to the land beneath the wharves,[61] the Supreme Judicial Court first addressed the question of whether the Lewis Wharf statutes were grants of some degree of title or merely revocable licenses.[62] The court found guidance in *Fitchburg Railroad v. Boston & Maine Railroad,*[63] where the Charlestown Wharf Company was authorized by Chapter 35 of the Acts of 1841 to extend and maintain their several wharves into the harbor channel to a certain line. As with the Lewis Wharf statutes, this authorization was given with the right to dock vessels at the sides and ends of the wharves, and to receive cargo therefrom.[64] In the opinion written by Chief Justice Shaw, the court held that where the proprietor of a wharf is authorized by an act of the legislature to extend the wharf into the Boston Harbor channel, the act authorizing such extension operates as a grant and not merely as a revocable license.[65]

This analysis was subsequently upheld in *Bradford v. McQuesten,*[66] which interpreted other wharfing statutes, which in pertinent part are virtually identical to the Lewis Wharf statutes.[67] The *Bradford* court, with Chief Justice Holmes participating, held (1) that these statutes operated as legislative grants subject to the terms and conditions expressed in them, (2) that the Commonwealth could divest itself of any right or title it had in or to the flats, and (3) that it was the common understanding that these wharfing statutes operated as grants and that wharves and improvements were made on that footing. Furthermore, the court stated that it seemed obvious that "the Commonwealth intended to part with all of its rights except so far as contained in the conditions on which the grant was made."[68] Ultimately, the *BWDC* court

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61. 79 Mass. Adv. Sh. 1992, 2003, 393 N.E.2d 356, 362 (1979).

62. *Id.* at 2006-07, 393 N.E.2d at 362.

63. 57 Mass. (3 Cush.) 58 (1849).

64. *Id.* at 71. The language quoted is virtually identical to that in Chapter 102 of the Acts of 1832. In addition, the cases cited in the text are "closely analagous" to Chapter 18 of the Acts of 1840. *See* 79 Mass. Adv. Sh. 1992, 2006, 393 N.E.2d 356, 362 (1979).

65. Fitchburg R.R. v. Boston & Me. R.R., 57 Mass. (3 Cush.) 58, 59 (1849).

66. 182 Mass. 80, 64 N.E. 688 (1902).

67. The wharfing statutes that the *Bradford* court analyzed are 1851 Mass. Special Laws ch. 26 and 1855 Mass. Special Laws ch. 481, § 1. Compare the language of 1851 Mass. Special Laws ch. 26, with the language used in the Lewis Wharf statutes in Appendix A-2.

68. 182 Mass. 80, 81-82, 64 N.E. 688, 689 (1902). The full text of the *Bradford* holding is as follows:

> It is plain, it seems to us, that . . . [St. 1851, c. 26] operated as a legislative *grant subject to the terms and conditions expressed in it.* No particular words are necessary to constitute a legislative grant, and the Commonwealth could divest itself of any right or title in or to the flats . . . as well as by an act of the Legislature, as by a more formal instrument. Hundreds of similar acts had been passed before the St. of 1869, c. 432, was

was compelled by the weight of authority, to conclude that the Lewis Wharf statutes were grants of title and were not merely revocable licenses.[69] The issue of the quantity of title granted by the Lewis Wharf statutes was then addressed by the court using three propositions.

1. Having the right to build a wharf over tidal land does not necessarily mean having title to that land.[70]

The Supreme Judicial Court acknowledged that its past decisions have been inconsistent in the treatment of the relationship between wharfing privileges and ownership of the land under the wharf. After the court reviewed these decisions,[71] it concluded that "these cases establish no clear doctrine about the nature of the title, if any, granted"[72] by wharfing statutes. The only consistency is that "this title is somehow in a special category, different from ordinary fee simple title to upland property."[73]

2. Title to land lying below the low-water line is not equivalent to title to upland.[74]

To support this statement, the court relied on four cases dealing with title to the flats (*i.e.*, the land between mean high and extreme low

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enacted declaring that any authority thereafter given to build on or enclose ground in tidewaters should be construed as a revocable license, and it has been the common understanding, we think, that *they operated as grants, and wharves have been built and improvements made on that footing. The acts were passed to promote trade and commerce by enabling and encouraging the owners of flats to build wharves, warehouses, and other structures thereon for the use and convenience of those having occasion to resort to the ports and harbors* where the flats are situated, and requiring the facilities afforded by such structures. They should be construed so as to promote the object which the Legislature had in view, if that can be done without doing violence to settled rules of construction. . . . *The interests of the Commonwealth in navigation are carefully protected by limiting the extension to the harbor line, and by requiring that below low water the wharf shall be built on piles which shall be certain distances apart. It would seem plain that the Commonwealth intended to part with all its rights except so far as contained in the conditions on which the grant was made.*

Id. (citations omitted) (emphasis added). The *BWDC* court also cites to the same effect, Treasurer & Receiver Gen. v. Revere Sugar Refinery, 247 Mass. 483, 489, 142 N.E. 909, 910 (1924), which held that such statutes operated as grants "subject to the terms and conditions therein set forth. . . ." *Id.* More recently, in the 1945 case of Richard T. Green Co. v. Chelsea, 149 F.2d 927 (1st Cir. 1945), a Federal Court interpreting Massachusetts law, cited both *Bradford* and *Revere Sugar* with approval.

69. 79 Mass. Adv. Sh. 1992, 2006, 393 N.E.2d 356, 363 (1979).

70. *Id.* at 2007, 393 N.E.2d at 363.

71. *Id.* The court reviews City of Boston v. Richardson, 105 Mass. 559 (1870); Commercial Wharf Co. v. Winsor, 146 Mass. 559, 16 N.E. 560 (1888); Gray v. Bartlett, 37 Mass. (20 Pick.) 186 (1838); Nichols v. City of Boston, 98 Mass. 39 (1867); Attorney Gen. v. Boston Wharf Co., 78 Mass. (12 Gray) 553 (1859); Commonwealth v. Boston Terminal Co., 185 Mass. 281; 70 N.E. 125 (1904); Haskell v. City of New Bedford, 108 Mass. 208 (1871); Hamlin v. Pairpoint Mfg. Co., 141 Mass. 51, 6 N.E. 531 (1886); and Hastings v. Grimshaw, 153 Mass. 497, 27 N.E. 521 (1891).

72. 79 Mass. Adv. Sh. 1992, 2010, 393 N.E.2d 356, 364 (1979).

73. *Id.*

74. *Id.*

water)[75] and concluded that by virtue of the Ordinance of 1647 title to flats are subject to the public rights of fishing and navigation. By analogy, the court reasoned "[i]f a restriction on the title is appropriate for land *between* high and low water mark it is even more necessary for land *below* low water mark. . . ."[76]

> 3. The land below low-water line can be granted by the State only to fulfill a public purpose, and the rights of the grantee to that land are ended when that purpose is extinguished.[77]

Illinois Central Railroad v. Illinois was cited by the court as supporting the proposition that the land below low-water line can only be granted to fulfill a public purpose.[78] The United States Supreme Court in *Illinois Central* gave as an example of such a public purpose the erection of wharves and docks to improve navigation and marine commerce.[79] The Court declared that as long as grants of these lands are made for this purpose, no valid objections can be made to them.[80]

The *BWDC* court added that the Supreme Judicial Court had also in the past held that legislative acts must be for a public purpose.[81] The public purpose underlying the Lewis Wharf statutes was then narrowly[82] defined by the court to be "to promote trade and commerce by enabling and encouraging the owners of flats to build wharves, warehouses, and other structures thereon for the use and convenience of those having occasion to resort to the ports and harbors."[83]

The *BWDC* court then asserted that the Supreme Judicial Court had held before that where a corporation was granted the use of certain previously public property for a public purpose, there was an implied condition subsequent that the grantee could not retain the granted property without using it for the purpose for which it was granted.[84] Moreover,

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75. *Id.* at 2010-12, 393 N.E.2d at 364-65; Commonwealth v. Alger, 61 Mass. (7 Cush.) 53 (1853); Crocker v. Champlin, 202 Mass. 437, 442, 89 N.E. 129, 131 (1909); Butler v. Attorney Gen., 195 Mass. 79, 84, 80 N.E. 688, 689 (1907); and Michaelson v. Silver Beach Improvement Assoc., 342 Mass. 251, 261, 173 N.E.2d 273, 280 (1961).

76. 79 Mass. Adv. Sh. 1992, 2013, 393 N.E.2d 356, 365 (1979) (emphasis in original).

77. *Id.*

78. 146 U.S. 387 (1892), *quoted in* Boston Waterfront Dev. Corp. v. Commonwealth, 79 Mass. Adv. Sh. 1992, 2013-14, 393 N.E.2d 356, 365-66 (1979).

79. Illinois Cent. R.R. v. Illinois, 146 U.S. 387, 452 (1892).

80. *Id.*

81. Boston Waterfront Dev. Corp. v. Commonwealth, 79 Mass. Adv. Sh. 1992, 2014, 393 N.E.2d 356, 366 (1979), *citing* Opinion of the Justices, 332 Mass. 769, 781-82, 126 N.E.2d 795 (1955) *and* Lowell v. Boston, 111 Mass. 454, 460 (1873).

82. The Appeals Court decision below characterized this definition of the public purpose as being very narrow. 78 Mass. App. Ct. Adv. Sh. 354, 370-71, 374 N.E.2d 598, 605-06 (1978).

83. 79 Mass. Adv. Sh. 1992, 2015, 393 N.E.2d 356, 366 (1979), *quoting* Bradford v. McQuesten, 182 Mass. 80, 92, 64 N.E. 688, 689 (1902).

84. 79 Mass. Adv. Sh. 1992, 2016, 393 N.E.2d 356, 366 (1979), *citing* Boston Elevated Ry. Co. v. Commonwealth, 310 Mass. 528, 566, 39 N.E.2d 87, 114 (1942); Worcester v. Western R.R.

the *BWDC* court stated that any change in the use of public or publicly-granted land must be approved by the legislature.[85]

Whether the present use of Lewis Wharf comports with the public purpose, as defined by Judge Quirico, remains an open question since this issue was not addressed by the trial court.[86] However, the court did hold that BWDC's title to area B was subject to that same public trust on which the Commonwealth originally held it, and that it may be used only for a purpose approved by the legislature as a public use.[87]

The *BWDC* court believed that the Appeals Court characterization of the state of the title to area B properly delineated the intention underlying the grant made by the Lewis Wharf statutes.[88] Therefore, the court concluded that BWDC had title to area B in fee simple, but subject to the condition subsequent that it be used for the purpose for which it was granted.[89]

V. ANALYSIS

This section shall analyze each of the three propositions advanced by the *BWDC* court above, and shall explain, expand upon and criticize, where appropriate, the court's application of the case law cited in support of those propositions.

Corp., 45 Mass. (4 Met.) 564, 566 (1842); *and* New York Elec. Lines Co. v. Empire City Subway Co., 235 U.S. 179, 194 (1914).

First, BWDC was not granted a mere right to *use* area B, which is simply personal estate, but was granted an estate in fee, which is obviously real estate. Secondly, "a mere statement of the use to which a grantee contemplates putting the granted premises or of the purpose for the grant is insufficient to create an enforceable trust." Newburyport Redev. Auth. v. Commonwealth, 80 Mass. App. Ct. Adv. Sh. 287, 308-09, 401 N.E.2d 118, 136 (1980), *citing* MacDonald v. Street Comm'rs of Boston, 268 Mass. 288, 294-97, 167 N.E. 417, 420-21 (1929); Loomis v. City of Boston, 331 Mass. 129, 132, 117 N.E.2d 539, 541 (1954); Wakefield v. Attorney Gen., 334 Mass. 632, 636, 138 N.E.2d 197, 199 (1956), and Opinion of the Justices, 369 Mass. 979, 985, 338 N.E.2d 806, 812 (1975).

85. *See* Boston Waterfront Dev. Corp. v. Commonwealth, 79 Mass. Adv. Sh. 1992, 2016, 393 N.E.2d 356, 366 (1979), *citing* Robbins v. Dept. of Pub. Works, 355 Mass. 328, 330, 244 N.E.2d 577, 579 (1969); Gould v. Greylock Reservation Comm'n, 350 Mass. 410, 419, 215 N.E.2d 114 (1966); Chase v. Sutton Mfg. Co., 58 Mass. (4. Cush.) 152, 169 (1849); and Commonwealth v. Charlestown, 18 Mass. (1 Pick.) 180, 187 (1822).

86. 79 Mass. Adv. Sh. 1992, 2016-17, 393 N.E.2d 356, 367 (1979). The court does imply, however, that the present use probably is inconsistent with the purpose as defined when they say: "it was probably inconceivable to the [legislators at that time] . . . that the harbor would ever cease to be much used for commercial shipping, or that a wharf might be more profitable as a foundation for private condominiums and pleasure boats than as a facility serving public needs of commerce and trade."

87. *See* Robbins v. Dept. of Pub. Works, 355 Mass. 328, 330, 244 N.E.2d 577, 579 (1969); Boston Waterfront Dev. Corp. v. Commonwealth, 79 Mass. Adv. Sh. 1992, 2017, 393 N.E.2d 356, 367 (1979). The *BWDC* decision may be read to imply that the public trust with which the land is impressed is inextinguishable. *Id.* at 2013-14, 393 N.E.2d at 364-66. In addition, Newburyport Redev. Auth. v. Commonwealth, 80 Mass. App. Ct. Adv. Sh. 287, 318, 401 N.E. 2d 118, 141 (1980), interprets the *BWDC* decision as declaring that the public trust cannot be extinguished.

88. 79 Mass. Adv. Sh. 1992, 2017, 393 N.E.2d 356, 367 (1979).

89. *Id.*

In the first proposition it appears that the court is beginning to reach for a result when it argues that "[h]aving the right to build a wharf over tidal land does not necessarily mean having title to that land."[90] The court had just finished concluding that title had in fact been granted. Moreover, the court seems to misinterpret the holdings of some of the cases cited in support of that proposition.[91] For example, the court maintains that *City of Boston v. Richardson* holds that a grant of the right to wharf over flats of the Commonwealth only "*may* indeed carry with it a title in the flats," but does not state unequivocally that it does.[92] However, in the next sentence the *Richardson* court asserts that this legislative authorization warrants the inference that it did intend to convey the title.[93] In addition, *Gray v. Bartlett* is quoted by the *BWDC* court as stating that the land beneath plaintiff's wharf which lies below low-water mark is public land and owned by neither of these parties.[94] This is distinguishable from the instant case, in that, there was no statute in *Gray v. Bartlett* which authorized the extension of the wharf.[95] Therefore no rights were acquired below low water.

After reviewing the cases cited to support the first proposition, the *BWDC* court concluded that those cases established no clear doctrine about the nature of the title granted to private parties by legislative acts giving authority to wharf below low water line.[96] However, the nine cases that the court reviewed include four in which the court concluded that it was unnecessary to determine the state of title to the land.[97] An

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90. *Id.* at 2007, 393 N.E.2d at 363.

91. City of Boston v. Richardson, 105 Mass. 351, 362 (1870), did not actually determine that title had been granted, but implied that, if it were necessary to the decision, it would conclude that title was granted. However, the *BWDC* court argues with this obvious implication by stating it only "*may* indeed carry with it title to the flats." Boston Waterfront Dev. Corp. v. Commonwealth, 79 Mass. Adv. Sh. 1992, 2007, 393 N.E.2d 356, 363 (1979) (emphasis in original).

The language quoted from Commercial Wharf v. Winsor, 146 Mass. 559, 563, 16 N.E. 560, 569 (1888), gives the impression that that court decided that only the right to extend a wharf was granted. In fact, the court declined to determine what was granted and merely quoted the wharfing statute.

At final count, of the nine cases reviewed by the *BWDC* court, four conclude that wharfing statutes constitute a grant of title, four do not determine whether title is granted, and one is not on point.

92. 79 Mass. Adv. Sh. 1992, 2007, 393 N.E. 2d 356, 363 (1979).

93. *Id.*

94. 79 Mass. Adv. Sh. 1992, 2008, 393 N.E.2d 356, 363 (1979).

95. 37 Mass. (20 Pick.) 186 (1838).

96. 79 Mass. Adv. Sh. 1992, 2010, 393 N.E.2d 356, 364 (1979).

97. Of the nine cases reviewed by the *BWDC* court, four determined that title was granted, namely Nichols v. Boston, 98 Mass. 39 (1867); Attorney Gen. v. Boston Wharf Co., 78 Mass. (12 Gray) 533 (1854); Commonwealth v. Boston Terminal Co., 185 Mass. 281, 70 N.E. 125 (1904); and Haskell v. City of New Bedford, 108 Mass. 208 (1871). Four of the remaining five cases, City of Boston v. Richardson, 105 Mass. 351 (1870); Commercial Wharf v. Winsor, 146 Mass. 559, 16 N.E. 560 (1888); Hamlin v. Pairpoint Mfg. Co., 141 Mass. 51, 6 N.E. 531 (1886); and Hastings v. Grimshaw, 153 Mass. 497, 27 N.E. 521 (1891), concluded that it was unnecessary to determine the

analysis of the cases which actually determine the title granted by wharfing statutes reveals a strongly established doctrine that title is granted in fee subject only to the public rights of fishing and navigation and to the conditions specifically expressed in the granting act.[98]

In its second proposition, the *BWDC* court states that "[t]itle to land lying below the low water line is not equivalent to title to upland."[99] This statement is obviously true in the case of tidelands which are impressed with a public trust.[100] Some cases hold that this public trust is extinguished when the tideland is enclosed or built upon.[101] Other cases disagree, maintaining that the public trust is inextinguishable.[102]

For support of its second proposition the *BWDC* court relied on *Commonwealth v. Alger* and *Crocker v. Champlin.*[103] In *Alger* a wharf owner extended his wharf so that part of it lay above the low water line, but below the Harbor Commissioner's line, beyond which no wharves were to be extended. The decision, authored by Chief Justice Shaw, held that it was competent for the legislature to deprive Alger of the use of his wharf without compensation. The reasoning was that land in which the public have rights should be held to more restrictive regula-

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title to the land. The last case, Gray v. Bartlett, 37 Mass. (20 Pick.) 186 (1838), held that the land under plaintiff's wharf, which was below low water, was part of the public domain and owned by neither of the parties. However, it was obvious here that the land was owned by the public due to the fact that there existed no wharfing statute which granted the land to any private grantee.

98. *See* Bradford v. McQuesten, 182 Mass. 80, 68 N.E. 688 (1902); Treasurer & Receiver Gen. v. Revere Sugar Refinery, 247 Mass. 483, 142 N.E. 909 (1924); Richard T. Green Co. v. City of Chelsea, 149 F.2d 927 (1st Cir. 1945).

In Attorney Gen. v. Boston Wharf Co., 78 Mass. (12 Gray) 553 (1859), a statute authorized the Boston Wharf Company to extend its wharves to a certain line in the harbor. The court held that "the defendants are the owners of, and have good title to, all of the lands and flats included within . . . [the described] boundaries. . . . [T]heir right and title to the territories is unqualified and perfect." *Id.* at 563.

In Commonwealth v. Boston Terminal Co., 185 Mass. 281, 70 N.E. 125 (1904), the court asserts that the legislature can "pass its interest . . . in lands that are below extreme low water mark" free of any public trust, so that when these lands are "filled by the grantee [it] will extinguish the right of use by the public." *Id.* at 283-84, 70 N.E. at 126; *see also,* Boston & Hingham Steamboat Co. v. Munson, 117 Mass. 34 (1875). And finally, in Haskell v. City of New Bedford, the court refers to the plaintiff as "the owner in fee" of even that portion of the land and wharf below low water. 108 Mass. 208, 209 (1871). *See also,* Address by Loring P. Jordan, Jr., Remarks to the Boston Society of Civil Engineers (October 26, 1960).

99. 79 Mass. Adv. Sh. 1992, 2010, 393 N.E.2d 356, 364 (1979).

100. Traditionally the Massachusetts cases have held that the public trust reserves to the public the rights of fishing and navigation. *See, e.g.,* Commonwealth v. Alger, 61 Mass. (7 Cush.) 53 (1853).

101. *See* Commonwealth v. Alger, 61 Mass. (7 Cush.) 53, 79 (1853); Commonwealth v. Boston Terminal Co., 185 Mass. 281, 283-84, 70 N.E. 125, 126 (1904); Boston & Hingham Steamboat Co. v. Munson, 117 Mass. 34, 39-40 (1875).

102. *See, e.g.,* Newburyport Redev. Auth. v. Commonwealth, 80 Mass. App. Ct. Adv. Sh. 287, 401 N.E.2d 118 (1980).

103. Boston Waterfront Dev. Corp. v. Commonwealth, 79 Mass. Adv. Sh. 1992, 2010-11, 393 N.E.2d 356, 364-65 (1979), *citing* Commonwealth v. Alger, 61 Mass. (7 Cush.) 53 (1853), *and* Crocker v. Champlin, 202 Mass. 437, 89 N.E. 129 (1909).

tion in its use. Therefore, the *BWDC* court stated, if restrictions on title are appropriate for the land between the high and low water lines, they are even more necessary for land below low water.[104] However, the *Alger* decision construed the colonial Ordinance of 1647 as vesting the flats in the owner of the upland in fee, subject to a public right of navigation until built upon or enclosed.[105] It follows that the holding in *Alger* applies only to unimproved flats and not to filled land which is improved with buildings as in the case of Lewis Wharf.[106] This is a distinction the *BWDC* court failed to point out.[107]

The third proposition is ultimately the most determinative of the result in the *BWDC* case. In its third proposition, the *BWDC* court stated that "[t]he land below low water can be granted by the state only to fulfill a public purpose, and the rights of the grantee to that land are ended when that purpose is extinguished."[108] *Illinois Central Railroad v. Illinois* was relied upon by the *BWDC* court to support this proposition.[109] In *Illinois Central Railroad,* the Illinois legislature granted over 1,000 acres of the bed of Lake Michigan to the railroad, but years later passed a statute revoking that grant. The United States Supreme Court upheld the revocation.[110]

Despite its high authority, *Illinois Central Railroad* fails to support even the first half of proposition three, which is that land below low water can be granted *only* to fulfill a public purpose. While the Lewis Wharf grants were undoubtedly made to benefit the public, this does not appear to be a strict limitation which would foreclose ancillary benefits to private parties. The opinion of the Supreme Judicial Court quotes the very language which appears to negate its contention. "The State can[not] . . . abdicate its trust over property in which the whole people are interested, like navigable waters and the soils under them, so as to leave them *entirely* under the *use* and *control* of private parties, *except* in the instance of parcels mentioned for the improvement of the navigation and use of the waters, *or* when parcels can be disposed of

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104. 79 Mass. Adv. Sh. 1992, 2013, 393 N.E.2d 356, 365 (1979).

105. Commonwealth v. Alger, 61 Mass. (7 Cush.) 53, 79 (1853).

106. *Accord,* Crocker v. Champlin, 202 Mass. 437, 441-42, 89 N.E. 129, 130 (1909); City of Boston v. Richardson, 105 Mass. 351, 362 (1870).

107. Commonwealth v. Alger, 61 Mass. (7 Cush.) 53 (1853); City of Boston v. Richardson, 105 Mass. 351 (1870); Commonwealth v. Boston Terminal Co., 185 Mass. 281, 70 N.E. 125 (1904); and Crocker v. Champlin, 202 Mass. 437, 89 N.E. 129 (1909), all seem to indicate that when the tidelands are built upon or enclosed the public trust is terminated, as are the accompanying restrictions on title. Therefore, it would appear that the public right of navigation could not thereafter be relied upon to justify the flooding or other taking of land below mean high water with the nonpayment of compensation therefor.

108. 79 Mass. Adv. Sh. 1992, 2013, 393 N.E.2d 356, 365 (1979).

109. Illinois Cent. R.R. v. Illinois, 146 U.S. 387 (1892).

110. *Id.* at 448-55.

without impairment of the public interest in what remains . . .'"[111] (emphasis added). It cannot be seriously contended that the 1832 grant to the Lewis Wharf Company substantially impaired the public interest in the remainder of the harbor, because the Legislature passed Chapter 229 of the Acts of 1837 which set a limit to the extensions of wharves into Boston Harbor to prevent any such impairment. This limit lies a considerable distance to the east of the disputed area B, and coincides with the U.S. Pierhead and Bulkhead Line on the attached plan.

Furthermore, *Illinois Central Railroad* can certainly not be used in support of the second half of proposition three, namely, that the rights of the grantee to tideland are ended when the purpose for which it was granted is extinguished. This is true for two reasons. First, to negate the imposition of any implied conditions on title to land granted by wharfing statutes, the United States Supreme Court contemplated state abdication of the trust applicable to tidelands so as to leave them entirely under the use and control of private parties.[112] The abdication of this trust was, however, carefully limited to two instances; where these parcels were granted for the erection of wharves to improve the public interest in navigation and commerce, and where their disposition would not impair the public interest in what remains.[113]

Secondly, *Illinois Central Railroad* simply does not involve the termination of the grantee's rights due to the extinguishment of the purpose for the grant. It involves a statutory revocation of the grantee's rights to the granted tideland. The United States Supreme Court upheld the statutory revocation of the grant not because the purpose for the grant was extinguished, but because the vastness of the grant exceeded the power of the legislature.[114] The enormity of the grant was compared to the granting of all of the navigable water in an entire state to a single individual or corporation and, therefore, was held to be inconsistent with the public trust upon which the land was held.[115] In *Illinois Central Railroad* there was no intimation, nor operation, of any implied condition subsequent.

After noting that the Massachusetts Supreme Judicial Court had held

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111. 79 Mass. Adv. Sh. 1992, 2014, 393 N.E.2d 356, 366 (1979), *quoting* Illinois Cent. R.R. v. Illinois, 146 U.S. 387, 453 (1892). This language is not being misinterpreted. Reinforcement for this interpretation is provided by similar language in the opinion.

> The control of the State for the purposes of the trust can never be lost, except as to such parcels as are used in promoting the interests of the public therein, or can be disposed of without any substantial impairment of the public interest in the lands and waters remaining.

146 U.S. at 453.

112. 146 U.S. 387, 453 (1892).

113. *Id.* at 452-53.

114. *Id.* at 452-55.

115. *Id.* at 455.

that legislative acts must be for a public purpose,[116] the *BWDC* court proceeded to define very narrowly the purpose served by the Lewis Wharf statutes. The Appeals Court below declined to decide whether the purpose underlying the statutes "is as broad as 'commercial purposes' or as narrow as to promote trade and commerce by enabling and encouraging the owners of flats to build wharves, warehouses, and other structures thereon for the use and convenience of those having occasion to resort to the ports and harbors."[117] The Supreme Judicial Court ruled that the grant was made for the latter purpose.[118]

The difficulty in accepting the notion that the grant of area B was made upon the condition that it be used in accordance with the aforementioned purpose is two-fold. First this purpose was first committed to writing approximately 70 years after the grant.[119] Secondly, the *BWDC* court, in the very next paragraph of its decision, stated that it was probably inconceivable to the legislators and judges of the time that the tremendous volume in shipping trade would ever cease, or that the wharf might be used as a foundation for private condominiums.[120] It follows, therefore, that it is equally inconceivable that in 1832 or 1834 the legislature intended to place such an unnecessary condition upon the Lewis Wharf grant.[121]

The *BWDC* court then added that it has held before that where a corporation was granted the *use* of certain previously public property for a public purpose, there was an implied condition in the grant that the company could not retain the granted locations without using them for the purpose for which they were granted. It is important to note that such an implied condition subsequent only attaches where the sovereign grants the property for no consideration.[122] However, the Lewis Wharf statutes were found by the court to constitute a grant in fee and not a

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116. *See* Opinion of the Justices, 332 Mass. 769, 781-82, 126 N.E.2d 795, 802-03 (1955); and Lowell v. Boston, 111 Mass. 454, 460-61 (1873).

117. 78 Mass. App. Ct. Adv. Sh. 354, 370-71, 374 N.E.2d 598, 605-06 (1978). "Commercial purposes" was discussed in S. Doc. No. 44, at 1 (1852).

118. 79 Mass. Adv. Sh. 1992, 2015, 393 N.E.2d 356, 366 (1979).

119. Bradford v. McQuesten, 182 Mass. 80, 64 N.E. 688 (1902), was decided in 1902. Support for this analysis can be found in the dissent where Justice Braucher strongly condemns the decision because:

> [t]he only condition expressed in the 1832 statute requires that any part of a wharf constructed in the harbor channel be "built on piles" and be parallel with described lines; there is no suggestion that there has been a breach of that condition. The condition now in issue is defined by the Court on the basis of verbal formulas in committee reports and judicial opinions first committed to writing many years after the grant.

79 Mass. Adv. Sh. 1992, 2025, 393 N.E.2d 356, 370 (1979).

120. 79 Mass. Adv. Sh. 1992, 2015, 393 N.E.2d 356, 366 (1979).

121. If the legislature could not conceive of a time when the harbor would cease to be much used for shipping, it is equally inconceivable that in 1832 the legislature would have felt compelled to impose a use restriction on the Lewis Wharf grant.

122. *See* Boston Waterfront Dev. Corp. v. Commonwealth, 79 Mass. Adv. Sh. 1992, 2016, 393 N.E.2d 356, 366 (1979), *citing* Boston Elevated Ry. Co. v. Commonwealth, 310 Mass. 528,

mere permissive license to *use* the disputed land. The apparent flaw in the court's reasoning is that they are referring to an implied condition subsequent attaching to a grant of the use of land rather than to a grant of a fee in land. Uses are permissive and often are revocable whereas grants in fee are not.[123]

In addition, it is the intent of the parties at the time of the grant which is relevant to its construction. However, the cases which first enunciated the holding that there was an implied condition subsequent that previously public property be used for the purpose for which it was granted, namely *Boston Elevated Railway v. Commonwealth*[124] and *New York Electric Lines Co. v. Empire City Subway Co.*,[125] were decided in 1914 and 1942, respectively. For an implied condition subsequent to apply to the grant made by the Lewis Wharf statutes, it would have to have been embodied in the grant at the time the grant was made.[126] This condition should not be imposed by a court in 1979 based on case law dated 80 to 100 years after the 1832 grant was made, unless it is clear that this was the intention of the legislature in 1832.

Furthermore, the facts and nature of the cases relied upon for sup-

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566, 39 N.E.2d 87, 114 (1942); Worcester v. Western R.R. Corp., 45 Mass. (4 Met.) 564, 566 (1842); *and* New York Elec. Lines Co. v. Empire City Subway Co., 235 U.S. 179, 194 (1914). *But see* Boston Waterfront Dev. Corp. v. Commonwealth, 78 Mass. App. Ct. Adv. Sh. 354, 371, 373 N.E.2d 598, 606, where the Appeals Court concedes that "[i]t is true, of course, that generally words declaring the purpose for which a grant is made are insufficient by themselves to create a condition subsequent. . . ." Rawson v. School Dist. in Uxbridge, 89 Mass. (7 Allen) 125, 128-29 (1863); Town of Wakefield v. Attorney Gen., 334 Mass. 632, 633-34, 636, 138 N.E.2d 197 (1956). SWAIM, CROCKER'S NOTES ON COMMON FORMS § 280 (7th ed. 1955). However, the Appeals Court then applies a rule of construction applicable to grants from the Crown of England, maintaining that:

> a conditional estate may be created by the use of words which declare that it is given . . . for a certain purpose, or with a particular intention. . . . But this rule is applicable only to those grants or gifts which are purely voluntary, and where there is no other consideration moving the grantor or donor besides the purpose for which the estate is declared to be created.

Boston Waterfront Dev. Corp. v. Commonwealth, 78 Mass. App. Ct. Adv. Sh. 353, 372, 374 N.E.2d 598, 606 (1978), *quoting* Rawson v. School Dist. in Uxbridge, 89 Mass. (7 Allen) 125, 128 (1863).

This rule of construction was deemed necessary to protect England from the oversights of the King who, after all, was but one individual and who might be pressured to grant out Crown lands to grantees who would likely be the authors of the granting instruments.

But a grant from the legislature does not have these characteristics and, thus, does not require this protective construction. To grant land by legislative act, both the Senate and the House must pass the act and the governor must sign it in order for it to be effective. Furthermore, since the legislature would almost surely be the author of the act, this rule of construction should not apply.

In addition, the present trend is to disfavor conditions subsequent. *See, e.g.*, Town of Wakefield v. Attorney Gen., 334 Mass. 632, 138 N.E.2d 197 (1956); *see also*, 1 CASNER, AMERICAN LAW OF PROPERTY § 192, at 311-13 (1939).

123. 1 CASNER, AMERICAN LAW OF PROPERTY § 192, at 311-13 (1939).

124. 310 Mass. 528, 566, 39 N.E.2d 87, 114 (1942).

125. 235 U.S. 179, 194 (1914).

126. That is, in 1832 and 1834.

port of an implied condition subsequent are patently distinguishable from the facts and nature of the *BWDC* case. A review of their facts and nature reveals that their holdings are inapplicable to the *BWDC* case. In *Boston Elevated Railway v. Commonwealth,*[127] the railway company was granted "locations" and a franchise to construct and operate an elevated railway on those locations. The court defined "locations" as being "in the nature of a privilege or permit to use the public ways [granted] . . ., for the purpose of facilitating public travel and accommodation."[128] The Massachusetts Supreme Judicial Court, in an earlier opinion relating to Boston Elevated Railway, held that "[t]he nature of its business is public."[129] In addition, the court held that the company's right in the streets was in the nature of personal estate, and not an interest in real estate.[130] A statutory forfeiture was declared which revoked the right to maintain and operate the railway because it was no longer being operated in the public service for the purpose for which the franchise was granted.[131] This statutory revocation was, in effect, upheld by the court by its ruling that the granted locations were subject to the implied condition subsequent that they be used for the purpose for which they were granted, and its finding of a breach of that condition.[132]

In *Worcester v. Western Railroad Corp.,*[133] the court recognized that, while real and personal property necessary to the establishment and maintenance of the railroad are vested in the corporation, it is in trust for the public and the railroad is obligated to use it in a particular manner for a specific public purpose.[134]

All three of the above cases deal with quasi-public rail transportation companies whose public nature and public function[135] distinguish them

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127. 310 Mass. 528, 39 N.E.2d 87 (1942).

128. *Id.* at 536, 39 N.E.2d at 99.

129. Opinion of the Justices, 261 Mass. 556, 594, 159 N.E. 70, 76 (1927).

130. Boston Elevated Ry. Co. v. Commonwealth, 310 Mass 528, 537, 39 N.E.2d 87, 99 (1942), *quoting* Connecticut Valley St. Ry. Co. v. City of Northampton, 213 Mass. 54, 64, 99 N.E. 516, 521 (1912).

131. Boston Elevated Ry. Co. v. Commonwealth, 310 Mass. 528, 540, 39 N.E.2d 87, 102 (1942).

132. *Id.* at 562-63, 571-73, 39 N.E.2d at 112-13, 116-17.

133. 45 Mass. (4 Met.) 564 (1842). In its analysis the *Worcester* court explained that a railroad is regarded as a public work, established by public authority, intended for the use and benefit of the whole community, and constitutes, therefore, like a canal, turnpike or highway, a public easement. *Id.* at 566.

134. *Id.* New York Elec. Lines Co. v. Empire City Subway Co., 235 U.S. 179 (1914), the third case cited in support of an implied condition, also involved the validity of a franchise revocation. The Court there upheld a 1906 ordinance revoking plaintiff's 1878 franchise which had never been exercised, holding that grants of franchises are subject to the tacit condition that they be lost by non-use or misuse. Therefore, since the right to use the streets was granted for the public benefit, the failure to exercise it is grounds for revocation. *Id.* at 194.

135. The "railroad" companies are further distinguishable from BWDC in the nature of their interests in land.

markedly from Boston Waterfront Development Corporation, a private, business corporation. *Boston Elevated Railway* and *New York Electric Lines* both involved revocation — one by statute, the other by ordinance — of permissive rights to use the public streets, which is the nature of personal estate, while BWDC was granted a fee interest in real property.[136] Furthermore, as *Worcester v. Western Railroad Corp.* points out, a railroad is in the nature of a public easement, while, in contradistinction, area B is held by BWDC in fee subject to the public's easement rights of fishing and navigation.[137] Given these differences in the nature of the entities and in their respective estates in land, the doctrine imposing an implied condition subsequent on the estates of the railroads seems inapplicable to BWDC's ownership of area B.

In addition, the public trust upon which the railroad in *Worcester* holds its property, is very different from the public trust to which area B is held subject. The railroad holds its property "in trust for the public and the railroad is obligated to *use* it in a particular manner for a specified purpose"[138] — namely railroad purposes. However, the public trust that area B is impressed with derives from the *jus publicum* which historically protected only the rights of fishing and navigation.[139] BWDC is not obligated to *use* its property in any particular manner by virtue of the public trust doctrine. The *BWDC* court has construed this use requirement from the implied condition subsequent. The public trust doctrine as applied to tidelands in Massachusetts has never before given the public any rights or influence in the development of tidelands held in fee except as that development might impair the public easement rights of fishing and navigation. The *BWDC* decision with (1) its narrow construction of the public purpose served by the Lewis Wharf statutes, (2) its imposition of a condition subsequent that the land must be used in accordance with that purpose, and (3) its language that the land is impressed with a public trust which gives the public an interest and responsibility in its development,[140] effectively results in a vast expansion of the public trust doctrine as applied to land below historic low water in Massachusetts.

The *BWDC* decision advances the public trust doctrine as applied to these types of cases to a position of control over permissible uses of land below historic extreme low water. The court's opinion implied that this

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136. *See* note 134 *supra.*

137. *See* Commonwealth v. Alger, 61 Mass. (7 Cush.) 53, 70 (1853).

138. Worcester v. Western R.R. Corp., 45 Mass. (4 Met.) 564, 566 (1842).

139. *See* Commonwealth v. City of Roxbury, 75 Mass. (9 Gray) 451, 483 (1857).

140. 79 Mass. Adv. Sh. 1992, 2017, 393 N.E.2d 356, 367 (1979). Previously, the public trust appurtenant to land below historic extreme low water in Massachusetts related only to the preservation of the public easement rights of fishing and navigation. *See* D. RICE, FINAL REPORT: A STUDY OF THE LAW PERTAINING TO THE TIDELANDS OF MASSACHUSETTS, 1971 House No. 4932, at 18. *See also,* Storer v. Freeman, 6 Mass. (6 Tyng) 435, 437 (1810).

control is exercisable only by the legislature, when the court maintains that where the use of public or publicly granted land changes over time, the legislature must approve the changed use.[141] The court's authority for this determination derives from *Robbins v. Department of Public Works.*[142] However, the *Robbins* rule applies only to lands actually devoted to one public use, and it does not appear from the facts that Lewis Wharf was ever devoted to a public use.[143]

Nevertheless, the court's delegation to the legislature of control over land use will presumably be exercised in the future by Acts declaring particular uses consistent or inconsistent with the applicable public purpose. The legislature would then be assuming the role of a state-wide zoning board of appeals.[144] If this inference is true, the legislature, and subsequently the courts, could become immersed in a sea of continuing supervision of property uses. It is, however, improbable that the court intended to burden the legislature with the task of supervising the use of hundreds of parcels of land held by private grantees pursuant to statutory grants, and to approve by affirmative legislation, every change in their use.[145] If the legislature were to supervise property uses in this manner, the court would undoubtedly be subjected to a tremendous volume of litigation seeking declaratory judgments of the validity of such legislation.[146] Therefore, it is probable that the court would

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141. Boston Waterfront Dev. Corp. v. Commonwealth, 79 Mass. Adv. Sh. 1992, 2016-17, 393 N.E.2d 356, 366 (1979), *citing* Robbins v. Dep't of Pub. Works, 355 Mass. 328, 330, 244 N.E.2d 577, 579 (1969).

142. 355 Mass. 328, 330, 244 N.E.2d 577, 579 (1969).

143. Robbins v. Dep't of Pub. Works, 355 Mass. 328, 330, 244 N.E.2d 577, 579 (1969), states that "[t]he rule that public lands devoted to one use cannot be diverted to another inconsistent public use without plain and explicit legislation authorizing the diversion is now firmly established in our law." *Id.* at 330, 244 N.E.2d at 579. Furthermore, "there must 'appear in the legislation not only a statement of the new use but a statement . . . showing in some way legislative awareness of the existing public use.' " Newburyport Redev. Auth. v. Commonwealth, 80 Mass. App. Ct. Adv. Sh. 287, 319, 401 N.E.2d 118, 141 (1980), *quoting* Robbins v. Dep't of Pub. Works, 355 Mass. at 330, 244 N.E.2d at 579. This rule, however, only applies to lands actually "devoted to one public use" and it does not appear from the facts that Lewis Wharf was ever devoted to a *public* use. It has been used as a *private* commercial shipping dock, not a public one, and, in addition, St. 1834, c. 115, gave the Lewis Wharf Company power to improve and manage their property, including area B, as to them seemed expedient.

The cases cited in the *BWDC* decision to support the statement that "where the use of public or publicly granted land changes over time, the Legislature must approve the changed use," namely Robbins v. Dep't of Pub. Works, 335 Mass. 328, 244 N.E.2d 577 (1969), Gould v. Greylock Reservation Comm'n, 350 Mass. 410, 215 N.E.2d 114 (1966), and Chase v. Sutton Mfg. Co., 58 Mass. (4 Cush.) 152 (1849) involves a state agency, a "public instrumentality," and a quasi-public canal company. Due to the public ownership factor in these instances, the legislature is required as the representative of the people to determine if the proposed change in the use of the land is in the public interest. However, BWDC is a private business corporation and the public trust which attaches to area B of their land has historically been limited to navigation and fishing rights. It has never extended to the uses to which the land may be put. *See* note 140 *supra.*

144. *See* note 141 and accompanying text *supra.*

145. Petition for Rehearing at 9, 79 Mass. Adv. Sh. 1992, 393 N.E.2d 356 (1979).

146. *Id.*

determine in appropriate proceedings whether a particular use of land is consistent with the public purpose pertaining to that land.

In response to the *BWDC* decision, and possibly also to the burden of the anticipated legislative role, proposed legislation has been drafted. This proposed legislation, if enacted, would declare that no condition, restriction or limitation on use shall be deemed to have been created or implied, from any grant by the Commonwealth purporting to create rights in waters or land located within the city of Boston situated below the primitive mean high-water mark, unless such condition, restriction or limitation is or was expressly set forth in the grant.[147] If certified to the Supreme Judicial Court for an advisory opinion, the constitutionality of such an act can be determined.[148] Furthermore, since rights of entry contingent upon the breach of a condition subsequent are inefficient, impractical and potentially expensive as devices to restrict land use, an affirmative response to the validity of the proposed legislation may permit a more practical supervision of these land uses. This practical supervision could include regulation pursuant to zoning laws, chapter 91 licensing procedures, federal and state water pollution statutes and urban renewal plans, rather than legislative or judicial determinations as to each present and each future use.

CONCLUSION

The result of the *BWDC* decision is that parcels of land which lie below the historic low-water line, and which were granted by the Commonwealth to a private party for no consideration other than the anticipation that improvements valuable to the Commonwealth would be constructed thereon, are subject to a condition subsequent that they be

147. *See* S. 2150 (1980) entitled a "Bill relative to title to tidelands lying within the city of Boston and bordering on or near the waters of the commonwealth."

148. *See* S. 2151 (1980) which states that "[g]rave doubt exists as to the constitutionality of [Senate Bill No. 2150] . . . if enacted into law; therefore be it *Ordered* that the opinions of the Honorable Justices of the Supreme Judicial Court be required by the Senate. . . ."

The extreme low water mark, as it stood upon the passage of the Colonial Ordinance of 1647, determines the extent to which the then owner of the upland acquired property rights in the tideland. Therefore it is somewhat surprising that the *BWDC* court used the Baldwin Low Water Mark of 1846 as the dividing line between public and private rights. It must be assumed that the parties stipulated to the use of the 1846 line, but if the 1647 low water mark lies upland of the 1846 low water mark (as it assuredly does) the Commonwealth has, with the court's approval, granted the intervening previously public lands for no consideration. Furthermore, the Commonwealth stipulated that this land is held in fee simple with neither restrictions nor implied conditions subsequent. *See* Boston Waterfront Dev. Corp. v. Commonwealth, 79 Mass. Adv. Sh. 1992, 1993, 393 N.E.2d 356, 357 (1979).

It will be interesting to compare this grant in fee simple of public lands for no consideration, with the Supreme Judicial Court's conclusion as to the constitutionality of the proposed legislation. *See* note 4 *supra*.

used for the purpose for which they were granted.[149] This condition subsequent does not attach to parcels which were granted for adequate consideration, however.[150] Therefore, most if not all of the titles to parcels of land in the Back Bay section of Boston, for example, which were auctioned off pursuant to statute will not be subject to a condition subsequent.[151] The properties most likely to be affected by the decision are parcels granted pursuant to wharfing statutes and the like, because most were granted for inadequate consideration. These parcels are likely to be now located on and near the waterfront, and are therefore extremely valuable.

Ironically, both the 1979 Supreme Judicial Court decision and the 1978 Appeals Court decision[152] on *Boston Waterfront Development Corp. v. Commonwealth,* which call for a legislative re-examination of

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149. Whether this condition subsequent is judicially enforceable remains an open question due to MASS. GEN. LAWS ch. 260 § 31A. BWDC contended that even if the Lewis Wharf statutes created a condition on their title to area B, the Commonwealth had lost its right to proceed against them for any breach of this condition due to MASS. GEN. LAWS ch. 260, § 31A; 79 Mass. Adv. Sh. 1992, 2019, 393 N.E.2d 356, 368 (1979). The court declined to determine the effect, if any, of this statute of limitations on the Commonwealth's assertion of its rights because the question was not properly raised by the issue presented to the Appeals Court. *Id.* That issue was whether the Land Court erred in finding that petitioner obtained fee simple title. *Id.* Consequently, further proceedings are necessary to determine the effect of MASS. GEN. LAWS ch. 260, § 31A, on the rights of the Commonwealth. *Id.* In essence, the statute bars any court proceeding after January 1, 1966, which is based upon a right of entry for condition broken unless the person(s) having that right has filed in the appropriate registry of deeds a notice of such right. This notice requirement applies to all such rights whether or not the owner thereof is government or a governmental subdivision. *See* MASS. GEN. LAWS ch. 260, § 31A.

The court admits that on its face, the language appears to include the Commonwealth. 79 Mass. Adv. Sh. 1992, 2021, 393 N.E.2d 356, 368 (1979). After the Land Court's decision which ruled that BWDC's predecessors in title had acquired fee simple absolute title to area B, the Legislature, by St. 1968, ch. 496, amended Section 31A to read: "[t]his section shall apply to all such rights whether or not the owner thereof is a corporation or a charity or a government or a governmental subdivision, *other than the commonwealth. . . .*" *Id.* at 2021, 393 N.E.2d at 368-69.

The Legislature later passed Chapter 527 of the Acts of 1974 which, by Section 4, provided that:

> the provisions of Section 31A of chapter 260 of the General Laws, as amended, shall not be construed to apply to, and do not apply to . . . fee simples subject to the right of entry or condition broken of the commonwealth, whether created before or after the effective date of the passage of this act, in lands owned and conveyed by the commonwealth, notwithstanding any lapse of time or the passage of any prior law.

See MASS. GEN. LAWS ANN. ch. 260, § 31A.

On January 1, 1966, section 31A of Chapter 260 expressly applied to governments and governmental subdivisions. Therefore, since the Commonwealth failed to record the required notice, this statute would seem to bar the Commonwealth from asserting its right of entry in any court after that date. However, if subsequent proceedings were brought to determine this issue, the court would probably rule that the 1968 amendment to Section 31A which excepted the Commonwealth from its provisions and the 1974 related law, as quoted above, evidence the intent of the legislature to exempt the Commonwealth from the statute of limitations at the time of its passage in 1956. Therefore, it is unlikely that the court would construe Section 31A of Chapter 260 of the General Laws to be a bar to the Commonwealth's assertion of its right of entry.

150. *See* note 122 *supra.*

151. *See, e.g.,* 1860 Mass. Special Laws, c. 200.

152. *See* 78 Mass. App. Ct. Adv. Sh. 354, 373, 374 N.E.2d 598, 606 (1978).

tideland law, were foreshadowed by the 1853 opinion of Chief Justice Shaw in *Commonwealth v. Alger.* Chief Justice Shaw stated:

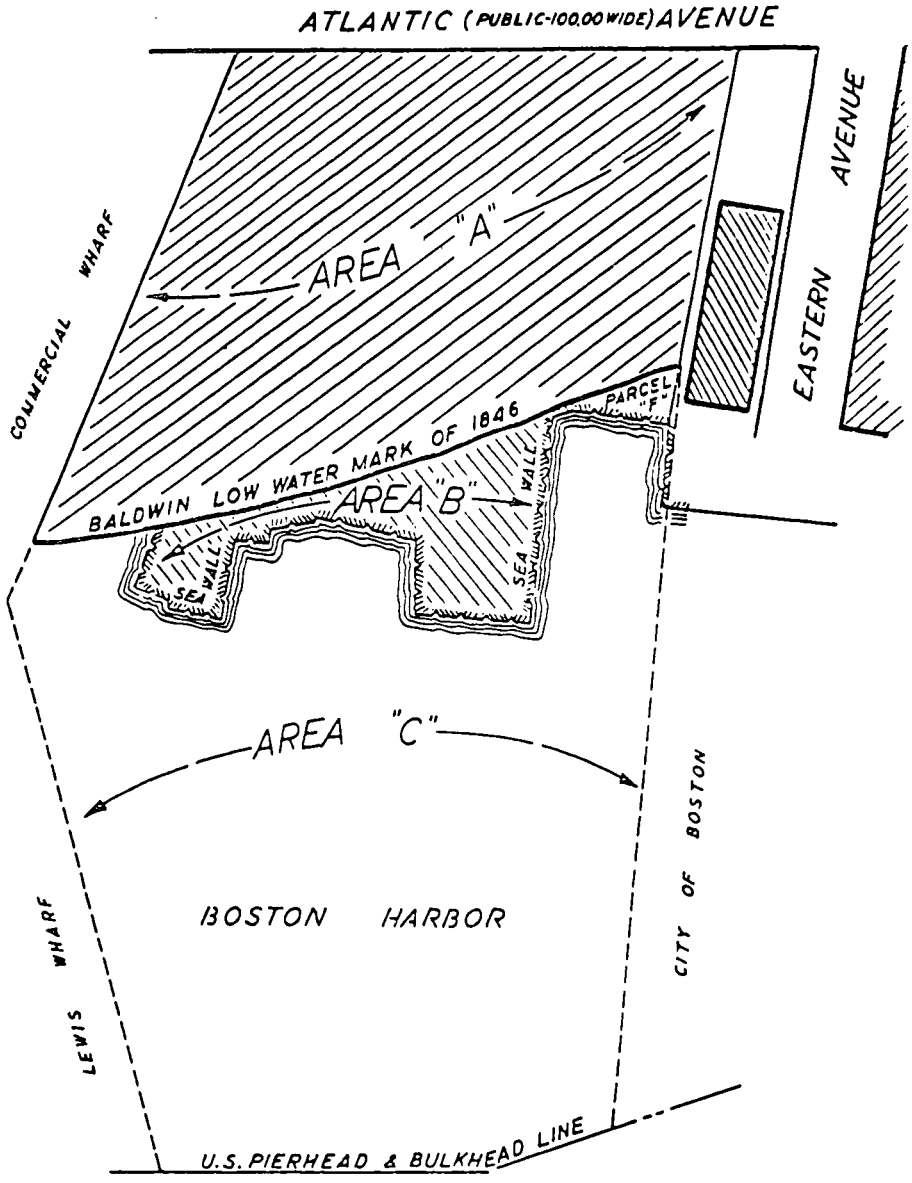
> Having once come to a conclusion that a case exists in which it is competent for the legislature to make a law on the subject, it is for them, under a high issue of duty to the public and to individuals, with a sacred regard to the rights of property and all other private rights, to make such [laws] . . . as they may judge necessary to protect public and private rights, and to impose no larger restraints upon the use and enjoyment of private property, than are in their judgment strictly necessary to preserve and protect the rights of others.[153]

In other words, Shaw also seemed to be calling for a legislative reexamination of the law applied to littoral property. Now, nearly 130 years later, it is finally up to the legislature to equitably balance the interests of the public in recreational areas with the interests of residents in living near the water, and with the interests of the business community in developing and beautifying waterfront areas, in order to arrive at a solution based upon the needs of the 1980's and beyond.

RICHARD H. MURPHY, JR.

153. Commonwealth v. Alger, 61 Mass. (7 Cush.) 53, 95, 102-03 (1853).

APPENDIX A-1


ATLANTIC (PUBLIC-100.00 WIDE) AVENUE
EASTERN AVENUE
COMMERCIAL WHARF
AREA "A"
PARCEL "F"
BALDWIN LOW WATER MARK OF 1846
AREA "B"
SEA WALL
SEA WALL
SEA WALL
AREA "C"
BOSTON HARBOR
CITY OF BOSTON
LEWIS WHARF
U.S. PIERHEAD & BULKHEAD LINE

APPENDIX A-2

1832 Mass. Special Laws c. 102

An Act to authorize the proprietors of Lewis' Wharf to extend the same.

SECT. 1. *BE it enacted by the Senate and House of Representatives, in General Court assembled, and by the authority of the same,* That the proprietors of the wharf in the city of Boston, now called and known by the name of Lewis' Wharf, be, and they are hereby authorized and empowered to extend and maintain the said wharf into the harbor channel, as far as to a line drawn straight from the present northeasterly corner of the end of Long wharf, or Boston pier, so called, to a point on the northerly end of said line, intersected by the southeasterly line or side of Union wharf, extended straight as far as the proprietors of said Union wharf are authorized to extend the same, by an act entitled "an act to authorize the proprietors of Union wharf to extend the same," passed on the twenty-seventh day of February, in the year of our Lord one thousand eight hundred and twenty-nine; and that the proprietors of said Lewis' wharf shall have and enjoy the right and privilege of laying vessels at the sides and end of their said wharf, and receiving dockage and wharfage therefor: *provided,* that so much of said wharf as may be constructed in said channel, shall be built on piles, and be parallel with the lines of the dock, and common highway, established northeasterly of said Long wharf, by the city of Boston and others.

Extension of Lewis' wharf authorized.

1828 ch. 92.

Proviso.

SECT. 2. *Be it further enacted,* That nothing herein contained shall be construed to authorize the proprietors of said Lewis' wharf to lessen or injure the rights or property of the owner or owners of any wharf or wharves adjoining said Lewis' wharf. [*March 7, 1832*].

Rights of others protected.

1834 Mass. Special Laws c. 115

An Act to incorporate the Lewis Wharf Company in the city of Boston.

SECT. 1. *BE it enacted by the Senate and House of Representatives, in General Court assembled, and by the authority of the same,* That John Dinney, Samuel S. Lewis and George Hallett, their associates and successors, are hereby made a corporation, by the name of the Lewis Wharf Company, with power to hold, in fee simple or otherwise, all or any part of that real estate situate in said city of Boston, including Lewis' wharf and Hancock's wharf, and bounded and described as follows, viz: northwesterly by Ann street, northeasterly by the northeasterly side of Fleet street, and the southwesterly side of Snow's wharf, formerly called Scarlet's wharf, extended into the harbor channel, southwesterly by Commercial street and the land and wharf of the Commercial wharf company, extended into the said channel, and northerly, easterly and southerly by a line or lines in said channel as far northerly, easterly and southerly as said Lewis' wharf or said Hancock's wharf may be lawfully extended; and said company may, within the limits aforesaid, construct docks and wharves, lay vessels within and at the ends and sides thereof, and receive dockage and wharfage therefor, erect buildings, lay out streets and passage ways, and improve and manage said property, as to them shall seem expedient: *provided,* that nothing herein contained shall be understood as authorizing said corporation in any way to interfere with the legal rights of any person or persons whomsoever.

Persons incorporated.

Real estate.

Proviso.

Number of shares.

Assessments, & c.

SECT. 2. *Be it further enacted,* That said corporation may, at any legal meeting, agree upon the number of shares, not exceeding five hundred, into which their stock shall be divided, which shares shall be transferable in a book kept by their clerk for that purpose, may assess on the stockholders such sums of money, from time to time, not exceeding in the whole two thousand dollars on each share, as may be necessary for the purchase, improvement and management of their estate, and may, in case any stockholder shall neglect to pay any such assessment, cause such of the shares of said stockholder, may be sufficient therefor, to be sold at public auction to the highest bidder, first giving thirty days notice of said sale, by advertisement thereof, in one or more newspapers printed in said Boston; and, after deducting the amount of such unpaid assessment, and the charges of sale, the surplus, if any, shall be paid to said stockholder, and the purchaser of such share or shares shall be entitled to receive a certificate of the same.

Right of voting.

SECT. 3. *Be it further enacted,* That, in all meetings of the members of said corporation, each proprietor shall be entitled to one vote for each share by him held of said stock, but no one proprietor shall ever be entitled to more than ten votes: *provided, always,* that no assessment shall be made at any meeting, unless agreed to by two thirds at least both in number and value of those proprietors present and represented, nor unless notice of the purpose of such meeting shall have been given ten days at least previous thereto, in the manner prescribed by the by-laws; and absent members may vote by proxy authorized in writing. [*March 25, 1834.*] Add. act, 1835 ch. 76.

APPENDIX A-3

1835 Mass. Special Laws c. 76

An Act in addition to "An Act to incorporate the Lewis Wharf Company, in the city of Boston."

BE it enacted by the Senate and House of Representatives, in General Court assembled, and by the authority of the same, That the Lewis Wharf Company, and their successor, be, and they are hereby authorized and empowered to purchase and hold all that tract or parcel of land, wharf and flats, situate in the city of Boston, including the wharf formerly called Scarlet's or Snow's wharf, bounded westerly on Commercial street, northeasterly by land, wharf and flats now or lately of Erasmus Thompson, southeasterly by the harbor channel, and southwesterly by the land, wharf and flats of said Lewis Wharf Company. And said company shall hold the said real estate, when purchased by them, with all the powers and privileges, and subject to all the duties and requisitions mentioned in relation to their other property, in the act to which this is an addition. [*March 27, 1835.*]

1834 ch. 115.

Authorized to purchase and hold land.

1840 Mass. Special Laws c. 18

An Act to authorize the Lewis Wharf Company to extend their Wharves.

1834, ch. 115.
1835, ch. 76.

BE it enacted by the Senate and House of Representatives, in General Court assembled, and by the authority of the same, as follows:

Limit to which the wharf may be extended.
1837, ch. 229.

The Lewis Wharf Company are hereby empowered and authorized to extend and maintain their wharves, in the city of Boston, into the harbor channel, as far as the line established by the act, entitled an act to preserve the harbor of Boston, and to prevent encroachments therein, passed on the nineteenth day of April, in the year one thousand eight hundred and thirty-seven; and shall have and enjoy the same rights and privileges of laying vessels at the sides and ends of their said wharves, and of receiving wharfage and dockage therefor, which they now have: *provided,* that so much of said wharf as may be constructed into said channel, shall be built upon piles, and that nothing herein contained shall in any way interfere with the legal rights of the owners of any wharves adjoining that of said company, or of any other person whatever. [*March 7, 1840.*] Add. act, 1841, ch. 11.

To be built on piles.

Seider v. Roth[1] Jurisdiction:[2] A Durable Rule Dies a Slow Death With the Advent of *Rush v. Savchuk*[3]

In 1966, a New York Court of Appeals decision in the case of *Seider v. Roth* enabled New York residents, who were injured in out-of-state accidents, to bring an action against the non-resident tortfeasors in New York state courts. Jurisdiction over the non-resident defendants was established by attaching the contractual obligation of their insurance companies to indemnify them provided the insurance company was doing business in New York.[4] The contractual obligation of the insurer to defend and indemnify the insured was regarded as a "debt" owed to the non-resident defendant by the insurer and subject to attachment in New York.[5] However, the demise of the *Seider* rule appears on the horizon

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1. 17 N.Y.2d 111, 216 N.E.2d 312, 269 N.Y.S.2d 99 (1966).

2. Jurisdiction over persons or property is categorized as in personam or in rem, respectively. It is necessary to establish a court's jurisdiction over the persons involved in, or property which is the subject of the suit. An in personam judgment had an effect over a particular person, an in rem judgment affects the interests of all persons in a particular piece of property or thing. This Comment is primarily concerned with a third type of jurisdiction, quasi in rem jurisdiction. This type of jurisdictional device binds the interests of particular persons in a thing or property. There are two types of quasi in rem proceedings. First, the plaintiff asserts an interest in a particular res or thing and seeks to establish that interest against the claim of another. Second, the plaintiff does not assert that he has an interest in the res or thing, but asserts a claim against the defendant personally and seeks, by attachment or garnishment, to apply the thing to the satisfaction of his claim against the defendant. *See* Comment, *The Constitutionality of Seider v. Roth after Shaffer v. Heitner,* 78 COLUM. L. REV. 409 (1978); *see also* RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 56-68, Introductory Note at 190 (1971). This discussion will refer to the second type of quasi in rem proceeding.

3. 444 U.S. 320 (1980).

4. 17 N.Y.2d 111, 216 N.E.2d 312, 269 N.Y.S.2d 99 (1966).

5. N.Y. CIV. PRAC. §§ 5201, 6201 (McKinney 1972).

§ 5201. Debt or property subject to enforcement; proper garnishee

(a) Debt against which a money judgment may be enforced. A money judgment may be enforced against any debt, which is past due or which is yet to become due, certainly or upon demand of the judgment debtor, whether it was incurred within or without the state, to or from a resident or non-resident, unless it is exempt from application to the

with the advent of the United States Supreme Court's decision in the recent Minnesota Supreme Court case of *Rush v. Savchuk.*

The rationale in *Seider* for the attachment of a debt for jurisdictional purposes was espoused by an early United States Supreme Court decision in *Harris v. Balk.*[6] In 1977, another United States Supereme Court case, *Shaffer v. Heitner,*[7] affected the *Harris* decision[8] by stating that a non-resident's property (a debt was considered property) located within a forum state cannot be attached for jurisdictional purposes if it is

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satisfaction of the judgment. A debt may consist of a cause of action which could be assigned or transferred accruing within or without the state.

(b) Property against which a money judgment may be enforced. A money judgment may be enforced against any property which could be assigned or transferred, whether it consists of a present or future right or interest and whether or not it is vested, unless it is exempt from application to the satisfaction of the judgment. A money judgment entered upon a joint liability of two or more persons may be enforced against individual property of those persons summoned and joint property of such persons with any other persons against whom the judgment is entered.

(c) Proper garnishee for particular property or debt.

1. Where property consists of a right or share in the stock of an association or corporation, or interests or profits therein, for which a certificate of stock or other negotiable instrument is not outstanding, the corporation, or the president or treasurer of the association on behalf of the association, shall be the garnishee.

2. Where property consists of a right or interest to or in a decedent's estate or any other property or fund held or controlled by a fiduciary, the executor or trustee under the will, administrator or other fiduciary shall be the garnishee.

3. Where property consists of an interest in a partnership, any partner other than the judgment debtor, on behalf of the partnership, shall be the garnishee.

4. Where property or a debt is evidenced by a negotiable instrument for the payment of money, a negotiable document of title or a certificate of stock of an association or corporation, the instrument, document or certificate shall be treated as property capable of delivery and the person holding it shall be the garnishee; except that in the case of a security which is transferable in the manner set forth in section 8-320 of the uniform commercial code, the firm or corporation which carries on its books an account in the name of the judgment debtor in which is reflected such security, shall be the garnishee; provided, however, that if such security has been pledged, the pledgee shall be the garnishee.

§ 6201. Grounds for attachment

An order of attachment may be granted in any action, except a matrimonial action, where the plaintiff has demanded and would be entitled, in whole or in part, or in the alternative, to a money judgment against one or more defendants, when:

1. the defendant is a foreign corporation or not a resident or domiciliary of the state; or

2. the defendant resides or is domiciled in the state and cannot be personally served despite diligent efforts to do so; or

3. the defendant, with intent to defraud his creditors or to avoid the service of summons, has departed or is about to depart from the state, or keeps himself concealed therein; or

4. the defendant with intent to defraud his creditors, has assigned, disposed of or secreted property, or removed it from the state or is about to do any of these acts; or

5. the defendant, in an action upon a contract, express or implied, has been guilty of a fraud in contracting or incurring the liability; or

6. the action is based on the wrongful receipt, conversion or retention, or the aiding or abetting thereof, of any property held or owned by any governmental agency, including a municipal or public corporation, or officer thereof; or

7. there is a cause of action to recover damages for the conversion of personal property, or for fraud or deceit.

6. 198 U.S. 215 (1905).

7. 433 U.S. 186 (1977).

8. 198 U.S. 215 (1905).

unrelated to the cause of action.[9] The *Shaffer* court emphasized that there must be some other minimum contacts between the non-resident defendant and the forum state[10] or that the property must be the subject matter of the suit.[11]

The *Shaffer* decision arguably presented a constitutional due process problem to the *Seider* procedure which used the property of non-resident defendants solely for jurisdictional purposes. However, though controversial at its inception,[12] the *Seider* device has withstood many constitutional challenges including recent interpretations of the *Shaffer* decision.[13] *Seider* proponents distinguish the *Shaffer* holding by declaring that the insurance proceeds sought by the injured plaintiffs are the subject matter of the suit and therefore can be validly attached. However, the Supreme Court of the United States in *Rush* appears to be reluctant to agree with the *Seider* rule advocates.[14]

In *Rush*[15] the Court held that a State may not constitutionally exercise quasi in rem jurisdiction[16] over a non-resident defendant, who has no contacts with the forum state, by attaching the contractual obligation of the defendant's insurer to indemnify the defendant.[17] The fact that an insurance company is licensed to do business in a forum state was deemed to be an insufficient contact between the defendant's liability insurer and the forum state to confer valid jurisdiction.[18]

The Court reversed the Minnesota Supreme Court's decision[19] which

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9. 433 U.S. 186 (1977).

10. *Id.*

11. *Id.*

12. *See, e.g.*, Rosenberg, *One Procedural Genie Too Many or Putting Seider Back Into Its Bottle*, 71 COLUM. L. REV. 660 (1971); Stein, *Jurisdiction by Attachment of Liability Insurance*, 43 N.Y.U.L. REV. 1075 (1968); Zammit, *Quasi-In-Rem Jurisdiction: Outmoded and Unconstitutional?*, 49 ST. JOHN'S L. REV. 668 (1975); Comment, *Garnishment of Intangibles: Contingent Obligations and the Interstate Corporation*, 67 COLUM. L. REV. 550 (1967); Note, *Jurisdiction In Rem and the Attachment of Intangibles: Erosion of the Power Theory*, 1968 DUKE L.J. 725.

13. *Seider* upheld in New York: *See* Donawitz v. Danek, 42 N.Y.2d 138, 366 N.E.2d 253, 397 N.Y.S.2d 592 (1977); Simpson v. Loehmann, 21 N.Y.2d 305, 234 N.E.2d 669, 287 N.Y.S.2d 633 (1967). Though New York courts have split over the implications for *Seider*-type jurisdiction, it was most recently upheld in light of Shaffer v. Heitner, 433 U.S. 186 (1977), in Baden v. Staples, 45 N.Y.2d 889, 383 N.E.2d 110, 410 N.Y.S.2d 808 (1978), and Alford v. McGraw, 61 App. Div.2d 504, 402 N.Y.S.2d 499 (1978).

14. 444 U.S. 320 (1980).

15. *Id.*

16. *See also* note 2 and accompanying text *supra.*

17. 444 U.S. 320, 321 (1980).

18. *Id.*

19. States which have rejected the minority view are: Javorek v. Superior Court, 17 Cal.3d 629, 552 P.2d 728 (1976); Grinnell v. Garrett, 295 So.2d 496 (La. App. 1974); Belcher v. Government Employees Ins. Co., 282 Md. 718, 387 A.2d 770 (1978); State ex rel. Government Employees Ins. Co. v. Lasky, 454 S.W.2d 942 (Mo. App. 1970); Hart v. Cote, 145 N.J. Super. 420, 367 A.2d 1219 (Law Div. 1976); Johnson v. Farmers Alliance Mutual Ins. Co., 499 P.2d 1387 (Okla. 1972); Jardine v. Donnelly, 413 Pa. 474, 198 A.2d 513 (1964); De Rentiis v. Lewis, 106 R.I. 240, 258 A.2d 464 (1969); Howard v. Allen, 254 S.C. 455, 176 S.E.2d 127 (1970); Housley v. Anaconda Co., 19

held that an assertion of jurisdiction over out-of-state defendants pursuant to its state statute,[20] satisfied the due process standards of "fair play and substantial justice,"[21] set forth in *International Shoe Co., Inc. v. Washington*[22] and in *Shaffer v. Heitner.*[23] The Court in *Rush* held that a state may exercise jurisdiction over a non-resident defendant only if the defendant had those minimum contacts with the forum state prescribed by *International Shoe* and its progeny.[24] In determining whether a particular exercise of state court jurisdiction is consistent with due process, the Court stated that the inquiry must focus on the relationship between the defendant, the forum and the litigation as established in *Shaffer.*[25] The Court noted that the only relationship between the defendant, the forum state and the law suit in *Rush* was that the defendant's insurance company was licensed to do business in the forum state. The Court declared that this factor was insufficient to satisfy the due process standards of minimum contacts and fairness to maintain the suit.[26]

This Comment discusses briefly the history of the States' exercise of jurisdiction over non-resident defendants. It looks into the balance sought to be achieved between the interests of the States in providing a forum for their injured residents and the interests of fairness to the non-resident defendants who must defend themselves in a foreign jurisdiction. This Comment points out the extensions and limitations placed

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Utah 2d 124, 427 P.2d 390 (1967). *See also* Tessier v. State Farm Mutual Ins. Co., 458 F.2d 1299 (1st Cir. 1972); Kirchman v. Mikula, 443 F.2d 816 (5th Cir. 1971); Robinson v. O.F. Shearer & Sons, 429 F.2d 83 (3rd Cir. 1970); Sykes v. Beal, 392 F. Supp. 1089 (D. Conn. 1975); Ricker v. LaJoie, 314 F. Supp. 401 (D. Vt 1970). *See* notes 65-69 and accompanying text *infra.*

20. MINN. STAT. § 571.41, Subd. 2 (1978) provides in relevant part:

> Notwithstanding anything to the contrary herein contained, a plaintiff in any action in a court of record for the recovery of money may issue a garnishee summons before judgment therein in the following instances only:
> (b) If the court shall order the issuance of such summons, if a summons and complaint is filed with the appropriate court and either served on the defendant or delivered to a sheriff for service on the defendant not more than 30 days after the order is signed, and if, upon application to the court it shall appear that:
> (2) The purpose of the garnishment is to establish quasi in rem jurisdiction and that:
> (b) defendant is a nonresident individual, or a foreign corporation, partnership or association.
> (3) The garnishee and the debtor are parties to a contract of suretyship, guarantee, or insurance, because of which the garnishee may be held to respond to any person for the claim asserted against the debtor in the main action. . . .

The Minnesota Supreme Court cited this version of the statute, enacted in 1976, in its opinion on remand from the United States Supreme Court in Rush v. Savchuk, 311 Minn. 496, 272 N.W.2d 888 (1978). The version of the statute that was in effect at the time of the original opinion in Rush v. Savchuk, 311 Minn. 480, 245 N.W.2d 624 (1976) does not differ in any important respect.

21. 326 U.S. 310, 316 (1945).

22. *Id.*

23. 433 U.S. 186 (1977).

24. 444 U.S. 320, 333 (1980).

25. *Id.* at 327.

26. *Id.* at 327-28.

upon the exercise of jurisdiction over out-of-state defendants by examining interpretations of the U.S. Supreme Court decisions leading up to the *Seider* decision.[27] A brief examination of the *Seider* case follows the background discussion and the rationale behind the *Seider* rule is presented. The *Seider* rule is then compared with the *Shaffer* holding, which is ultimately distinguished by the New York and Minnesota courts who seek to apply the *Seider* procedure.

After presenting the facts, issue and holding of the *Rush* case, an analysis of the pro and anti-*Seider* viewpoints is presented. This article concludes that the *Rush* decision implicitly yet effectively overrules the procedure announced by *Seider* even though the *Rush* Court does not do so expressly. Because the minimum contacts test of *International Shoe,* which was reaffirmed by *Shaffer,* is deemed to be the crux of the U.S. Supreme Court's emphasis and the finding that these contacts have not been met by the *Seider* device used in *Rush,* the *Seider* procedure is now perceived to be violative of due process and therefore unconstitutional. Practically speaking, this Comment concedes no other alternative than for plaintiffs injured out-of-state to sue their non-resident tortfeasors in the defendant's own state, or the state where the accident took place, unless the non-resident will acquiesce to in personam jurisdiction in the plaintiff's state.

I. HISTORICAL BACKGROUND OF JURISDICTION OVER PERSONS AND PROPERTY

The long line of cases which discuss the basis of a state's power to exercise jurisdiction over a defendant invariably begins with the landmark case of *Pennoyer v. Neff.*[28] The Supreme Court of the United States

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27. This Comment does not analyze the entire history of the establishment of jurisdiction over non-resident defendants. Rather, it highlights the most recent interpretations of *Shaffer* and *International Shoe* in the recent United States Supreme Court case of Rush v. Savchuk, 444 U.S. 320 (1980). It attempts to point out that the most recent casualty to faulty jurisdictional reasoning is the controversial *Seider* rule.

28. 95 U.S. 714 (1877). *Pennoyer* dealt with the constitutionality of an Oregon long-arm statute which provided for state jurisdiction over a nonresident if he would, a) voluntarily appear before the court; b) be present within the state; c) be a resident of the state; or d) have property within the state.

> The statute of Oregon at the time of the commencement of the suit against Neff was as follows:
>
> "SECT. 55. When service of the summons cannot be made as prescribed in the last preceding section, and the defendant, after due diligence, cannot be found within the State, and when that fact appears, by affidavit, to the satisfaction of the court or judge thereof, or justice in an action in a justice's court, and it also appears that a cause of action exists against the defendant, or that he is a proper party to an action relating to real property in this State, such court or judge or justice may grant an order that the service be made by publication of summons in either of the following cases: . . .
>
> "3. When the defendant is not a resident of the State, but has property therein, and the court has jurisdiction of the subject of the action.
>
> "SECT. 56. The order shall direct the publication to be made in a newspaper published in the county where the action is commenced, and, if no newspaper be published in the

established in *Pennoyer* that the due process clause of the Fourteenth Amendment limited a state's jurisdiction to persons or property present within its territory only,[29] unless jurisdiction was consented to by the non-resident.

Twenty-eight years later in *Harris v. Balk,*[30] the United States Supreme Court ruled that intangible property, such as a debt, would be deemed to be "present" within any state the debtor finds himself.[31] In *Harris,* a debt was owed to Balk, a North Carolina resident, by Harris, also a North Carolina resident who was visiting in Maryland. Epstein, a resident of Maryland, was owed money by Balk. Epstein attached the debt Harris owed Balk. Harris did not contest the garnishee process and paid Epstein[32] the money Harris owed to Balk. Balk commenced an action against Harris in North Carolina on the ground that the Maryland court did not have jurisdiction to garnish the debt due Balk from Harris. He contended that Harris was only temporarily in Maryland and the situs of the debt was North Carolina. The North Carolina trial court agreed with Balk's contentions and found against Harris. The North Carolina Supreme Court affirmed.[33] On appeal, the United States Supreme Court reversed stating that if a court (Maryland) could obtain personal jurisdiction over a debtor (Harris) of an absentee defendant (Balk), a plaintiff (Epstein) could garnish that debt as an intangible res found within the state's boundaries and the res could then serve as a

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county, then in a newspaper to be designated as most likely to give notice to the person to be served, and for such length of time as may be deemed reasonable, not less than once a week for six weeks. In case of publication, the court or judge shall also direct a copy of the summons and complaint to be forthwith deposited in the post-office, directed to the defendant, at his place of residence, unless it shall appear that such residence is neither known to the party making the application, nor can, with reasonable diligence, be ascertained by him. When publication is ordered, personal service of a copy of the summons and complaint out of the State shall be equivalent to publication and deposit in the post-office. In either case, the defendant shall appear and answer by the first day of the term following the expiration or the time prescribed in the order for publication; and, if he does not, judgment may be taken against him for want thereof. In case of personal service out of the State, the summons shall specify the time prescribed in the order for publication.

"SECT. 57. The defendant against whom publication is ordered, or his personal representatives, on application and sufficient cause shown, at any time before judgment, shall be allowed to defend the action; and the defendant against whom publication is ordered, or his representatives, may in like manner, upon good cause shown, and upon such terms as may be proper, be allowed to defend after judgment, and within one year after the entry of such judgment, on such terms as may be just; and, if the defense be successful, and the judgment or any part thereof have been collected or otherwise enforced, such restitution may thereupon be compelled as the court shall direct. But the title to property sold upon execution issued on such judgment to a purchaser in good faith shall not be thereby affected."

"SECT. 60. Proof of the service of summons shall be, in case of publication, the affidavit of the printer, or his foreman, or his principal clerk, showing the same."

29. 95 U.S. 714, 722, 733 (1877).

30. 198 U.S. 215 (1905).

31. *Id.* at 227.

32. *Id.* Harris had returned to North Carolina before judgment had been rendered. He paid Epstein's attorney in North Carolina upon apprisal of the judgment in Maryland.

33. *Id.* at 217.

basis for quasi in rem jurisdiction.[34] However, the judgment rendered could not exceed the amount of the garnished debt.[35]

The *Harris* rationale presents what might be called the first of a two-pronged legal fiction upon which the *Seider* rule is based.[36] That is, *Harris* assigns a fictional situs, for garnishment purposes, to a debt wherever the debtor is found.[37] The second prong of this legal fiction is provided by *International Shoe,*[38] decided forty years after *Harris. International Shoe* established the "presence" of a corporation, for jurisdictional purposes, wherever it was doing business.[39]

In *International Shoe,* the Washington unemployment compensation statute required contributions by employers.[40] International Shoe Co., a Delaware corporation having its principal place of business in Missouri, employed some salespersons to be supervised by managers in Missouri. These salespeople resided in Washington and did most of their work there. A notice of assessment was served upon one of International's Washington salespersons and a copy of the notice was sent by registered mail to International's Missouri address. International refused to pay the assessment claiming that Washington had no jurisdiction over an out-of-state corporation. The Supreme Court of the United States held that for a state to subject a non-resident defendant to in personam jurisdiction, due process requires that he have certain "minimum contacts with the forum state such that maintenance of the suit would not offend traditional notions of fair play and substantial justice."[41] Washington's asserted jurisdiction over the non-resident corporation was upheld on the basis that a corporation was "present" wherever it was conducting business.[42]

The *Pennoyer* holding encompassed the rigid rule that a state may not exercise its jurisdictional power outside its territorial boundaries.[43] *Harris* and *International Shoe,* embodied the liberal standards that non-residents can be subject to judgments rendered in states where their debtors may be found[44] or where they had certain minimum contacts.[45]

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34. *Id.* at 222. *See also* note 2 and accompanying text *supra.*
35. *Id.* at 226-27.
36. 444 U.S. 320, 328 (1980). Although the *Seider* court did not expressly rely upon *Harris,* New York's attachment statute is at least in part predicated on *Harris* rationale. The *Seider* court's reliance on *Harris* was subsequently made explicit in Simpson v. Loehmann, 21 N.Y.2d 305, 234 N.E.2d 669, 287 N.Y.S.2d 633 (1967).
37. 198 U.S. 215, 224-25 (1905).
38. 326 U.S. 310 (1945).
39. *Id.* at 321.
40. *Id.* at 311-12.
41. *Id.* at 316.
42. *Id.*
43. 95 U.S. 714 (1877).
44. 198 U.S. 215 (1905).
45. 326 U.S. 310 (1945).

It would seem that the direction of the courts from 1877 to 1958 was toward reducing all restrictions upon the states' authority to exercise its jurisdiction over non-residents. In 1958, however, the U.S. Supreme Court had an opportunity to curtail this trend with its decision in *Hanson v. Denckla.*[46]

The *Hanson* case was concerned with the issue of whether the jurisdiction of a Florida State Probate Court could be obtained over a Delaware trust because the deceased settlor, and some beneficiaries under the trust, resided in Florida.[47] However, the trustee, the trust funds, and some other beneficiaries were neither present nor residing in Florida. The United States Supreme Court stated that it was essential that the non-resident defendant (the trustee) purposefully avail himself of the privileges and immunities of the forum state (Florida) for jurisdiction to apply.[48] The Court found that the trustee in Delaware never did any business nor carried on any transactions within Florida that would allow Florida to exert jurisdiction over him.[49] Even though there was some correspondence between the settlor and the trustee, such correspondence was initiated by the settlor, not the trustee.[50] In order to

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46. 357 U.S. 235 (1958).

47. In *Hanson,* a domiciliary of Pennsylvania executed a trust instrument in Wilmington, Delaware in 1935. The trust reserved the income to the settlor for her life and the principal and any undisturbed income was to pass on her death either as appointed in any last instrument she might execute and deliver to the trustee, or in absence of that, pursuant to her last will. The settlor then moved to Florida and in 1949 executed a series of appointments in favor of her grandchildren. She also executed a will the same day which contained a residuary clause covering any property over which she might have a power of appointment that had not been effectively exercised prior to her death. When the settlor died, her daughters in Florida, the residuary legatees, claimed that the powers of appointment had been ineffectively exercised and asked the Florida Probate Court to declare that the Delaware trust passed under the residuary clause of the will. The Delaware trustee and the grandchildren were served with process but most chose not to appear. Those who did appear contested jurisdiction on the grounds that the Delaware trustee was an indispensable party and that Florida had no basis for jurisdiction. The Florida court held for the daughters claiming that the appointments were ineffective, the trust was invalid, and that the trust property therefore passed under the will. The Florida court also stated that the presence of the res, the trust assets in Delaware, was not essential to its valid exercise of jurisdiction. The Florida court focused its attention on the fact that it had authority over the probate and construction of the will, under which the trust assets might pass. Therefore, that was sufficient for jurisdictional purposes, to order the trustee to relinquish the trust assets to the Florida beneficiaries.

Meanwhile, the grandchildren sued in Delaware for a declaratory judgment that the assets passed to them by appointment.

The Florida defendants were served with process, but few chose to appear. Those who did appear claimed that the Florida judgment rendered the Delaware action res judicata. The Delaware court held in favor of the appointments for the grandchildren and refused to grant the Florida judgment full faith and credit. The Delaware court claimed that Florida did not have jurisdiction over the case because the subject matter of the suit, the trust, was in Delaware and Florida could not exercise its power over it. Certiorari was granted and the United States Supreme Court affirmed the Delaware judgment.

48. 357 U.S. 235, 253 (1958).

49. *Id.* at 250.

50. *Id.* at 253. Finally, the Court pointed out that under Florida law, the trustee was an indispensable party over whom the court must acquire jurisdiction before it has the power to enter a

obtain personal jurisdiction over the trustee the minimum contacts test of *International Shoe Co.*, should have been met.[51]

II. THE *SEIDER* RULE

It is against this background that the *Seider* rule is set. The plaintiff in *Seider,* a New York resident injured in an automobile accident in Vermont, brought an action in New York court against Lemiux, the Canadian driver of another car involved in the accident.[52] Unable to establish in personam jurisdiction over the non-resident Canadian in New York, Seider sought to institute a quasi in rem proceeding by attaching the liability insurance obligation running to Lemiux from the Hartford Accident and Indemnity Company, his insurer.[53] Hartford was served with the attachment papers in New York, where it conducted business and was subject to suit. Lemiux was personally served in Canada and he moved to vacate the attachment, service of summons and complaint for lack of jurisdiction.[54] In upholding the attachment, the court relied implicitly on the well-established rule at that time of *Harris v. Balk.*[55]

The court in *Seider* looked to the obligation of Hartford to defend Lemiux in any automobile negligence action and, if judgment was rendered against him, to indemnify him. The New York court declared that as soon as the accident occurred, there was imposed upon the insurance company a contractual requirement to defend which could be construed as a "debt" to satisfy the New York statutes.[56] The court noted that the policy enumerated several obligations[57] which accrue as soon as the insurer gets notice of the accident regardless of whether there is a law suit. The attached insurance obligation in *Seider,* therefore, was treated as equivalent to the debt garnished in *Harris* and jurisdiction was upheld on that basis.[58]

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binding judgment affecting the trust. The Court declared that Florida does not acquire that jurisdiction by being the "center of gravity" of the controversy nor the most convenient location.

See also McGee v. International Life Ins. Co., 355 U.S. 220 (1957) wherein it was held that correspondence initiated by the non-resident was enough minimum contacts to maintain jurisdiction.

51. *Id.* at 251.

52. Seider v. Roth, 17 N.Y.2d 111, 112, 216 N.E.2d 312, 313, 269 N.Y.S.2d 99, 100 (1966). Roth, the driver of a third car involved in the collision, was the other co-defendant.

53. *Id. See also* note 2 and accompanying text *supra.*

54. *See* note 2 and accompanying text *supra.*

55. 198 U.S. 215 (1905). *See* note 30 and accompanying text *supra.*

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

57. For instance, under the "Insuring Agreements" and under "Additional Agreements" "No. 2", the insurer agrees upon receipt of notice of loss or damage to investigate and if expedient to negotiate or settle with the claimant. Furthermore, under "Section B" the insurer agrees to pay necessary medical and similar expenses of the insured and any other injured person.

Seider v. Roth, 17 N.Y.2d 111, 112, 216 N.E.2d 312, 314, 269 N.Y.S.2d 99, 101 (1966).

58. *Id.* at 113, 216 N.E.2d at 314, 269 N.Y.S.2d at 101.

Though the proponent of the *Seider* rule, Chief Justice Desmond of the Court of Appeals of

The *Seider* court further pointed out that by allowing a New York court's exercise of jurisdiction over a non-resident defendant based upon the contractual obligation of his insurer doing business in New York, the court has set up what is called a "direct action" against the insurer.[59] A direct action procedure, whether by statute or by judge-made law, would allow a plaintiff injured in an automobile accident to sue an insurance carrier directly.[60] This would be allowed no matter where the accident took place so long as the plaintiff was a resident of the forum state and the insurer was doing business within the forum state. Theoretically, such a procedure would render unnecessary the attachment of the insurer's obligations to defend and indemnify.[61] The judgment, of course, would only be rendered against the insurer and the plaintiff, if successful, would be foreclosed from subsequently suing the insured.[62]

New York, declared the question to be a novel one, he nevertheless relied upon a New York decision, *In re* Riggle's Estate, 11 N.Y.2d 73, 181 N.E.2d 436, 226 N.Y.S.2d 416 (1962).

In that case, the late Mr. Riggle, who had been a resident of Illinois, was the driver of an automobile which, in an accident in Wyoming, had injured a New York resident named Mrs. Wells. In order to sue Riggle in New York, Mrs. Wells moved to have appointed an administrator with the will annexed of Riggle's property. This was because Riggle died after the suit was commenced. The only "property" that belonged to Riggle's estate in New York was the obligation of an insurance company to defend and indemnify Riggle. According to Section 47 of the Surrogate's Court Act, (see below) for the purpose of conferring jurisdiction "a debt owing to a decedent by a resident of the state" was regarded as personal property. The court therefore held that the liability insurance policy made decedent's estate a "creditor" and the insurer a "debtor" sufficient to satisfy the statute even though no judgment had been obtained against Riggle. The most common criticism for comparing Riggle procedures with the *Seider* case is that the in personam jurisdiction over the non-resident defendant in Riggle had already been obtained. There was no contest of jurisdiction in Riggle, rather, the "debt" was sought to *maintain* jurisdiction already conferred.

Section 47 of the Surrogate's Court Act has been incorporated into the new Section 208 of the Surrogate's Court Procedure Act of 1967. It does not differ in relevant part:

> § 208. Jurisdiction; how affected by locality of certain assets
>
> For the purpose of conferring jurisdiction upon the court:
>
> 1. A debt or a cause of action for wrongful death, in favor of a non-domiciliary against a domiciliary, is deemed personal property in the county where the domiciliary, or either of two or more such domiciliaries resides, or if other than a natural person, such domiciliary has its principal office, except that a debt evidenced by a negotiable instrument is deemed for jurisdictional purpose - personal property in the county of the situs of the instrument.
>
> 2. An insurance policy upon the life of a non-domiciliary decedent shall have the situs of the principal office in this state of the company or corporation issuing the policy of insurance.
>
> 3. A share of stock of a corporation of this state owned by a non-domiciliary is deemed personal property in the county where the corporation has its principal office.
>
> 4. A life insurance policy or share of stock owned by a non-domiciliary is deemed personal property in the county where the policy or share of stock is situated, the provisions of subdivisions 2 and 3 notwithstanding.

59. 17 N.Y.2d 111, 113, 216 N.E.2d 312, 314, 269 N.Y.S.2d 99, 101 (1966).

60. *See* Comment, *The Constitutionality of Seider v. Roth after Shaffer v. Heitner*, 78 COLUM. L. REV. 409 (1978). This article is a detailed commentary concluding that the *Seider* procedure maintains its constitutionality after *Shaffer*. Justice Stevens agrees with the conclusions reached in this article as they pertain to the *Seider* rule and cites this article in his dissent in Rush v. Savchuk, 444 U.S. 320, 334 (1980).

61. *See* Comment, *supra* note 60, at 410.

62. Such a measure was passed by the New York State Legislature in 1973, but was vetoed by the Governor. *Id.* at 410 n.8.

The court in *Seider* noted that the reason it approved such a direct action was because the insurance carrier, by its policy, had agreed to defend in any place where jurisdiction is obtained against its insured.[63] The jurisdiction obtained was by attachment of the debt Hartford owed Lemiux to defend him. The situs of the debt, by *Harris*[64] standards, is where the debtor is, that is, New York or anywhere Hartford does business.

Aside from New York, which has upheld its *Seider* procedures numerous times,[65] only Minnesota and New Hampshire have adopted *Seider*-type jurisdiction.[66] In fact, many other states have specifically rejected the procedure.[67] New Hampshire has adopted a modified view of the rule permitting attachment of the non-resident defendant's liability insurance policy whenever such an exercise of jurisdiction is not "unreasonable."[68] There is also a reciprocity feature incorporated into the New Hampshire reasonableness test. For instance, if a defendant resides in Minnesota or New York—the only other states in which *Seider* rules apply—New Hampshire courts will deem it reasonable to use the attachment procedure against the defendant.[69]

III. THE EFFECT OF *SHAFFER v. HEITNER* ON *SEIDER v. ROTH*

With the advent of the high Court's decision in *Shaffer,*[70] which implicitly overruled the *Harris*[71] decision, the first real challenge to the *Seider* rule concept was presented. In *Shaffer,*[72] a non-resident plaintiff filed a shareholder's derivative suit in Delaware state court. The complaint named as defendants Greyhound, a Delaware corporation, Greyhound Lines (a Greyhound subsidiary incorporated in California) and several present and former officers and directors of one or both of these corporations.[73] None of the officers and directors were Delaware residents. The complaint alleged that the individual defendants had violated their fiduciary duties to the corporation by permitting activities in Oregon which made the company subject to anti-trust litigation and liable for substantial damages and criminal contempt fines.[74] The Delaware court obtained jurisdiction by sequestering Greyhound stock,

63. 17 N.Y.2d 111, 113, 216 N.E.2d 312, 315, 269 N.Y.S.2d 99, 102 (1966).
64. 198 U.S. 215 (1905).
65. *See* note 13 and accompanying text *supra.*
66. Rush v. Savchuk, 311 Minn. 480, 245 N.W.2d 624 (1976); Camire v. Scieszka, 116 N.H. 281, 358 A.2d 397 (1976); Forbes v. Boynton, 113 N.H. 617, 313 A.2d 129 (1973). *See also* note 20 and accompanying text *supra* for Minnesota statute.
67. *See* note 19 and accompanying text *supra.*
68. Camire v. Scieszka, 116 N.H. 281, 358 A.2d 397 (1976).
69. Forbes v. Boynton, 113 N.H. 617, 313 A.2d 129 (1973).
70. 433 U.S. 186 (1977).
71. 198 U.S. 215 (1905). *See also* note 85 and accompanying text *supra.*
72. 433 U.S. 186 (1977).
73. *Id.* at 189-90.
74. *Id.*

owned by the individual defendants. The Delaware Code[75] made Delaware the situs of ownership of stock in Delaware corporations (the rule in the other 49 states is that the situs is in the state of the owner's residence).[76]

Since Delaware law did not provide for a limited or special appearance,[77] the defendants were faced with the choice of either forfeiting their stock or submitting to in personam jurisdiction in the Delaware courts.[78] The defendants argued that since their stock was attached, without prior notice and an opportunity to be heard, the attachment procedure violated due process.[79]

The United States Supreme Court agreed and held that Delaware does not acquire jurisdiction either in rem or in personam merely by being the location of property owned by the defendant, unless such property is the subject of the litigation.[80] Here, the stock was not the subject matter of the suit, rather, the concern was the malfeasance of the corporate officers. Also, citing *International Shoe,*[81] the Court said that for Delaware to obtain in rem or in personam jurisdiction, the defendant must have certain minimum contacts with the forum state for

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75. DEL. CODE ANN. tit. 10, § 366 (1975):

Section 366 provides:

"(a) If it appears in any complaint filed in the Court of Chancery that the defendant or any one or more of the defendants is a nonresident of the State, the Court may make an order directing such nonresident defendant or defendants to appear by a day certain to be designated. Such order shall be served on such nonresident defendant or defendants by mail or otherwise, if practicable, and shall be published in such manner as the Court directs, not less than once a week for 3 consecutive weeks. The Court may compel the appearance of the defendant by the seizure of all or any part of his property, which property may be sold under the order of the Court to pay the demand of the plaintiff, if the defendant does not appear, or otherwise defaults. Any defendant whose property shall have been so seized and who shall have entered a general appearance in the cause may, upon notice to the plaintiff, petition the Court for an order releasing such property or any part thereof from the seizure. The Court shall release such property unless the plaintiff shall satisfy the Court that because of other circumstances there is a reasonable possibility that such release may render it substantially less likely that plaintiff will obtain satisfaction of any judgment secured. If such petition shall not be granted, or if no such petition shall be filed, such property shall remain subject to seizure and may be sold to satisfy any judgment entered in the cause. The Court may at any time release such property or any part thereof upon the giving of sufficient security.

"(b) The Court may make all necessary rules respecting the form of process, the manner of issuance and return thereof, the release of such property from seizure and for the sale of the property so seized, and may require the plaintiff to give approved security to abide any order of the Court respecting the property.

"(c) Any transfer or assignment of the property so seized after the seizure thereof shall be void and after the sale of the property is made and confirmed, the purchaser shall be entitled to and have all the right, title and interest of the defendant in and to the property so seized and sold and such sale and confirmation shall transfer to the purchaser all the right, title and interest of the defendant in and to the property as fully as if the defendant had transferred the same to the purchaser in accordance with law."

76. *See* U.C.C. § 8-317 (1972).

77. 433 U.S. 186, 193 (1977).

78. *Id.*

79. *Id.*

80. *Id.* at 209, 213.

81. 326 U.S. 310 (1945). *See also* note 40 and accompanying text *supra.*

the asserted jurisdiction to be just and fair.[82] Here, the defendants had no contact at all with Delaware other than administratively filing corporation papers and accepting directorships of a Delaware corporation.[83] The Court emphasized that it is the relationship among the defendant, the forum and the litigation that is the basis for jurisdiction over a non-resident, not their relationship with the plaintiff.[84]

The challenge to *Seider*-type jurisdiction became apparent when the *Shaffer* Court ruled that jurisdiction cannot validly be asserted over a non-resident defendant by attaching his property within the forum state if the property, as in *Shaffer,* is *completely unrelated* to the cause of action.[85] This holding was aimed directly at *Harris*-type jurisdiction upon which the *Seider* rule is primarily based. The Court said that the attachment process in *Shaffer* and the garnishment procedure in *Harris* were used solely to compel the non-resident defendant to submit to the forum state's jurisdiction.[86] The Court in *Shaffer* noted that though the presence of the defendant's property in a state might suggest the existence of other ties among the defendant, the state and the litigation, the presence of property alone would not support jurisdiction.[87] Therefore, under *Shaffer,* the *Harris* procedure was found to be violative of due process.

Arguably this determination should have adversely affected the *Seider* rule procedure, because the *Seider* rule allows for the attachment of property solely to confer jurisdiction. However, the *Seider* rule has been upheld in New York since the *Shaffer* decision[88] and the United States Supreme Court has twice declined to review appellate decisions sustaining *Seider*-type jurisdiction[89] until now with *Rush v. Savchuk.*[90]

IV. *RUSH v. SAVCHUK*

The *Rush* case arose out of a single car accident which occurred on January 13, 1972 in Elkhart, Indiana.[91] The accident involved an automobile driven by the defendant, Rush, which was owned by his father and insured by State Farm Mutual Automobile Insurance Com-

82. 433 U.S. 186, 212 (1977).
83. *Id.*
84. *Id.* at 204.
85. *Id.* at 209, 213.
86. *Id.* at 209.
87. *Id.*
88. *See* note 13 and accompanying text *supra.*
89. Minichiello v. Rosenberg, 410 F.2d 106 (2d Cir.) *affirmed on rehearing en banc,* 410 F.2d 117, (2d Cir. 1968) *cert. denied,* 396 U.S. 844 (1969); Victor v. Lyon, Assoc., Inc., 21 N.Y.2d 695, 234 N.E.2d 459, 287 N.Y.S.2d 424 (1967), *appeal dismissed for want of a substantial federal question, sub nom.* Hanover Ins. Co. v. Victor, 393 U.S. 7 (1968).
90. 444 U.S. 320 (1980).
91. *Id.* at 322.

pany (State Farm) under a liability insurance policy issued in Indiana.[92] At the time of the accident, both Rush and the plaintiff, Savchuk, the passenger injured in the accident, were residents of Indiana.[93] Savchuk moved to Minnesota in June of 1973 and instituted this action in May of 1974 in Minnesota.[94]

The action was commenced when Savchuk served a garnishment summons on State Farm.[95] Service was made by the delivery of a copy of the summons to the Commissioner of Insurance for the State of Minnesota.[96] A copy of the garnishment summons as well as copies of the

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92. *Id.*

93. *Id.*

94. *Id.*

95. *Id.*

96. Rush v. Savchuk, 311 Minn. 480, 482, 245 N.W.2d 624, 626 (1976). MINN. STAT. ANN. § 60A.19 (West Supp. 1979) reads in pertinent part:

60A.19 Foreign companies

Subdivision 1. Requirements. Any insurance company of another state, upon compliance with all laws governing such corporations in general and with the foregoing provisions so far as applicable and the following requirements, shall be admitted to do business in this state:

(1) It shall deposit with the commissioner a certified copy of its charter or certificate of incorporation and its bylaws, and a statement showing its financial condition and business, verified by its president and secretary or other proper officers;

(2) It shall furnish the commissioner satisfactory evidence of its legal organization and authority to transact the proposed business and that its capital, assets, deposits with the proper official of its own state, amount insured, number of risks, reserve and other securities, and guaranties for protection of policyholders, creditors, and the public, comply with those required of like domestic companies;

(3) By a duly executed instrument filed in the office of the commissioner, it shall appoint him and his successors in office its lawful attorneys in fact and therein irrevocably agree that legal process in any action or proceeding against it may be served upon them with the same force and effect as if personally served upon it, so long as any of its liability exists in this state;

(4) It shall appoint, as its agents in this state, residents thereof, and obtain from the commissioner a license to transact business therein.

Subd. 2. Service of garnishee process. When garnishee process is served upon the commissioner, as attorney for any insurance company, no garnishee fee shall be paid him. After the receipt of copy of the process the insurance company may demand of the attorney of the person making the garnishee the proper fees, and if the demand is not complied with before the day fixed for the disclosure of the garnishee, the proceeding may be dismissed.

Subd. 3. Commissioner appointed attorney for service of process. Before any corporation, association, or company issuing policies of insurance of any character and not organized or existing pursuant to the laws of this state is admitted to or authorized to transact the business of insurance in this state, it shall, by a duly executed instrument to be filed in the office of the commissioner, constitute and appoint the commissioner and his successors in office its true and lawful attorney, upon whom proofs of loss, any notice authorized or required by any contract with the company to be served on it, summonses and all lawful processes in any action or legal proceeding against it may be served, and that the authority thereof shall continue in force irrevocable so long as any liability of the company remains outstanding in this state.

This instrument shall contain a provision and agreement declaring that the company, association, or corporation desires to transact the business of insurance in this state, and that it will accept a license therefor according to the laws of this state.

In case of the failure of any such insurance company to comply with any of the provisions of subdivisions 3 and 4 of this section, or if it shall violate any of the conditions or agreements contained in the instrument filed, its right to transact insurance business in this state shall cease and it shall be the duty of the commissioner to immediately declare its license revoked; and, in case of revocation, the company shall not be again licensed to transact business in this state for the period of one year from date of the revocation. . . .

summons and complaint were also served personally on Rush in Indiana. The complaint alleged negligence and sought $125,000 in damages.[97]

In response to the garnishment summons, State Farm disclosed that nothing was due and owing from Rush as potential judgment debtor.[98] Savchuk then moved the trial court to grant permission to file a supplemental complaint making the garnishee, State Farm, a party to the action.[99] Rush and State Farm then moved for dismissal on the following grounds: lack of subject matter jurisdiction, lack of jurisdiction over the defendant, insufficiency of process, and insufficiency of service of process.[100] The trial court denied the defendants' motions to dismiss, but granted the plaintiff's motion to amend and supplement the complaint. The defendants appealed to the Minnesota Supreme Court.[101]

SAVCHUK I

On appeal, the Minnesota Supreme Court affirmed the trial court's decision.[102] First, the court held that the obligation of an insurance company to defend and indemnify a non-resident insured under an automobile liability insurance policy was an attachable debt in Minnesota for the purpose of obtaining quasi in rem jurisdiction. This applies only when the incident giving rise to the action occurs outside of Minnesota and the plaintiff is a resident of Minnesota when the suit is filed.[103] Also, the court held that the assertion of jurisdiction over Rush

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97. 444 U.S. 320, 323 (1980). The prayer was voluntarily reduced later to $50,000, the face amount of the policy. *Id.* at n.5.

98. MINN. STAT. ANN. § 571.49 (West 1947). Disclosure (in relevant part provides:)

> Subdivision 1. Garnishee to disclose. Within the time herein limited the garnishee shall serve upon the plaintiff or his attorney a disclosure in writing and under oath setting forth the amount and character of defendant's property in his hands or indebtedness owing to defendant and the facts in reference to. . . .
>
> Subdivision 2. Contents of disclosure. Such disclosure shall state: (1) Whether he was, at the time of the service of the garnishee summons indebted, or under any liability to the defendant, . . .

Subsequent to this suit, MINN. STAT. ANN. § 571.49 was repealed by 1976 MINN. LAWS ch. 335, § 24.

99. MINN. STAT. ANN. § 571.50 (West Supp. 1979) Effect of Disclosure (in relevant part states:)

> Subject to the provisions of sections 571.51 and 571.52, the disclosure shall be conclusive against judgment creditor as to all property of judgment debtor. If the garnishee denies that he is indebted to judgment debtor or has any property of judgment debtor in his possession the filing in court of a copy thereof shall operate as a full discharge of the garnishee at the end of 20 days from date of service of such disclosure, in the absence of further proceedings as provided for . . . . The filing of objections to the disclosure or the filing of any motion or other proceedings shall operate as a stay of such discharge. . . .

100. 311 Minn. 480, 482, 245 N.W.2d 624, 626 (1976).

101. *Id.* at 490, 245 N.W.2d at 626-27.

102. *Id.*, 245 N.W.2d at 626.

103. 444 U.S. 320, 324 (1980). In construing a statute less explicit than the one here in question, the court in Turner v. Evers, 31 Cal. App. Supp.3d 11, 18, 107 Cal. Rptr. 390, 395 (1973), stated: "* * * We disagree with the proposition that the obligation to indemnify requires a valid in

was constitutional because he had been given notice of the suit, an opportunity to defend, his liability was limited to the amount of the policy, and the garnishment procedure could only be used by Minnesota residents.[104]

The Minnesota high court recalled that according to the United States Supreme Court holding in *Hanson v. Denckla,*[105] a defendant must act to "purposefully avail himself of the privileges" of conducting activities in the forum state before personal jurisdiction over him may be asserted. The Minnesota court conceded that Rush had not engaged voluntarily in any activity in Minnesota,[106] nevertheless, the court found that considerations of fairness supported the exercise of quasi in rem jurisdiction. Moreover, the court looked to the reality that in accident litigation, it is the insurer who controls the defense of the case and, in this case, the insurer does business in and is regulated by the forum state. The state also has an interest in protecting its residents and providing them with a forum in which to litigate their claims.[107] Rush then appealed to the United States Supreme Court who vacated the judgment and remanded the cause for further consideration in light of *Shaffer v. Heitner.*[108]

Savchuk II

On remand, the Minnesota Supreme Court distinguished the sequestration procedure in *Shaffer* from the garnishment procedure in *Rush.* The Minnesota high court held that the assertion of jurisdiction, pursuant to their state statutes, was consistent with the standards established by *International Shoe*[109] and its progeny.[110] It stated that the garnishment statute of Minnesota was different from the Delaware stock sequestration procedure held unconstitutional in *Shaffer,* in that the attached insurer's obligation in *Rush* to defend and indemnify the insured when involved in an automobile accident constituted a debt *intimately* related to the litigation. Further, sequestration of stock in *Shaffer* was totally unrelated to the cause of action. The Minnesota court reasoned that while the obligation to defend in *Rush* could be separable from the tort action theoretically, it would have no independ-

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personam judgment against the insured, and hold the obligation to indemnify requires only the *possibility* of a valid judgment either against the insured personally or depriving him of his property." (Italics supplied.) 311 Minn. 480, 484 n.2, 245 N.W.2d 624, 627 n.2 (1976). *See also* Rintala v. Shoemaker, 362 F. Supp. 1044 (D. Minn. 1973).

104. 311 Minn. 480, 488, 245 N.W.2d 624, 629 (1976).

105. 357 U.S. 235 (1958). *See also* note 47 and accompanying text *supra.*

106. 311 Minn. 480, 487, 245 N.W.2d 624, 629 (1976).

107. *Id.* at 487-88, 245 N.W.2d at 629.

108. 433 U.S. 186 (1977). *See also* note 70 and accompanying text *supra.*

109. *See* note 38 and accompanying text *supra.*

110. 311 Minn. 496, 497, 272 N.W.2d 888 (1978).

ent value or significance apart from the accident litigation. The obligation to defend, the court stated, becomes inevitably "the focus ... [of the litigation] determining the rights and obligations of the insurer, the insured, and, practically speaking, the victim."[111]

The court referred to a recent interpretation of the *Seider* rule in *O'Connor v. Lee-Hy Paving Corp.*[112] In upholding *Seider* in light of *Shaffer,* Judge Friendly in *O'Connor* stated that a judgment for the plaintiff would not deprive the defendant of anything that could be of value to him.[113] The defendant "cannot use, recover, sell or hypothecate"[114] the promise of his insurer to indemnify him. Whereas in *Shaffer,* the stock could be sold and used by the defendants. In fact, in *Seider,* the liability policy is solely to protect the defendant and, where appropriate, to be recoverable by plaintiffs.[115] Often, the courts will limit the defendant's liability to the face amount of the policy. Therefore, argued the Minnesota Supreme Court, the defendant had very little at stake under the *Seider*-like garnishment procedure.[116]

Furthermore, though *Shaffer* generally directs the application of *International Shoe,* standards to all assertions of state court jurisdiction, the necessary minimum contacts under the *Seider*-like Minnesota jurisdictional statute[117] have not been clear. The reason for this, the Minnesota court explained, is that although *Seider*-type jurisdiction is highly controversial and the most contemporary application of quasi in rem jurisdiction, it had never been discussed by the United States Supreme Court.[118]

Finally, the Minnesota high court in *Savchuk II* stated that the asserted state interest in providing a forum for its resident plaintiffs is particularly strong where an alternative forum would not have permitted recovery.[119] Further, limiting the availability of this type of jurisdiction to residents of the forum[120] as discerned in *Savchuk I* minimizes

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111. *Id.* at 503, 272 N.W.2d at 892.

112. 311 Minn. 496, 503 n.6, 272 N.W.2d 888, 892 n.6 (1978) *quoting* Judge Friendly's opinion in O'Connor v. Lee-Hy Paving Corp., 579 F.2d 194, 198 (2d Cir. 1978).

113. *Id.* at 198.

114. *Id.*

115. *Id.*

116. *Id.*

117. Rush v. Savchuk, 311 Minn. 496, 501, 272 N.W.2d 888, 890-91 (1978). *See also* notes 20 and 38 and accompanying text *supra.*

118. 311 Minn. 496, 501, 272 N.W.2d 888, 890-91 (1978).

119. The *Rush* court stated:

> In the instant case, Indiana's guest statute would have cut off Savchuk's claim. Ind. Stat. § 9-3-3-1. A plaintiff's lack of access to an alternative forum might be a legitimate consideration in justifying exercise of jurisdiction. Shaffer v. Heitner, 433 U.S. 186 at 211 note 37 (1977). We also note, in this regard, that by the time the trial court ruled on Savchuk's motion to amend the complaint by making State Farm Mutual a party, the Indiana two-year statute of limitations had run.

311 Minn. 496, 502 n.5, 272 N.W.2d 888, 891 n.5 (1978).

120. 311 Minn. 480, 485, 245 N.W.2d 624, 628 (1976).

the potential for abuse as well as forum shopping[121] as discussed in Savchuk II. The court noted that the trial court, in its discretion, can always grant a motion to dismiss on the grounds of forum non conveniens, should the defendant's burden outweigh the plaintiff's interest in a Minnesota forum.[122]

From these premises the Minnesota Supreme Court in *Savchuk II,* on remand, held that Minnesota did not lack such minimally requisite "contacts, ties or relations" to those defending parties as to offend the requirements of due process. Moreover, the state's interests in providing a forum for its residents compelled the court to affirm its previous decision in *Savchuk I.*[123] Rush appealed to the United States Supreme Court and certiorari was granted.

V. The United States Supreme Court Decision

The Supreme Court's decision held that a state may not constitutionally exercise quasi in rem jurisdiction over a defendant who has no forum contacts by attaching the contractual obligation of his insurer, licensed to do business in the state, to defend and indemnify him in connection with the suit.[124] The state may exercise jurisdiction over a nonresident defendant only if the defendant has certain minimum contacts with the forum such that the maintenance of the suit does not offend "traditional notions of fair play and substantial justice" as espoused by *International Shoe.*[125] In determining whether a particular exercise of state court jurisdiction is consistent with due process, the inquiry must focus on the relationship between the defendant, the forum and the litigation as detailed in *Shaffer.*[126]

In the instant case, the Supreme Court found that the only circumstances offered to show a relationship among Rush, Minnesota and the law suit was that Rush's insurance company did business in Minnesota.[127] The Court then looked to the two-pronged legal fiction of *Harris* and *International Shoe.*[128] It noted that the presence in Minnesota of State Farm's policy obligation to defend and indemnify Rush was insufficient to give the state the power to determine Rush's liability for the out-of-state accident.[129]

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121. The *Rush* court stated that though Savchuk was a resident of Indiana at the time of the accident, Savchuk, then 19 years old went with his parents to Minnesota where he established residency. There was no suggestion of forum-shopping found in the record. 311 Minn. 496, 505 n.7, 272 N.W.2d 888, 893 n.7 (1978).

122. *Id.* at 505, 272 N.W.2d at 893.

123. *Id.*

124. 444 U.S. 320, 332 (1980).

125. *Id.*

126. *Id.* at 328-29.

127. *Id.*

128. *Id. See also* notes 36-39 and accompanying text *supra.*

129. 444 U.S. 320, 329 (1980). *See also* notes 36-39 and accompanying text *supra.*

Justice Marshall, who authorized the majority opinion,[130] emphasized that the mere presence of property in a state does not establish a sufficient relationship between the owner of the property and the forum state to support an exercise of jurisdiction over an unrelated cause of action. Relying on *Hanson,*[131] Marshall stated: "[I]t cannot be said that the defendant engaged in any purposeful activity related to the forum that would make the exercise of jurisdiction fair, just, or reasonable."[132]

Finally, the Court held that the requisite minimum contacts with the forum could not be established under the alternative approach of attributing the insurer's forum contacts to the insured, by treating the garnishment as the functional equivalent of a direct action procedure against the insurer. This method considers the insured as a nominal defendant named merely to obtain jurisdiction over the insurer.[133] The Court held that *Seider* actions are not direct actions because the prerequisite to the insurer's entry into the case as garnishee is the state's ability to exert its power over the non-resident nominal defendant.[134] The Court stated, "[i]f due process forbids the assertion of jurisdiction over the insured non-resident based solely on the policy, then there is no conceptual basis for bringing the garnishee (insurer) into the action."[135] Though the parties' relationships with each other may be significant in evaluating their ties to the forum, the requirements of *International Shoe* must be met as to *each* defendant over whom a state court exercises jurisdiction.[136] The judgment of the Minnesota Supreme Court was, therefore, reversed.

VI. THE PRO-*SEIDER* VIEW

An analysis of the Supreme Court's decision in *Rush* indicates a confrontation between the forum state's interests in facilitating recoveries for resident plaintiffs and the compelling directive from *International Shoe* that a state may exercise jurisdiction over a non-resident defendant only if that defendant has minimum contacts with the forum state.[137] Since Minnesota is a *Seider* rule state, Justice Marshall initially set out the arguments supporting the *Seider*-type jurisdictional point of view.[138]

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130. Justice Marshall also wrote the majority opinion in Shaffer v. Heitner, 433 U.S. 186 (1977).

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

132. 444 U.S. 320, 329 (1980).

133. *Id.*

134. *Id.*

135. *Id.* This is also true of the Minnesota court trying to attribute State Farm's contacts to Rush by considering the defending parties together and aggregating their forum contacts in determining whether it has jurisdiction.

136. Rush v. Savchuk, 444 U.S. 320, 332 (1980).

137. *Id.*

138. *Id.*

The Court noted that according to *Harris,*[139] the presence of the debt in the forum state is attachable and sufficient to permit quasi in rem jurisdiction over a non-resident defendant.[140] The Court conceded that the advocates of the *Seider* rule construe the contractual obligation of an insurance company to defend and indemnify a non-resident insured as a debt. This debt is deemed to be present in the state where the debtor is found. This debt is therefore subject to attachment.[141] These *Seider* rule states conclude that the exercise of jurisdiction is permissible under the due process clause because the insurer is in full control of the litigation and the state has a substantial and continuing relation with the controversy when one of the defendants (the insurer) and the plaintiff are from the forum state.[142]

Additionally, Minnesota had a three-fold test to be applied to *Seider* situations to determine whether the *International Shoe* criteria had been met. First, the Minnesota courts must determine whether proper notice was given to the defendant affording him adequate opportunity to defend the suit. Secondly, it must be determined whether the defendant can be exposed to liability greater than the amount of his insurance policy. Finally, it must be decided whether the *Seider* procedure in Minnesota can be used by non-residents of Minnesota in Minnesota. In other words, does the Minnesota *Seider* rule encourage forum shopping by allowing non-resident plaintiffs to use Minnesota as a forum for their grievances?[143]

In the instant case, there was no contention that Rush received less than adequate notice or opportunity to be heard. Also the initial claim of $125,000 against Rush was voluntarily reduced to $50,000 which represented the face value amount of Rush's insurance policy. Finally, Savchuk, a resident of Minnesota, was the only person able to bring this action as Minnesota will only allow its residents to use the *Seider* approach, thereby thwarting any forum shopping claims. Therefore, the test enumerated by the Minnesota Supreme Court's interpretation of their statute and the fairness criteria of *International Shoe* were met.[144]

The other approach noted by the United States Supreme Court which pro-*Seider* states use to rationalize this quasi in rem jurisdictional technique is to analogize the procedure as the rough equivalent of a

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139. *See* note 30 and accompanying text *supra.*

140. Rush v. Savchuk, 444 U.S. 320 (1980).

141. 17 N.Y.2d 111, 114, 216 N.E.2d 312, 314, 269 N.Y.S.2d 99, 102 (1966).

142. 444 U.S. 320, 330 (1980) *quoting* Simpson v. Loehmann, 21 N.Y.2d 305, 311, 234 N.E.2d 669, 672, 287 N.Y.S.2d 633, 637 (1967), *reargument denied* 21 N.Y.2d 990, 238 N.E.2d 319 (1968).

143. 311 Minn. 480, 483 n.6, 245 N.W.2d 624, 628 n.6 (1976).

144. *Id.* at 486, 245 N.W.2d at 630.

direct-action statute.[145] Judge Friendly expounded upon this approach in *Minichiello v. Rosenberg*[146] which is also relied upon by the Minnesota court's majority opinion.[147] This approach first determined whether it would have been constitutionally permissible for the New York state legislature to enact a statute which would allow a New York resident, injured outside the state, to proceed directly in a New York court against the non-resident defendant's insurer, if doing business in New York.[148] Since the *Seider* procedure could be used only by New York residents, and since it paralleled New York's interest in providing a forum for their resident plaintiffs to facilitate their recoveries, Judge Friendly concluded that New York had a valid legislative interest in passing such a statute.[149] The insurer doing business in New York is considered the real party in interest and the non-resident insured, held to be a nominal defendant, is viewed simply as a conduit for providing a conceptual basis for getting at the insurer.[150]

Rebutting the argument that the insurer's contractual obligation to defend does not arise until the injured party obtains a judgment against the insured, *Seider* rule states assert that the insurer's obligation arises absolutely as soon as the accident occurs.[151] The insurance policy is therefore intimately related to the litigation as required by *Shaffer*[152] and has no value or significance apart from the accident litigation.[153]

Finally, the states adopting the *Seider* rule hold that to limit the availability of this type of jurisdiction to the residents of the forum minimizes the potential for abuse and forum shopping. This is particularly true where, as here, the only other available forum was where the defendant Rush resided, and presumably there is no hardship for a

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145. 444 U.S. 320, 330 (1980). *See also* note 59 and accompanying text *supra*.

146. 410 F.2d 106 (2nd Cir.), *aff'd on rehearing en banc*, 410 F.2d 117 (2d Cir. 1968), *cert. denied*, 396 U.S. 844 (1969).

147. 311 Minn. 496, 503 n.6, 272 N.W.2d 888, 892 n.6 (1978).

148. *See* note 89 *supra*.

149. *See* Comment, note 60 *supra*.

150. 444 U.S. 320, 330 (1980), *citing* Minichiello v. Rosenberg, 410 F.2d 106 (2d Cir.), *aff'd en banc*, 410 F.2d 117 (2d Cir. 1968), *cert. denied* 396 U.S. 844 (1969).

151. 17 N.Y.2d 111, 113, 216 N.E.2d 312, 314, 269 N.Y.S.2d 99, 101 (1966).

152. *See* notes 71 and 85 and accompanying text *supra*.

153. O'Connor v. Lee-Hy Paving Corp., 579 F.2d 194 (2d Cir. 1978). *See also* note 112 and accompanying text *supra*.

Additionally, the Minnesota court held in *Savchuk I* that a quasi in rem judgment against the defendant would not operate as an estoppel if the plaintiff attempts to sue again outside the state of Minnesota to recover amounts beyond the policy limits. Though any hardship to a defendant arising out of a second suit is no greater than it would be from any quasi in rem action, the Minnesota court pointed out that a second suit will often be impossible practically, because the statute of limitations would have run in the only available alternative forum. 311 Minn. 480, 488, 245 N.W.2d 624, 630 (1976) *citing* Minichiello v. Rosenberg, 410 F.2d 106 (2d Cir.), *aff'd en banc*, 410 F.2d 117 (2d Cir. 1968), *cert. denied*, 396 U.S. 844 (1969). *See also* Note, *Developments In The Law: Res Judicata*, 65 HARV. L. REV. 818, 834 (1952).

defendant to defend in his own state. Aside from this, the Minnesota court pointed out that Rush could have made a motion to dismiss on the basis of forum non conveniens which the trial court could have granted in its discretion.[154]

VII. THE ANTI-*SEIDER* VIEW

The Supreme Court in *Rush* has reaffirmed the policy established by *International Shoe* and *Shaffer* that a state may exercise jurisdiction over a non-resident defendant *only* if he has the minimum contacts with the forum state that renders maintenance of the suit both fair and just.[155] Also, the Court re-emphasized its holding in *Shaffer* that mere presence of property within the forum state is not enough to confer jurisdiction unless the property is *intimately* connected with the litigation.[156] The contractual obligation of an insurance company (which does business in the forum state) to defend and indemnify a policy holder (who resides outside the forum state) was held to be neither a garnishable res present with the forum state, nor so intimately connected with the litigation, as to confer the forum state's power over the non-resident policyholder in a suit brought by a forum state's resident.[157]

The Court's inquiry in *Rush* focused upon the relationships existing between the defendant, the forum and the litigation as demanded by *Shaffer.*[158] The Court emphasized that Rush never had any contacts with Minnesota, that the accident took place in Indiana between two Indiana residents, and that the only affiliation between Rush, Minnesota and the lawsuit was that Rush's insurer did business in Minnesota.[159] Whether the insurer's contractual obligation to the insured is established as a garnishable res, was of secondary importance to the Court.[160] The primary issue, rather, was what relationship the insurance obligation to indemnify Rush had between Rush, Minnesota and the law suit even assuming the insurance obligation was a garnishable res?[161]

The Court held that the relationship between the insurer and its insured had no bearing upon Minnesota's right to adjudicate the suit, nor was the obligation the subject matter of the suit. The mere presence of property in the forum state, according to *Shaffer,* whether a gar-

154. 311 Minn. 480, 490, 245 N.W.2d 624, 630 (1976).
155. 444 U.S. 320, 328 (1980).
156. *Id.* at 328.
157. *Id.*
158. *Id.* at 329.
159. *Id.*
160. Rush v. Savchuk, 444 U.S. 320, 328 n.14 (1980).
161. *Id.*

nishable res or not, is not sufficient to confer jurisdiction if that property is unrelated to the cause of action.[162] Though ownership of property is a contact between a non-resident defendant and the forum state which may suggest the presence of other contacts, nevertheless, there must be sufficient other contacts to satisfy the fairness standard of *International Shoe.*[163]

The Rush decision declared that the mere fact that the defendant's insurer does business in another state does not suggest that the defendant has any other contacts within that same state. It is not likely, the Court explained, that Rush had any input in State Farm's decision to operate in Indiana, or New Mexico, or Florida, or California or any other of the fifty states and Canada in which State Farm conducts business. It is therefore just as unlikely that Rush expected, as a result of subscribing to State Farm's insurance policy, that he would subject himself to jurisdiction in any state in which a potential plaintiff happened to reside. The Court viewed these facts and, citing the *Hanson* rationale,[164] held that Rush could not be said to have engaged in any meaningful activity related to the forum that would make exercise of jurisdiction over him fair, just or reasonable.[165]

The *Rush* Court found the relationship between the litigation and the forum (through Rush's insurance policy) to be an insignificant contact standing alone. The *Rush* Court pointed out that the proceeds of the insurance policy are not so intimately connected to the suit that they become the subject matter of the case.[166] Even though the judgment, if it was to be paid at all, would have directly involved the funds of the insurance policy, the Court pointed out that, "the contractual arrangements between the insurer and the policyholder pertain only to the conduct, not the substance, of the litigation."[167] The fact that the defendant had some financial resource (insurance policy or large bank account) to fall back on to pay an adverse judgment is not an element which should affect the court's jurisdiction.[168] Only purposeful contacts between the defendant and the forum can establish a jurisdictional basis.

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162. *Id.* at 329.

163. *Id.* at 329.

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

165. *See* Kulko v. California Superior Court, 436 U.S. 84, 93-94 (1978). *See also* note 47 and accompanying text *supra.*

166. Rush v. Savchuk, 444 U.S. 320, 329 (1980).

167. *Id.*

168. *Id.* This is true unless the defendant breached his obligation to cooperate with the insurance company in the defense of the suit. *See generally* Comment, note 60 *supra,* at 412 n.22. Justice Otis, who dissented in both *Savchuk I* and *Savchuk II* stated that the obligation for the insurance company to pay a judgment rendered against the insured for an automobile accident is "no more the subject of the litigation than would be a bank account available in Minnesota to satisfy the judgment." 311 Minn. 496, 506, 272 N.W.2d 888, 893 (1978) (Otis, J., dissenting).

As to the functional equivalent of a direct action argument,[169] the Court stated that the Constitution's due process clause,[170] as interpreted by the progeny of *International Shoe* and *Shaffer,* forbade the exercise of jurisdiction over a non-resident defendant based solely upon the policy obligation of the insurer to the insured.[171] The Court held that the exercise of jurisdiction over the insured defendant must come first before the insurer is brought in the case.[172] Pragmatically, without jurisdiction over the insured defendant, there is no conceptual basis for the insurer to be in court to defend his client.

The Supreme Court said that it was untenable to aggregate the forum contacts of the defending parties by attributing State Farm's activities in Minnesota to Rush in order to obtain jurisdiction over Rush.[173] The Court held that the minimum contacts test must be satisfied by each and every defendant over whom a state court seeks to exercise jurisdiction.[174]

Finally, the Court observed that the states espousing the *Seider* rule had erroneously shifted the focus of the inquiry, as established in *Shaffer,* from the relationship among the defendant, the forum and the litigation, to the relationship among the plaintiff, the forum, the insurer and the litigation.[175] This was conceptually accomplished by emphasizing the role played by the insurance proceeds as the goal of the plaintiff's efforts. Since the plaintiff was seeking damages and the insurer was residing in the forum state, the insurance proceeds were deemed to be the subject matter of the suit and the basis for jurisdiction over the owner of the policy (the non-resident defendant). The Court explained that the insurer's contacts with the forum are erroneously shifted to the defendant by this rationalization. Of course, the real concern in such litigation is the establishment of the defendant's negligence as well as the amount of damages to be awarded to the injured plaintiff. The source from which a defendant will be able to satisfy an adverse judgment is not material to these issues.

Under the pro-*Seider* rule, the State's interest in providing a forum for their residents seems to be an overriding substitute to the

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169. *See* note 59 and accompanying text *supra.*

170. U.S. CONST. amend. XIV in relevant part reads:

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; *nor shall any State deprive any person of life, liberty, or property, without due process of law;* nor deny to any person within its jurisdiction the equal protection of the laws. (emphasis added).

171. 444 U.S. 320, 332 (1980).

172. *Id.*

173. *Id.*

174. *Id.*

175. *Id.*

defendant's rights to due process.[176] The United States Supreme Court in *Rush* correctly held that the due process clause "does not contemplate that a state may make binding a judgment ... against an individual or corporate defendant with which the state has no contacts, ties or relations."[177]

CONCLUSION

The rule in *Seider v. Roth* is a rule which has been rejected in most jurisdictions which have considered it.[178] The dissent by Justice Otis of the Minnesota Supreme Court in *Savchuk I* noted that even "a majority of the court which spawned *Seider* now believes it to be in error, and [is] mindful of its potentiality undesirable consequences. . . ."[179]

When the plaintiff Savchuk was injured, he and the defendant were both *Indiana* residents. They had an accident in *Indiana* on an *Indiana* highway in a car registered, owned, and insured in *Indiana.* All of the witnesses, records and the initial treating physicians were all located in *Indiana.* This was all admitted by the plaintiff's own statement of the case.[180] In fact, the record disclosed no relationship at all between the defendant and the state of Minnesota. To subject the defendant Rush to suit in any jurisdiction where his insurer does business, without any further contacts by Rush with that forum state, would be to extend the fairness and minimum contacts tests of *International Shoe* to an unreasonable limit.

Justice Stevens' comments in his concurring opinion in *Shaffer* highlight the anomaly. He stated that when someone purchases shares of stock on the open market they cannot be expected to know that they have thereby become subject to suit in a remote forum. This is especially true when the stock itself is totally unrelated to the cause of action. Stevens noted that if its procedure were upheld in *Shaffer,* Delaware would, in effect, "impose a duty of inquiry" on every purchaser of securities in the national market.[181]

The same observation can be made for an individual such as Rush who purchased an insurance policy in his resident state and was made subject to suit in any jurisdiction where his insurance company does business. Rush was fortunate his plaintiff was only from Minnesota. One can easily imagine his predicament if Savchuk was from Alaska. Being subject to suit in far away forums merely because your insurer does business there is obviously unfair. That would be the result if the

176. *Id.* at 332-33.
177. *Id.*
178. *See* notes 19 and 67 and accompanying text *supra.*
179. 311 Minn. 480, 494, 245 N.W.2d 624, 632 (1976).
180. 311 Minn. 496, 510, 272 N.W.2d 888, 896 (1978).
181. 433 U.S. 186, 218 (1977) (concurring opinion).

Supreme Court did not strike down the *Seider* procedure used in Minnesota in *Rush*. The Court held that this situation is violative of due process and the majority of jurisdictions, as well as commentators, agree.[182]

Due to the *Rush* decision, the practical effects of *Seider*-type jurisdiction which generally favor the forum resident plaintiffs, are important to consider. Aside from the obvious inconvenience to the plaintiff of having to litigate his claim in a foreign jurisdiction, the plaintiff must also relinquish certain advantages under modern choice of law rules which tend to favor application of forum law. For instance, if the court finds that a conflict between the legitimate interests of two states is unavoidable, the court would apply the law of the forum.[183]

Moreover, the insurance company's "no action" clauses, typically overridden by *Seider,*[184] may now be reinforced. These clauses are standard liability insurance contract clauses which provide that the insurer does not become liable to an injured person *until* a judgment has been rendered against the insured.[185] The purpose of such clauses is to protect insurers from jury prejudice which might result from their appearance as parties defendant. Under *Seider,* the insurance companies were parties defendant and now with *Rush,* the fact that the insurer's obligation does not mature until judgment further insulates the insurer from jury prejudice. With the advent of *Rush,* the effect in states like New York, which has traditionally been viewed as a jurisdiction in which high monetary judgments are frequently given, the insurer, who will remain anonymous until after a verdict is rendered, will now probably pay amounts less than the total amount of the policy.[186]

Rush will have some further impact on the insured defendant. Under *Seider,* the litigational burdens arising from the need to defend in a foreign forum fell primarily on the insurer. Though the defendant's insurer may have to indemnify the defendant, the cost of defending at home will more than likely be less. Also, the defendant, under the *Seider* procedure, was usually required by contract to cooperate with the insurer's presentation of the case. Though the defendant was also

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182. 311 Minn. 480, 493-94, 245 N.W.2d 624, 632 (1976).

183. W. REESE & M. ROSENBERG, CASES ON CONFLICT OF LAWS 469-470 (7th ed. 1977). *See also* Currie, *Notes On Methods And Objectives In The Conflict Of Laws,* 1959 DUKE L.J. 171, 178; Currie, *On The Displacement Of The Law Of The Forum,* 58 COLUM. L. REV. 964, 1027-28 (1958).

184. The reason *Seider* is said to override "no action" clauses is because under *Seider* the insurer's obligation to the insured accrues at the moment of the accident. Whereas the typical "no action" clause in the liability insurance contract states that an insured must have a judgment rendered against him before the insurer's obligation accrues. 17 N.Y.2d 111, 112, 216 N.E.2d 312, 314, 269 N.Y.S.2d 99, 102 (1966).

185. 8 J. APPLEMAN, INSURANCE LAW AND PRACTICE § 4851 n.2 (1962).

186. *See* Comment, note 60 *supra.*

subject to the inconvenience of traveling to another state to act in his role as a witness, his participation in the case was frequently nominal. Now, under *Rush,* there is a further incentive for the defendant to cooperate with his insurer to defend in that the judgments are no longer limited to the face amount of the policy. The defendant would have to play a larger part to keep his liability at a minimum before seeking indemnification from his insurer.[187] This is as it should be, especially if the accident and the injuries were caused by the defendant's negligence.

Finally, the purpose of long-arm statutes is to give redress to bonafide citizens who have suffered a wrong by harmful intrusion by non-residents. It is reasonable to expect non-residents who do business within a state and who enjoy the privileges and protections afforded them by that state to be amenable to suits filed by that state's citizens who have been injured by the non-resident's tortious activities.[188] It is unreasonable, however, to subject a non-resident defendant to suits filed in distant forums merely because a person he happened to do some business with also does business in the distant forum. For the foregoing reasons, it is therefore unreasonable for the *Seider* rule to remain the rule of even the few states that have attempted to retain it, and the *Rush* decision is indicative of this sentiment.

Although *Rush* did not expressly overrule *Seider,* it is quite apparent that the Court does not find *Seider* to be consistent with the *Shaffer* and *International Shoe* reasonableness and minimum contacts tests. Therefore, for all intents and purposes the *Seider* rule, which has been in operation for the past fourteen years and the subject of much controversy over that relatively short time span, has finally been laid to rest by the United States Supreme Court in *Rush v. Savchuk.*

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187. *Id.*
188. 311 Minn. 496, 511, 272 N.W.2d 888, 896 (1978) (Otis, J., dissenting opinion).

BOOKS RECEIVED

LAWSUIT. By Stuart M. Speiser. New York, New York: Horizon Press. 1980. Pp. 617. $9.95. Paperbound. Stuart Speiser, a senior partner in a prominent litigation firm, presents a survey of modern tort litigation through the use of the case method. Speiser primarily use major cases in which he or his firm has had some connection with the representation of the plaintiff. The first chapter is a discussion of the highly publicized lawsuit by Ralph Nader against General Motors for invasion of privacy. The author describes the background of the case, outlines the personalities and devotes considerable time to the legal tactics employed. The case is discussed from a practical standpoint of how much money was involved, what Nader's objectives were and how a settlement was finally arrived at. Chapter 2 is a history of American Tort Law. Speiser reports on early tort cases and why the average individual was not adequately protected. He states that the development of three features is responsible for putting ordinary clients on an equal footing with large corporate defendants. Speiser describes those features as the jury trial, the contingent fee and the development of the entrepeneur-lawyer who puts his own resources on the line in presenting a clients case. Chapter 3 involves the background, investigation and tactics of the lawsuit due to the mid-air disaster over the Grand Canyon. There is a chapter devoted to the problems in personal injury cases. Later sections discuss the areas of products liability and governmental liability. These chapters are illustrated by cases of which the author has personal knowledge. Chapter 7 describes how the development of American tort law has led to litigation in American courts concerning accidents occurring in other parts of the world. Additionally there is a discussion of the applicable conflicts of laws problems and how they are handled. Chapter 8 details the state of the art of being a tort lawyer today. Throughout the book Speiser talks frankly about the strategies used in the cases and the legal and practical problems that arose. He describes legal theories such as negligence while simultaneously discussing such practical concerns as the deep pocket theory. The book includes many anecdotes and character sketches of prominent attorneys in the field. Much of the work is a defense of the civil litigation system and the contingent fee.

EYEWITNESS TESTIMONY. By Elizabeth F. Loftus. Cambridge, Massachusetts: Harvard University Press. 1980. Pp. 215. *Eyewitness Testimony* is a book dealing with the various reasons why eyewit-

nesses may unreliably recount events. Professor Loftus, an associate professor of psychology at the University of Washington, Seattle, begins with a discussion of the physical conditions affecting eyewitness accounts, such as stress, poor viewing conditions, or brief exposure. Then, using a series of psychological experiments, Professor Loftus reveals other methods by which memory can be distorted after the fact by means of certain interrogation methods, as well as the more subtle factors such as personal biases, stereotypes and expectations, that all intervene to alter eyewitness memory. Unreliability of eyewitness identification poses one of the more serious problems in the administration of criminal justice and civil litigation. Professor Loftus' book attempts to confront the many issues involved from a psychological perspective. For those trial lawyers who must confront and challenge eyewitness testimony, this book provides the practitioner with some useful insights.

THE DRED SCOTT CASE. ITS SIGNIFICANCE IN AMERICAN LAW AND POLITICS. By Don E. Fehrenbacher. New York, New York: Oxford University Press. 1978. Pp. 595. *Dred Scott v. Sandford* was the United States Supreme Court's first invalidation of a major federal law, and is, therefore, a landmark in the history of judicial review. The 7-2 decision, delivered by Chief Justice Taney, formulated two fundamental rules of law into the nation. One, that no Negro could be a United States citizen or even a state citizen "within the meaning of the Constitution" and two, that Congress had no power to exclude slavery from the federal territories. Fehrenbacher's treatise is a superb study of this case, its historical underpinnings, and the legal, social, and political ramifications of the decision. This 1979 Pultizer Prize winning book provides the reader with a thoughtful and articulate study of a period in American hsitory that spawned the controversy litigated in *Dred Scott,* and the consequences that followed its holding.

ESTATE PLANNING. By Jerome A. Manning. New York, New York: Practicing Law Institute. 1980. Pp. 395. $40. *Estate Planning* is a general overview of this complex area of law combing the most recent tax developments with an analysis of variables such as types of property, and family relationships that affect the choice of a particular estate plan. It includes chapters dealing with the marital deduction, the non-marital share, providing for children, making gifts, life insurance, retirement benefits, business interests, and payment of estate taxes. Its structure and content is designed for the practitioner to be a checklist of the important considerations to be evaluated rather than a treatise on the surrounding legal issues. Because of the complexity and size of the field, no single volume

book could adequately cover in any depth the many issues and considerations a competent estate planner should consider. Mr. Manning's attempt is obviously not to condense all the many issues into one treatise. Rather, the book is a brief overview and checklist of the many legal and tax considerations today's estate planner must be versed in.

The Motion *In Limine:* An Effective Procedural Device with No Material Downside Risk

*Jay S. Blumenkopf**

The motion in limine *is a pretrial procedural device used to exclude potential prejudicial evidence from trial. In this Article, the author discusses the development of* in limine *practice in both the civil and criminal arenas. Addressed, is the utilization of the motion* in limine *to exclude expert testimony, evidence of claims, affirmative defenses, and unreliable evidence. In summary, the author concludes that the motion is a valuable procedural tool and encourages its expansion.*

Of the myriad of procedural motions permissible in most jurisdictions, the most underutilized and least understood is the motion *in limine.*[1] This circumstance is unfortunate for the practitioner since the motion *in limine* is an effective procedural device[2] with no material

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1. 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." BLACK'S LAW DICTIONARY 914 (5th ed. 1979). The traditional motion *in limine* has been defined as:

> a motion, heard in advance of jury selection, which asks the court to instruct the defendant, its counsel and witnesses not to mention certain facts *unless and until permission of the court is first obtained outside the presence and hearing of the jury.*

Davis, *Motions in Limine,* 15 CLEV.-MAR. L. REV. 255, 255 (1966) (emphasis in original) (footnotes omitted). This definition is no longer completely accurate since the motion *in limine* has evolved into a "general litigation" tool that may be utilized at any time before prejudicial evidence is offered at trial. *See* Comment, *The Use of Motion in Limine in Civil Litigation,* 1977 ARIZ. ST. L. J. 442 (1977).

The procedural motion *in limine* to exclude prejudicial evidence must be distinguished from the "*in limine*" procedure for determining liability in condemnation cases. *See, e.g.,* Troiano v. Colorado Dep't of H'ways, 170 Colo. 484, 463 P.2d 448 (1969).

2. The motion *in limine* is "a procedural step to the offer of evidence." State v. Miller, 229 N.W.2d 762, 767 (Iowa 1975); Twyford v. Weber, 220 N.W.2d 919, 923 (Iowa 1974).

downside risk.[3] The motion, in essence, is a petition for a pretrial evidentiary ruling. In its simplest form the successful motion *in limine* will ensure that prejudicial evidence is kept from the jury.[4] A more expansive utilization of the motion will preclude the presentation of entire lines of proof.[5]

Notwithstanding the expansive potential use of the motion *in limine,* its primary objective is to procure a ruling in advance of trial that results in the exclusion of prejudicial evidence,[6] or reference, either directly or indirectly, to the existence of prejudicial matter at any time during the course of the trial.[7] The strategic use of the motion *in limine* as a procedural device to maximize discovery, or to obtain leverage, be it in settlement negotiations, plea bargaining, or otherwise, makes it an equally valuable litigation tool.[8] These areas of potential use are, of course, merely illustrative and not comprehensive.[9] Indeed, the multitude of circumstances[10] in which motions *in limine* can be utilized are coextensive with counsel's imagination[11] and its proper utilization, as with all litigation devices, is to be encouraged.[12]

The motion *in limine* for the purpose of exclusion may be made at any time before the anticipated prejudicial evidence is offered at trial.[13]

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3. For a discussion of the downside risk motion practice and the risk return theory of motions, *see* G. VETTER, SUCCESSFUL CIVIL LITIGATION: HOW TO WIN YOUR CASE BEFORE YOU ENTER THE COURTROOM (1977).

4. Whenever counsel discovers evidence prejudicial to his client's case he may avail himself of the protective measures of a motion *in limine*. The motion may be utilized regardless of the admissibility of the prejudicial evidence at trial under technical rules of evidence. *See* Troxel v. Otto, 153 Ind. App. 437, 444, 287 N.E.2d 791, 794 (1972).

5. *See, e.g.*, Good v. A.B. Chance Co., 39 Colo. App. 70, 75, 565 P.2d 217, 221 (1977).

6. *See* Rothblatt & Leroy, *The Motion in Liminie* [sic] *in Criminal Trials: A Technique for the Pretrial Exclusion of Prejudicial Evidence,* 60 KY. L. J. 611, 613 (1972); Davis, *Motions in Limine, supra* note 1; Davis, *The Motion in Limine — A Neglected Trial Technique,* 5 WASHBURN L. J. 232 (1966); Commentary, *The Motion in Limine: Pretrial Trump Card in Civil Litigation,* 27 U. FLA. L. REV. 531 (1975).

7. *See* Peskin, *Innovative Pre-Trial Motions in Criminal Defense,* 1 AM. J. TRIAL ADVOC. 35, 69 (1977); 20 AM. JUR. TRIALS, *Motion in Limine Practice* § 4, at 450 (1973); Rothblatt & Leroy, *supra* note 6, at 617, 618.

8. *See* R. HUNTER, FEDERAL TRIAL HANDBOOK, § 11.4 (1974); *Note, The Motion in Limine — A Useful Procedural Device,* 35 MONT. L. REV. 362, 363 (1974); Note, *Pre-trial Exclusionary Evidence Rulings,* 1967 WIS. L. REV. 738, 739 (1967).

9. *See* 20 AM. JUR. TRIALS, *Motion in Limine Practice* § 8 (1973); note 6 *supra.*

10. Care must be exercised, however, to avoid its indiscriminate application. Indeed, one court has stated that: "The motion should be used, if used at all, as a rifle and not as a shotgun, pointing out the objectionable material and showing why the material is admissible and prejudicial." Lewis v. Buena Vista Mutual Ins. Ass'n, 183 N.W.2d 198, 201 (Iowa 1971) *citing* Sidney, *Motion in Limine, Workshop Outlines at Ninety-Second Annual Meeting,* Iowa State Bar Association, AI, at A8-A9 (1965).

11. *See, e.g.*, Troxel v. Otto, 153 Ind. App. 437, 440, 287 N.E.2d 791, 794 (1972).

12. *See* Compania Dominica de Aviacion v. Knapp, 251 So.2d 18 (Fla. Dist. Ct. App. 1971); Zartzell v. Roschke, 31 Mich. App. 87, 187 N.W.2d 564 (1971), *rev'd on other grounds,* 387 Mich. 577, 198 N.W.2d 309 (1971). *See also* Annot., 94 A.L.R.2d 1087, 1088 (1964); *Pre-trial Evidence Rulings, supra* note 8.

13. Department of Pub. Works & Bldgs. v. Roehig, 45 Ill. App. 3d 189, 194, 359 N.E.2d 752, 758 (1976); Lapasinskas v. Ouick, 17 Mich. App. 733, 737 n.1, 170 N.W.2d 318, 319 n.1 (1969); Fenimore v. Donald M. Drake Constr. Co., 87 Wash.2d 85, 90-91, 549 P.2d 483, 486-87 (1976).

The traditional procedure is to move *in limine* prior to jury selection.[14] This approach is premised on the theory that "once the 'skunk is in the box' the odor is ineradicable."[15] That is, once the jury is exposed to offending matter, the prejudicial effect on the minds of jurors cannot be overcome by an order striking the evidence and the court's instruction to disregard.[16] The pre-*voir dire* motion *in limine* is a prophylactic measure[17] calculated to keep the "skunk [out of] the box."[18] Thus, if the motion is successful, the court's ruling will preclude the proponent of prejudicial evidence from adducing or even alluding to the offending matter at any time during the trial.[19]

This Article traces the historical development of the motion *in limine,* including both civil and criminal practice in Section I. Section II discusses the various new uses of this motion and suggests that today's attorneys be creative and effectuate its use whenever practicable. Statutory authority for the use of a motion *in limine* is provided in Section III. Much of the authority concerns the motion per se, while other authority is presented to provide foundation analogously. In Section IV, strategy for *in limine* practice is addressed and a proposal for its expanded use in current day practice is propounded. Additionally, this section covers those sanctions which are presently available for enforcing violations of an *in limine* order. Finally, the Article concludes that no definitive parameters on the use of motions *in limine* exist, and the inventive trial attorney should be cognizant that this motion is a formidable legal tool which should be more fully utilized.

See generally, Davis, *Motions in Limine, supra* note 1; Davis, *The Motion in Limine — A Neglected Trial Technique, supra* note 6; *A Useful Procedural Device, supra* note 8; *Pre-trial Evidence Rulings, supra* note 8.

14. *See* note 1 and accompanying text *supra.*

15. Kromzer, *Advantages to Be Gained By Motions for the Plaintiff,* 6 S. TEX. L. J. 179 (1963).

16. Both the ability and the inclination of the jury to accept the court's instruction to disregard evidence stricken from the record have been questioned. *See* J. FRANK, COURTS ON TRIAL 111 (1949). " 'The naive assumption that prejudicial effect can be overcome by instructions to the jury . . . all practicing lawyers know to be unmitigated fiction. . . .' " Bruton v. United States, 391 U.S. 123, 129 (1949), *quoting* Krulewitch v. United States, 336 U.S. 440, 453 (1949) (Jackson, J., concurring); Dolan, *Rule 403: The Prejudice Rule in Evidence,* 49 S. CAL. L. REV. 220, 238 (1976). *See also* A. OSBORN, THE MIND OF THE JUROR 87, 92 (1937); Armstrong, *Objections to Evidence in Jury Trials: A Multiple Review,* 23 TENN. L. REV. 545, 555-61 (1955); Note, *Improper Argument to Juries in Civil Cases,* 43 MINN. L. REV. 545 (1959).

17. Alert counsel . . . may protect himself against possible misconduct by means of a pre-trial order determining admissibility whenever his trial preparation discloses evidence of a highly prejudicial nature which may or may not be admissible. Protective orders might conversely serve as a firm and advance admonition to counsel not to embark upon a path which might lead to a mistrial or reversal. . . .

Troxel v. Otto, 153 Ind. App. 437, 444, 287 N.E.2d 791, 794 (1972).

18. *See* Kromzer, *supra* note 15, at 179.

19. *See* Redding v. Ferguson, 501 S.W.2d 717, 722 (Tex. Civ. App. 1973); Bridges v. City of Richardson, 163 Tex. 292, 354 S.W.2d 366 (1962); Mahoney & Jacobson, *The Motion in Limine: A Remedy For Dirty Tricks,* 27 FED'N INS. COUNSEL Q. 65, 66 (1976).

Moreover, violations of the court's *in limine* ruling should "lead to serious consequences." Burdick v. York Oil Co., 364 S.W.2d 766, 770 (Tex. Civ. App. 1963). *See* Charbonneau v. Superior Court of Los Angeles, 42 Cal. App.3d 505, 116 Cal. Rptr. 153 (1974), where the conse-

I. HISTORICAL DEVELOPMENT

The motion *in limine* is similar to and believed to have evolved from the pretrial criminal motion to suppress illegally obtained evidence.[20] The distinction between the motion to suppress and the motion *in limine* is that the former is predicated "upon specific constitutional or statutory grounds . . .,"[21] while the latter is addressed to the inherent power of the trial court to admit and exclude evidence.[22] Historically, the trial court exercised its inherent discretionary powers when evidence was offered during the course of the trial. In many instances, this procedure proved deficient because the jury was exposed to evidence that was ultimately ruled inadmissible or improper. The motion *in limine* permits the court to exercise its discretionary powers while guaranteeing that prejudice does not creep into the trial.

In Indiana, for example, where the state's procedural practice now encompasses *in limine* practice,[23] the Court of Appeals, in the 1973 case of *Burrus v. Silhavy,* held that a "motion *in limine* is a necessary adjunct to the trial court's inherent power to admit and exclude evidence."[24] In approving *in limine* practice, the court reasoned that a fair and impartial trial would be foreclosed if the jury were exposed to prejudicial statements or questions. As a result of this decision, Indiana trial courts enjoy great flexibility with respect to the issuance of protective orders necessary to ensure fair trials.[25] The provident recognition of *in limine* practice by the Indiana Court of Appeals in 1973 was arrived at with the benefit of forty years of hindsight. Earlier courts faced with petitions for pretrial evidentiary rulings did not view *in limine* practice with the same enlightened attitude.

The earliest reported civil action in which a petition for a pretrial evidentiary ruling was made is the 1933 Alabama case, *Bradford v. Bir-*

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quence resulting from counsel's violations of the trial court's *in limine* ruling was a two-day jail sentence for contempt. *But see* Blackburn v. State, 314 So.2d 634 (Fla. App.), *cert. denied,* 429 U.S. 864 (1975), where the court reconsidered its earlier ruling at the time the evidence was offered.

20. Annot., 63 A.L.R.3d § 2(a), 311 (1975).

21. 20 AM. JUR. TRIALS, *Motion in Limine Practice* § 8, at 455 (1973).

22. *See* Eichel v. New York Central R.R. Co., 375 U.S. 253, 256 (1963) (Harlan, J., concurring), wherein it was stated: "The authority of the trial court to entertain a 'motion *in limine*' emanates from the inherent power of the trial court to exclude or admit evidence in furtherance of its fundamental constitutional purpose which is the administration of justice." Burris v. Silhavy, 155 Ind. App. 558, 563, 293 N.E.2d 794, 797 (1973). For a discussion of "[t]his fundamental purpose," *see* Knox County Council v. State ex rel. McCormick, 217 Ind. 492, 498, 29 N.E.2d 405, 407 (1940).

23. *See* Burrus v. Silhavy, 155 Ind. App. 558, 560, 293 N.E.2d 794, 795 (1973). *See also* Proper v. Mowry, 90 N.M. 710, 714, 568 P.2d 236, 240 (1977).

24. 155 Ind. App. 558, 564, 293 N.E.2d 794, 798 (1973).

25. *Id.* at 564, 293 N.E.2d at 797.

mingham Electric Co.[26] In *Bradford,* the trial court, in a personal injury action, denied plaintiff's application for a pretrail order precluding defense counsel from offering improper evidence with respect to the plaintiff's character.[27] The Supreme Court of Alabama, finding that no existing rule of law or practice authorized this procedure, affirmed the trial court's holding.[28] The Alabama Supreme Court, moreover, found that the trial court was in no position to assume in advance of trial that improper evidence would be offered and ruled accordingly.[29]

A. Early Recognition of In Limine *Practice*

For a time, the view of the Alabama Supreme Court in *Bradford* on *in limine* practice prevailed. Notwithstanding, there developed a gradual recognition of the need to preclude counsel from injecting prejudicial matter into a trial.[30] This awareness arose from the significant increase in the number of jury trials in which attorneys persistently pursued an entirely unjustified line of questioning for the specific purpose of affecting the jury's verdict.[31] The motion *in limine* was, therefore, recognized as being an "appropriate"[32] as well as a "desirable"[33] procedure designed to prevent the submission of prejudicial questions and the offering of prejudicial evidence in the presence of the jury.[34]

Recognition of *in limine* practice did not lead to its widespread utilization, and its early advancement as a trial tactic was sporadic at best.[35] Consequently, the evolvement of the motion *in limine* lacks a sense of

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26. 227 Ala. 285, 149 So. 729 (1933).
27. *Id.* at 287, 149 So. at 730.
28. *Id.*
29. *Id.*
30. *See* Davis, *supra* note 1, at 256, *quoting* Annot., 109 A.L.R. 1089 (1937).
31. *Id.*
32. Bridges v. City of Richardson, 163 Tex. 292, 293, 354 S.W.2d 366, 367 (1962).
33. *Id.*
34. *Id.*
35. *Id.* at 293, 354 S.W.2d at 368. *See* Davis, *supra* note 1.

Implicit support for the motion *in limine* was conferred by the United States Supreme Court in Eichel v. New York Central R.R. Co., 375 U.S. 253 (1963). In *Eichel,* the Supreme Court, *per curiam,* found that the trial court had properly excluded evidence of plaintiff's receipt of disability payments with respect to the issue of malingering or the extent and duration of plaintiff's disability. Justice Harlan, concurring in part and dissenting in part, found that:

> Whether or not evidence that the petitioner was receiving disability pension payments . . . should have been admitted depends on a balance between its probative bearing on the issue as to which it was offered . . . and the possibility of prejudice to the petitioner resulting from the jury's consideration of the evidence on the issues as to which it is irrelevant. Where a balance of this sort has to be struck, it should, except in rare instances, be left to the discretion of the trial judge, subject to review for abuse. . . . It is he who is in the best position to weigh the relevant factors, such as the value of the disputed evidence as compared with other proof adducible to the same end and the effectiveness of limiting instructions.

Id. at 256-57.

historical continuity easily capable of simple categorization. What is consistent in the development of *in limine* practice, however, is the resulting exclusion of prejudicial matter achieved by *in limine* rulings in the various jurisdictions now recognizing this procedural device. Full cognizance of the need for pretrial rulings excluding prejudicial evidence arrived shortly after the *Bradford* decision.

For example, as early as 1940, the Supreme Court of Virginia presupposed *in limine* practice when it excluded evidence of the physical condition of the beneficiaries in a wrongful death case so as to ensure that the jury's sympathy would not be unduly aroused to the point where it precluded the defendant from receiving a fair trial.[36] The State of Texas, while not the birthplace of *in limine* practice, must certainly be credited with facilitating its early development. Indeed, most of the early reported cases construing *in limine* practice arose out of cases before the Texas courts.[37] For example, in *Roosth & Genesco Products Co. v. White,*[38] the defendant moved *in limine* to preclude the plaintiff from introducing evidence of post-accident design modifications which allegedly corrected the defect claimed.[39] The trial court denied this motion and the defendant objected, unsuccessfully, to the introduction of testimony of the modification.[40] After the objectionable evidence was admitted the defendant sought to remedy the situation on cross-examination by introducing testimony for the purpose of clarifying the reason for the corrective measures.[41] The lower court conceded that the evidence had been inadmissible, but determined, nevertheless, that the defendant's explicatory testimony had dissipated any conceivable harm that might have resulted from the inadmissible evidence heard by the jury.

The Supreme Court of Texas reversed the lower court's "harmless error" finding, noting that the defendant first raised the point by a motion to exclude such evidence at the beginning of trial.[42] The court also

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36. Crawford v. Hite, 176 Va. 69, 72, 10 S.E.2d 561, 564 (1940). In *Crawford,* the court ruled that the jury was entitled to hear evidence of the physical condition of the beneficiaries upon considering the issue of apportionment of damages after a verdict had been reached on the issue of liability and the quantum of damages.

37. Bosley v. State, 414 S.W.2d 468, *cert. denied,* 389 U.S. 876 (1967); Bridges v. City of Richardson, 163 Tex. 292, 354 S.W.2d 366 (1962); Condra Funeral Home v. Rollins, 158 Tex. 478, 314 S.W.2d 277 (1958); Ford v. Carpenter, 147 Tex. 447, 216 S.W.2d 558 (1949); Gulf States Abrasive Mfg., Inc. v. Oertel, 489 S.W.2d 184 (Tex. Civ. App. 1972); Bell Aerospace Corp. v. Anderson, 478 S.W.2d 191 (Tex. Civ. App. 1972); Hudson v. Smith, 391 S.W.2d 441 (Tex. Civ. App. 1965); State v. Baker Bros. Nursery, 366 S.W.2d 212 (Tex. Civ. App. 1963); Burdick v. York Oil Co., 364 S.W.2d 766 (Tex. Civ. App. 1963); Aetna Casualty & Surety Co. v. Finney, 346 S.W.2d 917 (Tex. Civ. App. 1961).

38. 152 Tex. 619, 262 S.W.2d 99 (1953).

39. *Id.* at 623, 262 S.W.2d at 104.

40. *Id.*

41. *Id.* at 620, 262 S.W.2d at 100.

42. *Id.* at 623, 262 S.W.2d at 104. For cases discussing the "harmless error" rule and its rela-

indicated that the appropriate objections were made when the evidence was offered and that such objections were not waived by the curative steps taken by the petitioner on cross-examination, and by explanatory testimony after the objectionable evidence was admitted.[43] In *Roosth,* a simple pretrial instruction from the trial court would have prevented the jury from being exposed to the prejudicial matter.

In an apparent attempt to advise the Texas trial courts of the availability of the motion *in limine* as a procedural device to exclude prejudice, the Supreme Court of Texas carefully articulated the usefulness and proper utilization of *in limine* practice in *Bridges v. City of Richardson.*[44] In the final analysis, regardless of its desirability and the obvious potential benefits that may be realized from its proper utilization, the motion *in limine* has not been universally accepted by trial and appellate courts.[45] Still, it has certainly developed into a viable procedural device to exclude common areas of prejudicial evidence.[46]

B. Basic Civil In Limine *Practice*

In jurisdictions where *in limine* practice is firmly established as a procedural device, its use, quite often, is restricted in civil cases to the exclusion of matter that would not be admissible under long-standing rules of evidence. Indeed, an examination of civil cases in which *in limine* rulings were sought demonstrates that the preliminary motion to exclude is commonly directed at, but certainly not limited to, collateral matter[47] such as evidence of insurance payments,[48] pension benefits,[49] workman's compensation benefits,[50] veteran's benefits,[51] litigiousness,[52] subsequent remedial measures,[53] the income tax consequences of

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tionship to the motion *in limine, see* Schoellman v. Ammann, 352 S.W.2d 920 (Tex. Civ. App. 1962) and Montgomery v. Vinzant, 297 S.W.2d 350 (Tex. Civ. App. 1956).

43. Roosth & Genesco Prod. Co. v. White, 152 Tex. 619, 622, 262 S.W.2d 99, 103 (1953).

44. 163 Tex. 292, 354 S.W.2d 366 (1962), where the court stated that the motion *in limine* is appropriate and desirable to eliminate prejudicial testimony.

45. *See* Carrithers v. Jean's Ex'r, 259 Ky. 20, 81 S.W.2d 857 (1935); State v. Flett, 234 Ore. 124, 380 P.2d 634 (1963); Neilsen v. Brown, 232 Ore. 426, 374 P.2d 896 (1962).

46. *See* notes 48-78 and accompanying text *infra.*

47. *See* Kantor v. Ash, 215 Md. 285, 137 A.2d 661 (1958); Texas Employers' Ins. Ass'n v. Yother, 306 S.W.2d 730 (Tex. Civ. App. 1957); State v. Simmons, 148 W. Va. 340, 135 S.E.2d 252 (1958).

48. *See* American Cooperage Co. v. Clemons, 346 S.W.2d 705 (Tex. Civ. App. 1963).

49. *See* Wagner v. Larson, 257 Iowa 1202, 1225, 136 N.W.2d 312, 326 (1965).

50. *See* Texas Employers' Insurance Ass'n v. Yother, 306 S.W.2d 730 (Tex. Civ. App. 1957) (motion for continuance on case involving workman's compensation benefits).

51. *See* Wagner v. Larson, 257 Iowa 1202, 1225, 136 N.W.2d 312, 326 (1965).

52. *See* Southern Truck Leasing Co. v. Manieri, 325 S.W.2d 912 (Tex. Civ. App. 1959); Martinez v. Williams, 312 S.W.2d 742 (Tex. Civ. App. 1958).

53. Roosth & Genesco Prod. Co. v. White, 152 Tex. 619, 629, 262 S.W.2d 99, 104 (1972). *See also* Huff v. New York Central R.R. Co., 116 Ohio App. 32, (*reported in* 12 DEFENSE L. J. 310), *aff'd,* 111 Ohio Op. 2d 257, 186 N.E.2d 478 (1961). *Huff* was a wrongful death action in which a

recovery,[54] the remarriage of the surviving spouse,[55] personal habits[56] or criminal convictions.[57]

For instance, the Indiana personal injury case of *Burrus v. Silhavy*[58] is exemplificative of the use of the motion *in limine* to exclude evidence of collateral source payments. In *Burrus,* the plaintiff obtained a pretrial ruling precluding the introduction of evidence of insurance payments made to the plaintiff by a third-party insurance company.[59] In another personal injury case, *Doyle v. New York,*[60] portions of plaintiff's hospital records constituting hearsay from unidentified persons were the subject of a motion *in limine.* The matter consisted of a medical history which indicated that the plaintiff was a drug addict and alcoholic.

The effect of this patently offensive matter could only be prejudicial. Moreover, whether or not the plaintiff was under the influence of drugs or alcohol at the time of the accident was clearly not an issue in this case. The trial court, however, denied the plaintiff's motion *in limine.* The Appellate Division, recognizing the impact of such prejudicial matter upon a jury, compounded by defense counsel's portraying the plaintiff as a drug addict and alcoholic, reversed the trial court's ruling.[61] Thus, in *Doyle* the plaintiff was initially deprived of a fair trial because the trial judge did not appreciate the potential for prejudice resulting from the admission of improper evidence which the plaintiff sought to exclude by a motion made in advance of trial. This case underlines the serious and long-range effects of a denial of a timely and proper motion *in limine.*

A trial judge's perceptive recognition of potential prejudice was instrumental in the granting of a motion *in limine* in *Cook v. Philadelphia Transit.*[62] There, the plaintiff successfully moved *in limine* to prevent the defendant from using the name "Crazy Bar" when describing the scene of an accident which gave rise to the lawsuit.[63] The fundamental

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successful motion *in limine* resulted in the exclusion of evidence of the installation, subsequent to the accident resulting in the lawsuit, of blinkers and other safety equipment at the crossing where the decedent was killed. Also excluded was evidence of a letter from the decedent's daughter to the President of the United States in which she described the crossing where her father was killed as a "death trap."

54. Hildyard v. Western Fasteners, Inc., 33 Colo. App. 396, 522 P.2d 596 (1974).

55. Cherrigan v. San Francisco, 262 Cal.2d 643, 69 Cal. Rptr. 42 (1968).

56. Doyle v. New York, 281 A.D. 821, 119 N.Y.S.2d 71 (1953). *See also* Miller v. Chicago Transit Auth., 3 Ill. App. 2d 223, 121 N.E.2d 348 (1954); Sanders v. George, 258 N.C. 776, 129 S.E.2d 480 (1963).

57. Wagner v. Larson, 257 Iowa 1202, 1225, 136 N.W.2d 312, 326 (1965).

58. 155 Ind. App. 558, 293 N.E.2d 794 (1973).

59. *Id.*

60. 281 A.D. 821, 119 N.Y.S.2d 71 (1953).

61. *Id.*

62. 414 Pa. 154, 199 A.2d 446 (1964).

63. *Id.* at 156, 199 A.2d at 447.

reason for the court's decision was that the mere mention of the name "Crazy Bar" might prejudice the plaintiff by suggesting that she was intoxicated,[64] thereby placing her sobriety, which was not at issue, before the jury. Thus, even where an attorney makes an appropriate and timely motion *in limine,* the trial judge must be cognizant of its efficacy or the moving party can be tied up in appeals as was the plaintiff in *Doyle.*

The common use of the motion *in limine* to obtain pretrial rulings excluding collateral matter should certainly not be viewed as a limitation on the use of this procedural device. The use of the motion *in limine* in similar cases, however, should be utilized as groundwork for *in limine* practice in more unique circumstances. A somewhat unusual use of the motion *in limine* in a civil action was made in a California condemnation case, *Sacramento - San Joaquin Drainage District v. Reed.*[65] In that case, evidence of the diminished value of the remainder of the condemnee's land attributable to possible future flooding was the subject of a motion *in limine* by the condemnor. The trial judge believed that such an item was a permissible factor in establishing damages, because a flood control levee was to be constructed on the condemned land. The California Appellate Court, however, found that such evidence was inadmissible with respect to the determination of the land value because the likelihood of flooding was wholly speculative and only a matter of opinion.[66] The pretrial motion to exclude in this case went beyond the ordinary bounds of *in limine* practice to achieve a successful result.

Another instance of unusual and imaginative use of a motion *in limine* can be found in a Montana contested will case which firmly established *in limine* practice in that state. *Wallin v. Kinyon Estate,*[67] concerned a will that was admitted to probate even though there were allegations that the drafter of the will was practicing law without a license and had unduly influenced the testator.[68] The trial court granted a motion *in limine* to preclude the introduction of any evidence concerning the qualifications of the public administrator who drew the will,[69] thereby limiting the issue at trial to that of undue influence. The basis for the trial court's decision was the fact that the will complied with all statutory requirements.[70] The Supreme Court of Montana held that the trial court's exclusion of evidence of the alleged unlawful practice of law by the drafter of the will properly insulated the jury from exposure to prejudicial evidence that may have affected the jury's ability

64. *Id.* at 158, 199 A.2d at 447-48.
65. 215 Cal. App. 2d 60, 29 Cal. Rptr. 847 (1963).
66. *Id.* at 70-71, 29 Cal. Rptr. at 853.
67. 164 Mont. 160, 519 P.2d 1236 (1974).
68. *Id. See also* Kipp v. Wong, 163 Mont. 476, 517 P.2d 897 (1974).
69. 164 Mont. at 162, 519 P.2d at 1237.
70. *Id.* at 165, 519 P.2d at 1238-39.

to reach a fair and impartial verdict on the issue of undue influence.[71] In sum, these cases provide some unique and inspirational examples for practicing attorneys to consider when a motion *in limine* might be an appropriate device to employ in the civil arena.

C. *Basic Criminal* In Limine *Practice*

The use of the motion *in limine* in criminal cases in jurisdictions recognizing this procedural device, as in civil cases, has developed a common pattern of practice. The exclusion of prior convictions represents the most common area of matter excluded by such a pretrial motion.[72] Other common areas of exclusion in criminal cases involve matter not generally admissible under the traditional rules of evidence, such as the commission of other crimes,[73] including evidence of accusations,[74] arrests,[75] offers to plead guilty[76] or the withdrawal of guilty pleas.[77]

Counsel contemplating the utilization of a motion *in limine* in a criminal case, of course, should not feel constrained to these common areas but should seek to exclude matter that limits the evidence the prosecution may offer to prove its case. A motion structured with this goal in mind can refine the trial issues and narrow the disputed issues actually presented to the jury. For example, in *United States v. Fishel,*[78] a tax prosecution case in which the defendant was charged with bribery of an IRS agent, the prosecution's proof was severely limited when the defense successfully moved *in limine* to exclude a tape recording. The agent allegedly bribed had been assigned to audit the tax returns of two corporations in which the defendant had an interest and for which the defendant had signed the returns. In the course of the audit three conversations between the defendant and the agent were recorded on three different tapes.[79] During pretrial discovery, the government revealed that two of the three tape recordings could not be found. The defense contended that the two lost tapes established that the defendant had been entrapped and moved *in limine* to suppress the remaining tape. The court, focusing on concerns of fundamental fairness, found that if the jury heard only the one tape recording proving the crime of bribery,

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71. *Id.* at 165, 519 P.2d at 1239.

72. United States v. Palumbo, 401 F.2d 270 (2d Cir. 1968), *cert. denied,* 394 U.S. 947 (1969).

73. *See* Rothblatt & Leroy, *supra* note 6, at 627.

74. *Id. But see* State v. Morgan, 192 Wash. 425, 430-31, 73 P.2d 745, 747 (1937) (evidence of arrests resulting in no convictions admissible).

75. *See generally* Rothblatt & Leroy, *supra* note 6. *But see* State v. Morgan, 192 Wash. 425, 430-31, 73 P.2d 745, 747 (1937) (evidence of arrests admissible).

76. *See* Rothblatt & Leroy, *supra* note 6, wherein it is noted that evidence of a defendant's withdrawal of a guilty plea is obviously prejudicial and should be kept from the jury.

77. *Id.*

78. 324 F. Supp. 429 (S.D.N.Y. 1971).

79. *Id.* at 430.

while not hearing the other two tapes allegedly establishing the defense of entrapment, the defendant would be denied a fair trial on the entrapment issue. Accordingly, the court suppressed the remaining tape recordings.[80]

A recent New Hampshire criminal case, *State v. McGovern,*[81] demonstrates the imaginative use of the motion *in limine* to refine the trial issues, thereby ensuring a fair trial on the crime actually charged in the indictment. In *McGovern,* the defendant was charged with negligent homicide arising from a one car crash in which a passenger was killed. The indictment alleged that the defendant was traveling at excessive speed at the time of the crash. The defendant, who had been drinking before the accident, had refused to take a breathalyzer test, and the prosecution had conceded that there was insufficient evidence to charge the defendant with driving while intoxicated. This concession notwithstanding, the prosecution expressed an intent to introduce evidence of the defendant's drinking and of his refusal to take a breathalyzer test.[82] The defense moved *in limine* to preclude the prosecution from introducing evidence of the defendant's drinking because the only negligent act alleged in the indictment was speeding and there was no charge in the indictment that the defendant was driving while intoxicated. Thus, evidence that the defendant had been drinking was of questionable legal relevance to the crime charged. The trial court granted defendant's motion and guaranteed its enforcement by providing a mandatory mistrial for violation of the order.[83]

In both *McGovern* and *Fishel* the motions *in limine* clearly went beyond the common areas of exclusion in criminal cases to preclude the introduction of substantive evidence and are prime examples of the breadth of the evidentiary matter that may be excluded by the use of a preliminary motion to exclude. Indeed, the possibilities for the exclusion of evidentiary matter in criminal cases are endless. An attorney should thoroughly analyze the factual issues of any criminal case to ascertain if there is evidence of questionable legal relevance or of a patently unfair nature that may be excluded by a proper motion *in limine.*

II. THE EXPANDING SCOPE OF *IN LIMINE* PRACTICE

The litigation boom in a society that has become increasingly complicated has, perforce, resulted in the filing of lawsuits of an inherently complex nature.[84] As a result of their complexity, these multi-issue liti-

80. *Id.* at 430-32.

81. State v. McGovern, No. ST662 A (N.H. Super. Ct., Feb. 13, 1978), *reported in* [1979] 21 ATLA. L. REP. 315.

82. *Id.*

83. *Id.*

84. *See* AMERICAN LAW INSTITUTE, CIVIL TRIAL MANUAL, THE MACHINERY OF JUSTICE 1-23 (Supp. 1978), A Joint Project of the American College of Trial Lawyers and the ALI-ABA Com-

gations have created opportunities for astute counsel to increasingly utilize the motion *in limine* to refine and narrow trial issues, as well as to exclude certain evidence on a particular issue.[85]

A. The Exclusion of Expert Testimony

Illustrating a creative formation of a motion *in limine* in a complex case is *Independent Iron Works, Inc. v. United States Steel Corp.*,[86] where a successful motion was cleverly formulated to exclude the deposition testimony of the plaintiff's expert witness, a distinguished economist. *Independent Iron Works, Inc.* was a private antitrust suit involving numerous acts of conspiracy and monopolization in the structural steel business.[87] Prior to trial the defendants moved to exclude the testimony of the plaintiff's expert economist, which consisted of the expert's "abstractions in the field of economics together with his opinions on issues of law,"[88] only some of which was within the province of an expert witness. The basis for the defendant's motion was that such testimony was not relevant to the issues of the trial.[89] The trial court agreed and excluded the economist's testimony, noting that the defendants were charged with violations of the antitrust laws, not violations of economic principles, and the case, therefore, should be tried upon legal principles, not economic ones.[90] The court, it should be noted, did not exclude the use of proper expert testimony in the field of economics, but only the introduction of testimony of the plaintiff's expert, much of which was improper. Indeed, the court's order specifically provided that an expert chosen by the court or by mutual consent of counsel would be permissible.[91] The use of an expert in the field of economics, apparently, was not required, since neither the court nor the plaintiff sought to call one, and the plaintiff did not attempt to lay the proper foundation for the introduction of those portions of the deposition testimony of its expert that were proper and admissible.[92]

The deposition testimony of an expert witness was the subject of

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mittee on Continuing Education, Robert McC. Figg, Ralph C. McCullough II, and James L. Underwood, Reporters.

85. *See* notes 86-128 and accompanying text *infra*. *See also,* Wallin v. Kinyon Estate, 164 Mont. 160, 519 P.2d 1236 (1974), where the plaintiff complained that the *in limine* ruling excluded two thirds of her case. *But see,* Sperberg v. Goodyear Tire & Rubber Co., 519 F.2d 708 (6th Cir.), *cert. denied,* 423 U.S. 987 (1975), where the trial court stated that exclusion of broad categories of evidence should rarely be employed.

86. 322 F.2d 656 (9th Cir. 1963).

87. *Id.* at 658-61.

88. *Id.* at 675.

89. *Id.*

90. *Id.*

91. *Id.*

92. *Id.*

another motion *in limine* in *Collins v. Wayne Corp.*,[93] a recent case arising from a bus accident in which nineteen people died and eleven were seriously injured.[94] Two days after the accident the defendant bus manufacturer hired an expert in the field of automobile collision investigation. During discovery proceedings, the expert's identity was revealed to the plaintiffs. The defendant then supplied the plaintiffs with the expert's investigative report and made him available to the plaintiffs, who took his deposition.[95]

Shortly before trial, the defendant moved *in limine* to exclude the expert's testimony on the ground that he was a consultant whose opinion was not discoverable under Rule 26 of the Federal Rules of Civil Procedure.[96] The plaintiffs argued that the deposition was the admission of a party opponent; thus, admissible under Federal Rule of Evidence 801(d)(2)(c).[97] The plaintiffs sought to have the expert's deposition ruled admissible as an admission of the defendant because it would have helped the plaintiffs' case in two ways: First, the testimony of the defendant's expert on impact speed was close to the estimates of the plaintiffs' expert. Second, the defendant's expert had testified that the expert retained by the plaintiffs was "perhaps the foremost authority in the field of bus design."[98] This testimony, however, would have only been helpful if attributed to an employee of the defendant, since the defendant's expert also testified that the bus was crashworthy and thus, not of defective design.

The trial court denied the defendant's motion *in limine,* but ruled that the plaintiffs were precluded from offering the deposition testimony of the defendant's expert as an admission. This denial deprived the plaintiffs of the tactical advantage that could be gained by offering the testimony of the defendant's expert. The functional effect of this ruling was, in essence, like the granting of a motion *in limine,* since the plaintiffs could not offer the testimony as an admission of a party opponent. Consequently, the plaintiffs made a strategic decision not to offer the expert's testimony at all.[99] On appeal, the Fifth Circuit Court of Appeals found that the testimony was of an expert retained by the defendant to investigate and analyze the accident and report his findings. Thus, the expert's report on his investigation and his deposition testimony, in which he described his investigation and explained his analysis, was an admission of the defendant bus manufacturer. The court,

93. 621 F.2d 777 (5th Cir. 1980).
94. *Id.* at 778.
95. *Id.* at 780.
96. *Id. See* FED. R. CIV. P. 26.
97. 621 F.2d at 780. *See* FED. R. EVID. 801(d)(2)(c).
98. 621 F.2d at 780.
99. *Id.* at 780-81.

however, found that the expert's testimony was cumulative of other evidence already in the case, and the trial court's error in limiting the use the plaintiffs could make of the expert's testimony was harmless. Since there was no way of measuring the effect that the expert's testimony would have had on the jury if attributed to the defendant, the exclusion of such testimony was strategically successful for the defendant.

B. The Exclusion of Evidence of Claims

International Halliwell Mines, Ltd. v. Continental Copper Steel Industry[100] is a complex case depictive of a counsel's inventive use of a pretrial motion to exclude. This case differs from *Independent Iron Works, Inc.*[101] and *Collins v. Wayne Corp.*[102] in that it was intrinsically proper lay testimony, as opposed to expert testimony, that was the subject of a preliminary motion to exclude. *International Halliwell Mines, Ltd.* was a diversity damage action "based on claims of unlawful domination, misappropriation of corporate opportunities, breach of fiduciary duty and corporate mismanagement. . . ."[103] The plaintiffs, a Canadian corporation and its wholly-owned Haitian subsidiary, asserted their claims against a New York corporation and its directors and officers who had served on the parent's board of directors at the time of the alleged misconduct.

The trial court excluded as cumulative proposed testimony which, according to the plaintiffs' offer of proof, related to the plaintiffs' financial condition and the actions of the defendant corporation's nominees on the Canadian corporation's board of directors. This proposed testimony covered the time during and prior to a period when the plaintiffs were suffering from economic distress attributable to the defendants. The proffered testimony was relevant and probative, since the essence of the plaintiffs' claims was that a settlement agreement under which the parties terminated certain contracts and entered into new contracts was done because of the economic problems caused by the defendant. These contracts were allegedly unfavorable to the plaintiffs and contained language releasing the defendant corporation from liability.[104] The court, nonetheless, found that regardless of the nature of the testimony concerning the plaintiffs' economic condition at the time it entered into the settlement agreement, the court could not disturb undisputed evidence overwhelmingly adverse to the plaintiffs which indicated that any claim based on economic duress had been waived.[105] The court found, moreover, that another of the plaintiffs' witnesses

100. 544 F.2d 105 (2d Cir. 1976).
101. 322 F.2d 656 (9th Cir. 1963).
102. 621 F.2d 777 (5th Cir. 1980).
103. 544 F.2d 105, 106 (2d Cir. 1976).
104. *Id.* at 108-09.
105. *Id.* at 109.

had testified as to the plaintiffs' financial condition during much of the same time period sought to be covered by the excluded evidence. Thus, the evidence was properly excludable as cumulative.

C. *The Exclusion of Affirmative Defenses*

In *International Halliwell Mines, Ltd.* it was the plaintiffs' inability to proffer testimony which could overcome the defendant's powerful evidence. The evidence was adverse to the plaintiffs' position asserted at trial and resulted in the exclusion of relevant evidence. In *Good v. A.B. Chance Co.*,[106] the defendant was unable to establish, at a pretrial evidentiary hearing brought about by the plaintiff's motion *in limine,* that a legal basis existed for the assertion of the defenses of contributory negligence and assumption of risk. As a result, evidence pertaining to these affirmative defenses was excluded at trial.[107]

In *Good,* the deceased was a linesman who was electrocuted when current from an energized line passed or arced through a brass bonding screw to the metal control mechanism in the basket of the aerial boom in which the deceased was working. The complaint alleged that the electrocution was caused by the inherently defective design of the aerial boom. This allegation was denied by the Chance Company, which asserted the two affirmative defenses of contributory negligence and assumption of the risk.[108]

At the evidentiary hearing the Chance Company, in support of the contributory negligence defense, offered evidence to show that the deceased had failed to use rubber gloves and line covers contrary to industry practice and the safety rules of the deceased's employer.[109] This evidence was excluded because the issue in a products liability case is whether the product was defective and caused the particular injury alleged.[110] Thus, evidence of the user's actions for the purpose of establishing a certain degree of negligent conduct on his part was not probative of whether the defect in the product caused the injury claimed.[111] Indeed, in *Good v. A.B. Chance Co.* the reception of evidence of the deceased's alleged negligence (*i.e.,* failure to comply with industry and company safety rules) would not have been probative on the issue arising from the alleged defect of the aerial boom and the resulting electrocution, and clearly would have prejudiced the plaintiff's case.[112]

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106. 39 Colo. App. 70, 565 P.2d 217 (1977).

107. *Id.* at 76-77, 565 P.2d at 223.

108. *Id.* at 74, 565 P.2d at 220-21.

109. *Id.* at 76, 565 P.2d at 222.

110. *See, e.g.,* Kinard v. Coats Co., 37 Colo. App. 555, 553 P.2d 835 (1976).

111. An Action in "[p]roducts liability . . . does not rest upon negligence principles, but rather is premised on the concept of enterprise liability for casting a defective product into the stream of commerce." *Id.* at 557, 553 P.2d at 837 (citations omitted).

112. *Id.* at 557, 553 P.2d at 837. *See* Good v. A.B. Chance Co., 39 Colo. App 70, 75-76, 565 P.2d 217, 222 (1977).

Supporting the assumption of risk defense, the Chance Company offered evidence to show that users of the aerial boom were informed at a sales demonstration and by an instructional movie shown during training sessions, that the brass bonding screw and the metal controls in the basket were defective.[113] The Chance Company, however, could not produce evidence showing that the deceased had attended the sales demonstration or had seen the training session movie. Absent such proof, the company could not establish that the deceased had subjective knowledge of the specific defects and the dangers posed thereby; thus, it failed to establish the requisite foundation for the assumption of risk defense.[114] Indeed, the evidence the Chance Company sought to offer would have supported a "conjectural inference" at most, and would have been fatally prejudicial to the plaintiff's case.[115] Accordingly, it was proper for the trial court to enter an *in limine* order excluding evidence on the assumption of risk defense.

D. The Exclusion of Incompetent or Unreliable Evidence

In *Good v. A.B. Chance Co.,* the defense failed to establish that there was a legal basis for the admission of evidence on the affirmative defenses and such evidence was excluded by the trial court's *in limine* ruling. In another wrongful death case, *Bearce v. United States,*[116] filed pursuant to federal statutory authority,[117] evidence that decedent was intoxicated while operating a motor boat was excluded by a successful motion *in limine* because there was no person statutorily competent to testify as to the results of the blood test establishing that the decedent was intoxicated. The decedent was killed when the motor boat he was operating struck a breakwater on Lake Michigan.[118] The Illinois Coroner's Act mandated that a blood specimen be taken for statistical purposes.[119] The results of this blood test showed the presence of a high level of alcohol in the decedent's blood at the time of his death.

The administrator of the decedent's estate, anticipating that the Government would improperly offer the evidence of the decedent's intoxication, moved *in limine* for a ruling excluding the results of the blood test taken pursuant to the Act, which provided that the results of such tests were not admissible as "evidence in any action of any kind in any court or before any tribunal, board, agency or person. . . ."[120] The

113. 39 Colo. App. 70, 77, 565 P.2d 217, 222 (1977).
114. *Id.* at 77, 565 P.2d at 222. *See also* Dolan v. Mitchell, 179 Colo. 359, 502 P.2d 72 (1972).
115. 39 Colo. App. 70, 76, 565 P.2d 217, 222 (1977).
116. 433 F. Supp. 549 (N.D. Ill. 1977).
117. The suit was filed under the Federal Torts Claim Act, 28 U.S.C. §§ 1346(b), 2671(b) *et seq.* (Supp. II 1978); the Suits in Admiralty Act, 46 U.S.C. §§ 741 *et. seq.* (1976); and the Death on the High Seas Act, 46 U.S.C. §§ 761 *et. seq.* (1976).
118. 433 F. Supp. at 550.
119. ILL. REV. STAT. ch. 31, § 10(e) (1975).
120. 433 F. Supp. 549, 551 (1977), *quoting* ILL. REV. STAT. ch. 31, § 10(e) (1975).

federal district court granted the administrator's motion *in limine,* and found that under Illinois law the blood analysis was for statistical purposes only. Thus, there was no witness competent to testify on the subject of the blood analysis taken as mandated by the Illinois statute.[121] As such, the evidence was incompetent and properly excluded by the court's *in limine* ruling.

In *Bearce,* compliance with the Illinois statute resulted in the exclusion of evidence of the decedent's intoxication. In *United States v. Ricco,*[122] it was the failure to comply with statutory requirements designed to insure the reliability of evidence that resulted in the exclusion of legally obtained wiretap evidence. The defendant in *Ricco,* who had been charged with various narcotics violations, moved *in limine* to suppress wiretap recordings which had been obtained pursuant to a valid state eavesdropping warrant.[123] The basis on which admissibility of the wiretap recordings was challenged was that the tapes were not sealed in accordance with state law. A New York statute required that conversations recorded pursuant to an eavesdropping warrant must be "immediately" brought before a judge for sealing.[124] The purpose of the sealing requirement was to ensure the integrity of the tapes by placing them under the control and supervision of the court, so as to avoid any potential for tampering or inadvertent abuse.

The *Ricco* court found that the failure to have the tapes (which were obtained under circumstances where the potential for abuse was clearly present)[125] sealed immediately, coupled with the absence of a satisfactory explanation for the delay, raised questions as to the reliability and integrity of the tapes. Thus, the tapes, which were probative of the ultimate issue of guilt or innocence, were cloaked with an aura of unreliability and were excluded — just as an improperly certified document would have been excluded.[126]

E. The Admission of Evidence

The motion *in limine* need not be limited to circumstances where counsel seeks to exclude evidence, but may serve as a useful procedural mechanism to obtain a pretrial ruling on the admissibility of questionable or problematic evidence. A case exemplifying a proponent's use of a motion *in limine* for a pre-trial ruling concerning the authenticity and admissibility of certain evidence is *LeRoy v. Sabena Belgian World Airlines.*[127] *LeRoy* was an airline crash case involving a wrongful death

121. 433 F. Supp. at 553.
122. 421 F. Supp. 401 (S.D.N.Y. 1976).
123. *Id.* at 403.
124. N.Y. CRIM. PRO. LAW § 700.50(2) (McKinney 1971).
125. 421 F. Supp. at 405.
126. *Id.* at 406.
127. 344 F.2d 266 (2d Cir.), *cert. denied,* 382 U.S. 878 (1965).

claim. Critical to the presentation and proof of the plaintiff's case was a copy of the transcript of the flight recording of radio transmissions to the aircraft before the crash. This recording indicated that a navigational error directed the aircraft off course.[128]

The uncertainty of the admissibility of the transcript copy created both strategic and practical problems for the plaintiff. If the transcript copy had been inadmissible the plaintiff would have been required to adduce other proof of the navigational error. During the course of the trial this may be extremely difficult and could result in a disruption of not only the trial, but also of the strategical presentation of the plaintiff's proof as well. A pretrial ruling on the transcript's admissibility would permit the plaintiff to structure its case accordingly. Thus, in *LeRoy* the plaintiff moved *in limine* for this ruling. The court, over defense objections to the transcript's authenticity, ruled it admissible.[129] The result was both a procedural and tactical advantage for the plaintiff.

In summary, the motion *in limine* has been successfully used to exclude expert testimony, certain types of lay testimony, affirmative defenses, and potentially incompetent and unreliable evidence. Alternatively, an attorney can utilize the motion to obtain rulings on the admissibility of evidence as well. Without doubt, however, a multitude of possibilities for the use of *in limine* practice remain untapped. Expansion of its use should be considered by all practitioners as the parameters of this motion are still being explored.

III. STATUTORY AUTHORITY

Presently, there are no specific federal or state court rules or any statutory authority for the motion *in limine*.[130] Such authority is not needed though, since courts have the inherent power to issue *in limine* rulings.[131] Resourceful attorneys, however, have extended use of the statutory motion to suppress evidence (procured in violation of the fourth amendment under Rule 41(e) of the Federal Rules of Criminal Procedure) to exclude prejudicial evidence as well.[132] In addition, Rule 16 of the Federal Rules of Civil Procedure, and more recently Rule 403 of the Federal Rules of Evidence, have been recognized as providing implicit authorization for *in limine* practice.[133] Moreover, since the motion

128. *Id.* at 268-71.
129. *Id.* at 274.
130. *See* Rothblatt & Leroy, *supra* note 6, at 614.
131. Eichel v. New York Central R.R. Co., 375 U.S. 253 (1963).
132. N.C. STEVENSON, SUCCESSFUL CROSS EXAMINATION STRATEGY (1971). *See also* FED. R. CRIM. P. 41(e).
133. FED. R. EVID. 403. *See also* Dolan, *supra* note 16.

in limine is most frequently employed to exclude prejudicial evidence, it is likely that Rule 403 will be increasingly utilized as authority for pretrial motions to exclude.

A. The Federal Rules of Evidence

Rule 403 of the Federal Rules of Evidence specifically provides for the exclusion of prejudicial evidence. This is true even though the excluded evidence may have probative value. The Rule states:

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issue, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.[134]

Thus, it is clear that Rule 403 authorizes the trial judge to exercise his discretionary power to exclude relevant evidence when necessary to protect a party from unfair prejudice.[135] An example of a court's use of Rule 403 to exclude relevant but prejudicial evidence can be found in *Grimes v. Employers Mutual Liability Insurance Co.*[136] In *Grimes,* a personal injury action, the plaintiff moved *in limine* for a pretrial ruling concerning the admissibility of certain films of the plaintiff.[137] The films showed the plaintiff undergoing certain clinical tests and performing various daily activities. Included in the daily activity scenes were segments where the plaintiff hugged his daughter and placed a cigarette in his quadriplegic brother's mouth.[138] The court determined that the film segments of the plaintiff performing daily activities, if a typical day in the life of the plaintiff, were relevant to the issue of damages. The court ruled, however, that the scenes of the plaintiff with his daughter and brother must be redacted. With respect to these two scenes the court found that the prejudicial effect of the evidence outweighed its probative value since these scenes served little purpose other than to create sympathy for the plaintiff.[139] Thus, it was appropriate for the court to exercise its flexible discretionary power under Rule 403 to exclude the prejudicial scenes in the film.

The flexible discretionary power to exclude relevant but prejudicial evidence contemplated by Rule 403 has been utilized as a procedural mechanism to exclude evidence in criminal cases[140] as well as in civil

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134. FED. R. EVID. 403.

135. *See, e.g.,* United States v. Jackson, 405 F. Supp. 938 (E.D.N.Y. 1975); Dolan, *supra* note 16.

136. 73 F.R.D. 607 (D. Alaska 1977).

137. *Id.* at 608.

138. *Id.* at 609.

139. *Id.* at 610.

140. United States v. Jackson, 405 F. Supp. 938 (E.D.N.Y. 1975).

cases. In *United States v. Jackson,*[141] the defendant, after being arrested in Georgia on an unrelated charge, was charged with a New York bank robbery. Prior to the trial, the defendant moved *in limine* pursuant to Rule 403 to preclude the Government from introducing potentially prejudicial evidence of the defendant's presence in Georgia and use of a false name, as proof of flight to escape arrest for the New York bank robbery.[142] Introduction of this corroborative evidence of guilt was sought by the Government because the surveillance photographs and the eyewitnesses' testimony were not likely to result in a completely positive identification of the defendant. The Government, therefore, sought to offer evidence of the defendant's presence in Georgia as proof of flight resulting from consciousness of guilt. It also sought to bolster the probative force of this circumstantial proof by introducing the defendant's use of a false name. Thus, the posture of the Government's proof was such that a legitimate purpose could be served by the introduction of this corroborative evidence. The evidence, therefore, had "significant probative value."[143]

The court found, however, that under Rule 403 "the other side of the coin" is the possibility that the defendant will be unfairly prejudiced by the introduction of this evidence. The focus of the court's concern was the possible prejudice the defendant might suffer by the Government's offer of proof, which would bring evidence of the defendant's arrest in Georgia for an unrelated crime and the uncomplimentary circumstances related to that arrest (the fact that the defendant was heavily armed and escaped from the local jail) to the jury's attention.[144] Even if these facts were kept from the jury, the inference that the defendant was engaged in a multistate crime spree might remain from evidence concerning the commission of crimes in more than one state. This inference could only create substantial prejudice to the defendant.

To aid in determining the admissibility of the Government's evidence of flight, the court accorded consideration to the practicability factor built into Rule 403. That factor permits the exclusion of probative evidence if it may tend to confuse or mislead the jury or if it might unduly delay the trial or waste time.[145] Considering these factors, the court noted that the calling of the Georgia patrolman who arrested the defendant would delay the trial. Moreover, the legality of the Georgia arrest was questionable, creating a complex factual issue in and of itself. Since this was essentially a collateral matter[146] it created the possibility

141. *Id.*
142. *Id.* at 943.
143. *Id.* at 944.
144. *Id.* at 944-45.
145. *Id.* at 945.
146. *Id.*

that the jury may become confused. After balancing all competing interests, the Government's need for the evidence against the possible prejudice to the defendant and the practicability factor, the court determined that the complexity of issues rendered it apparent that a compromise ruling was appropriate. The court ruled that evidence of the Georgia arrest would be inadmissible provided the defense entered into a stipulation that the defendant was in Georgia under a false name shortly after the robbery.[147] The court reasoned that exclusion of evidence of the Georgia arrest and the facts and circumstances thereof would remove the risk that the jury would perceive the defendant as a major crime figure. On the other hand, the stipulation afforded the jury a concrete basis to infer that the defendant was in Georgia under a false name to escape capture for the New York bank robbery.[148] The court then concluded that the jury, in light of all the evidence at trial, could intelligently resolve any remaining ambiguity.

B. The Federal Rules of Civil Procedure

Although Rule 403 of the Federal Rules of Evidence is now clearly viewed as authorizing motions *in limine,*[149] Rule 16 of the Federal Rules of Civil Procedure should not be overlooked as a procedural device for *in limine* practice,[150] since the function of the motion *in limine* is not unlike the pretrial conference. Rule 16 empowers the pretrial judge to "streamline" the issues.[151] More specifically, subsection six provides that the court may consider, at the pretrial conference, matters that will aid in the disposition of the action.[152]

To illustrate, in *Aley v. Great Atlantic & Pacific Tea Co.*[153] the issue of the pretrial exclusion of prejudicial evidence was addressed by the district court, pursuant to the authority of Rule 16. *Aley* was a false arrest and imprisonment suit in which the plaintiff sought to exclude testimony of prior occasions on which an employee of the defendant allegedly saw the plaintiff shoplifting.[154] The court in excluding such evidence, determined that prejudice to the plaintiff created by such evidence was too extreme to warrant its admission.[155]

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147. *Id.*
148. *Id.*
149. *See* notes 133-48 and accompanying text *supra.*
150. *See* note 133 and accompanying text *supra.* Rule 16(6) of the Federal Rules of Civil Procedure provides: "In any action, the court may in its discretion direct the attorneys for the Parties to appear before it for a conference to consider . . . (6) Such other matters as may aid in the disposition of the action." FED. R. CIV. P. 16(6).
151. FED. R. CIV. P. 16(6).
152. *Id.*
153. 211 F. Supp. 500 (W.D. Mo. 1962).
154. *Id.* at 500.
155. *Id.* at 503.

In another Rule 16 case, *Carlock v. Southwestern Greyhound Lines, Inc.*,[156] the plaintiffs moved to exclude evidence of their own immoral conduct. The plaintiffs' conduct was not an issue in the case, but the defense conceded it intended to introduce it at trial. The plaintiffs' conduct was far from exemplary; consequently, the plaintiffs contended that such evidence was highly prejudicial and of no probative value.[157] The court agreed, finding that the exclusion of such evidence in this situation met the object of Rule 16 by aiding in the prompt disposition of the action.[158] In this particular case the issues were narrowed by the evidentiary order entered at the pretrial conference, thus shortening the trial by eliminating witnesses and the resulting expense.[159]

C. State Rules of Procedure

Several states have adopted the Federal Rules of Civil Procedure in either their original or modified form.[160] Concomitantly, the adopting states have approved of the federal courts' decision to issue Rule 16 pretrial orders affecting the introduction and admission of evidence.[161] For instance, Rule 16 of the New Mexico Rules of Civil Procedure is derived from and is identical to Rule 16 of the Federal Rules of Civil Procedure.[162] The New Mexico Court of Appeals, although recognizing that New Mexico trial courts have the inherent power to issue *in limine* rulings, has suggested that *in limine* matters be raised at the Rule 16 pretrial conference.[163] In arriving at this decision, the appellate court reasoned that the presentation of the motion *in limine* in advance of trial, with filed briefs and time to hear argument, enables the court to study the issue involved, decide the matter, and issue an appropriate order.[164] On the other hand, the filing of a written motion accompanied by oral argument on the morning of trial places an undue burden on the trial court.[165]

To be sure, circumstances will arise in which issues capable of resolution by the motion *in limine* may not surface until after the Rule 16 conference.[166] Moreover, it may not always be strategically desirable to

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156. Carlock v. Southeastern Greyhound Lines, 8 Fed. Rules Serv. 16.261 (E.D. Tenn. 1944).
157. *Id.*
158. *Id.*
159. *Id.*
160. *See, e.g.*, N.M.R. Civ. P. (16)(6); N.D.R. Civ. P. 16.
161. *See, e.g.*, Proper v. Mowry, 90 N.M. 710, 568 P.2d 236 (1977); Van Ornum v. Otter Tail Power Co., 210 N.W.2d 188 (N.D. 1973).
162. *See* Proper v. Mowry, 90 N.M. 710, 568 P.2d 236 (1977).
163. *Id.* at 714, 568 P.2d at 240.
164. *Id.*
165. *Id.* at 714-15, 568 P.2d at 240-41.
166. Issues that necessitate a motion *in limine* may crop up at any phase of the trial.

move *in limine* far in advance of trial.[167] Whenever possible, however, the motion should be presented sufficiently in advance of trial so that the court is not shooting from the hip to reach a result.[168] This will allow a court time to study the issues and the impact of its decision both on the trial level and with respect to future appeals.

Where strategy is not of prime consideration on the particular *in limine* issue, the Rule 16 pretrial conference is the appropriate forum to raise the matter,[169] since this will give the court the time it needs before the trial to make a judicious decision and because the function of the pretrial conference is to consider matters that may aid in the disposition of the action. If an *in limine* order is entered at the pretrial conference, for example, and if such an order has a serious adverse impact on a party's proof at trial, a settlement may suddenly seem desirable. Thus, it is eminently clear, that entry of *in limine* orders pursuant to Rule 16 will aid in the disposition of actions. It is apparent, moreover, that the entry of such orders has been accepted in some states as a proper exercise of Rule 16 powers. For instance, in *Van Ornum v. Otter Tail Power Co.*,[170] the motion *in limine* hearing was held in conjunction with the North Dakota Rule 16 pretrial conference,[171] at which the trial court issued an order excluding certain evidence.[172] The Supreme Court of North Dakota concluded that the issuance of the *in limine* order was a proper exercise of the trial court's Rule 16 power.[173] Finally, in addition to reliance on Rule 16, informed counsel should check pertinent state statutes and cases to determine whether there exists any authority which may be relied upon to strengthen a motion *in limine* argument.

IV. MOTION *IN LIMINE* STRATEGY

In most jurisdictions recognizing *in limine* practice, the motion is made at the pretrial stage.[174] This is true in jurisdictions following a Rule 16 type provision as well as jurisdictions without such a provision.[175] Where a Rule 16 provision exists, the motion may be made far in advance of trial at the pretrial conference.[176] Where no Rule 16

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167. Strategically, early disclosure of a party's position on an issue may enable the adversary to structure his case accordingly.

168. Proper v. Mowry, 90 N.M. 710, 568 P.2d 236 (1977).

169. *Id.* at 714-15, 568 P.2d at 240-41.

170. 210 N.W.2d 188 (N.D. 1973).

171. *Id.* at 199.

172. *Id.* at 194.

173. *Id.* at 200.

174. 20 AM. JUR. TRIALS, *Motion in Limine Practice* § 2 (1973).

175. Burrus v. Silhavy, 155 Ind. App. 558, 293 N.E.2d 794 (1973); Proper v. Mowry, 90 N.M. 710, 568 P.2d 236 (1977).

176. Proper v. Mowry, 90 N.M. 710, 568 P.2d 236 (1977).

provision exists counsel often will move *in limine* on the eve of trial[177] or even during the course of the trial.[178]

Generally, however, the motion should be made within a reasonable time in advance of trial, thereby affording the trial judge sufficient time to carefully analyze the issues involved and to decide accordingly.[179] However, where the motion is designed to affect the structure and presentation of an opponent's case, counsel would be well advised — keeping fundamental concepts of fairness in mind — not to move *in limine* too far in advance of trial. Although the motion brought well in advance of trial under these circumstances may take the opposition by surprise, it may also give the other party time to restructure its case accordingly,[180] thus minimizing the strategic value of the motion *in limine* and risking disclosure of the movant's trial strategy to his adversary.[181]

Regardless of the timing of the motion, it is essential that counsel carefully analyze the pleadings and evaluate the factual information obtained during discovery so that precise well-defined issues are the subject of the motion.[182] The *in limine* order must be specific enough to forewarn opposing counsel of the excluded matter yet general enough to preclude circumvention of the ruling.[183] The order must also clearly express that it applies not only to direct reference to the excluded matter but also to indirect reference by counsel, and all parties and witnesses as well.[184] The motion should be framed carefully to adduce language in the order which will ensure the utmost protection desired by the movant.

Counsel contemplating the utilization of a motion *in limine* should consult the form books for his jurisdiction.[185] Regardless of the jurisdiction's specific precedural mechanism for *in limine* practice, one should submit a memorandum of law fully analyzing the party's factual contentions and the legal principles applicable thereto, in support of the motion.[186] The submission of a memorandum will enable the court to render an appropriate and studied decision based on a protracted analysis of the applicable authority for the jurisdiction. This is particularly true where the issue concerns a complex or unsettled area of law. A memorandum of law will also ease the court's burden in arriving at a decision, thereby enhancing the movant's chances for success.

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177. Prejudicial matter is often discovered in the final stages of preparation.
178. *See* note 166 *supra*.
179. *See* Proper v. Mowry, 90 N.M. 710, 568 P.2d 236 (1977).
180. *See* text accompanying notes 127-29 *supra*.
181. Proper v. Mowry, 90 N.M. 710, 568 P.2d 236 (1977).
182. *See, e.g.*, 20 AM. JUR. TRIALS, *Motion in Limine Practice* §§ 62-65 (1973).
183. *Id.*
184. *Id.*
185. *Id.* at §§ 63-65.
186. *Id.* at § 54.

V. SANCTIONS FOR VIOLATING *IN LIMINE* ORDERS

The court's entry of an *in limine* order does not guarantee absolute compliance by counsel. In theory, once a court has ruled, absent the most extraordinary of circumstances, strict adherence to the ruling is mandated. There are those, however, who will go to great lengths to violate the court's *in limine* rulings. Thus, regardless of the substance of the *in limine* ruling and the nature of the court's cautionary instruction, there will be practitioners who attempt to circumvent the ruling,[187] or who blatantly disregard it.[188] This is particularly true where there is no serious threat of sanctions for violation of the court's *in limine* order.

In *Burdick v. York Oil Co.*,[189] the plaintiff in a personal injury action successfully moved *in limine* to preclude the defendant from offering into evidence certain prejudicial matter contained in the plaintiff's Veterans Administration record and the court entered the appropriate order. The court order notwithstanding, the defense during the course of the trial constantly referred to the evidence excluded by the order.[190] The Texas Court of Civil Appeals reversed and, though it did not articulate the precise nature of the sanctions that should result from violation of the order, expressed the opinion that serious consequences should follow a violation of a court's *in limine* ruling.[191]

Other courts have also viewed the violation of *in limine* rulings as a serious matter for which stern sanctions should be imposed. Those sanctions may take the form of a mandatory mistrial,[192] appellate reversal,[193] and the taxing of costs,[194] as well as disciplinary action against the offending attorney.[195] Indeed, in *In re Charboneau*,[196] a recent California case, an attorney who violated the court's *in limine* ruling had two days in jail to contemplate his actions. In that case the trial court held the violating attorney in contempt for disobeying an order made pursuant to motions *in limine*[197] and as punishment for the contempt citation the court imposed a two day jail sentence. The California Court of Appeals, in upholding the trial court's ruling, found that

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187. *See* Burdick v. York Oil Co., 364 S.W.2d 766 (Tex. Civ. App. 1963).

188. Charbonneau v. Superior Court of Los Angeles, 42 Cal. App. 3d 505, 116 Cal. Rptr. 153 (1974).

189. *See* Burdick v. York Oil Co., 364 S.W.2d 766 (Tex. Civ. App. 1963).

190. *Id.*

191. *Id.* at 770.

192. *See* note 82 and accompanying text *supra*.

193. *See* Burdick v. York Oil Co., 364 S.W.2d 766 (Tex. Civ. App. 1963).

194. *See* Kromzer, *supra* note 15.

195. Charbonneau v. Superior Court of Los Angeles, 42 Cal. App. 3d 505, 116 Cal. Rptr. 153 (1974).

196. *Id.*

197. *Id.* at 509, 116 Cal. Rptr. at 156.

counsel's violation of the trial court's order *in limine* was conduct warranting an adjudication of contempt.[198]

Violation of the court's exclusionary ruling is not only improper, but, in view of the available sanctions, is also clearly a high risk tactic.[199] There is little reason to violate an order *in limine* since such ruling does not prohibit counsel from protecting the record by making an offer of proof of the matter excluded, outside the presence of the jury.[200] The offer of proof is crucial, moreover, not merely to preserve the record,[201] but also because the dynamics of the trial may require the matter precluded by an earlier ruling be admitted in light of the trial record.[202] Should this occur, and the evidence previously excluded be ruled admissible, the opponent of the motion will have recovered from the strategic setback of the successful motion *in limine*. Generally, however, the opponent must live with the court's ruling or risk the imposition of sanctions. On the other hand, the downside risk to the proponent of the motion is minimal,[203] since neither the granting[204] of the motion nor its denial[205] constitutes reversible error.[206]

Conclusion

The complexity of modern litigation as well as the inherent flexibility of motion *in limine* practice preclude the establishment of clearly defined parameters of use. Indeed, the early boundaries of this procedural device have been expanded by imaginative counsel, who will continue to enlarge the boundaries of *in limine* practice as the need arises. Certainly the efficacy and importance of *in limine* practice cannot be questioned. Thus, its underutilization in most jurisdictions is difficult to comprehend. It would seem that a procedural device that can predetermine trial issues would be the perennial tool of the litigator.

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198. *Id.* at 511, 116 Cal. Rptr. at 158.

199. *See* notes 187-98 and accompanying text *supra.*

200. Schnable v. Waters, 37 Colo. App. 498, 501-02, 549 P.2d 795, 798 (1976); Twyford v. Weber, 220 N.W.2d 919, 923 (Iowa 1974); Hartford Accident & Indem. Co. v. McCardell, 369 S.W.2d 331, 335 (Tex. 1963); City of Corpus Christi v. Nemec, 401 S.W.2d 834, 836 (Tex. Civ. App. 1966).

201. *See* note 200 and accompanying text *supra.*

202. Ross, *The Art of Objecting: Some Practical Considerations,* 2 Materials, New York State Basic Course for Prosecutors III.

203. *See* note 20 and accompanying text *supra.*

204. *See* Davis, *supra* note 1.

205. Harley-Davidson Motor Co. v. Daniel, 149 Ga. App. 120, 253 S.E.2d 783 (1979); Hartford Accident & Indem. Co. v. McCardell, 369 S.W.2d 331, 335 (Tex. 1963).

206. Robertson v. Southwestern Bell Tel. Co., 403 S.W.2d 458, 468-69 (Tex. Civ. App. 1966).

Fourth Amendment Standing After *Rakas v. Illinois:*[1] From Property to Privacy and Back

*Ira Mickenberg**

In this Article, Professor Mickenberg traces the development of fourth amendment law. By focusing upon major Supreme Court decisions, the author illustrates the confusion which exists in this area of the law. Originally, fourth amendment claims were couched in terms of property law. This proved to be too harsh and was recently rejected and replaced with a privacy based standard. However, by using vague language, the Court failed to eliminate property concepts from questions of fourth amendment rights. The Article concludes that a clear standard must be developed in order to eliminate confusion concerning privacy based and property based standards in deciding fourth amendment claims.

On February 4, 1975, police officers in Kankakee County, Illinois received a radio report of a clothing store robbery committed several hours earlier that day. The report described the two male robbers as well as the plate number, year, make, model and color of their getaway car. Patrol officers four miles from where the robbery took place spotted a car of the same make and model. Unlike the vehicle described in the radio report, this car had a different license number and was of a different year and color. In addition, this car had four occupants: a female driver, two men and a woman as passengers.[2]

Despite the fact that this clearly was not the car they were looking for, the officers stopped it and ordered those inside to get out. While

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1. 439 U.S. 128 (1978).

2. *See* Note, *Property Law and Fourth Amendment Privacy Protection*, 58 NEB. L. REV. 1123 (1979).

holding the occupants at gunpoint, the police searched the entire car. A sawed-off rifle was found under the seat and a box of shells in the glove compartment. The two men in the car, Frank Rakas and Lonnie King, were subsequently arrested and identified as the robbers. Prior to trial they moved to suppress the rifle and shells, claiming that they were stopped and searched illegally and without probable cause.

The fact pattern of *Rakas v. Illinois*[3] provided a perfect example of the dilemma presently facing courts in pre-trial suppression hearings. Under almost any standard, the stop and search of the car was without probable cause.[4] Thus, the rifle, shells and possibly any subsequently obtained evidence, such as a line-up identification, should be excluded from use at trial. On the other hand, it was also likely that the men in the car were the guilty parties and that they would go free if the motions to suppress were granted. Faced with public and political pressure to punish criminals, few judges are happy at the prospect of granting such a motion.

The trial court in Illinois resolved the question by refusing to reach the merits of the fourth amendment claim.[5] Rather, it held that because the defendants denied owning or possessing the property seized, they did not have standing to assert the claim.[6] The Illinois Appellate Court affirmed, as did the United States Supreme Court in *Rakas v. Illinois.*[7]

The Supreme Court decision has met with widespread criticism from the legal community.[8] The decision is viewed as being a major departure from the prevailing fourth amendment standards of the past twenty years, returning the fourth amendment to the status of protecting property and not individual privacy rights[9] and resulting in the declaring of an open season for illegal searches of automobiles and their passen-

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3. 439 U.S. 128 (1978).

4. The Illinois courts and the United States Supreme Court specifically declined to reach this issue; however, in view of the fact that the arresting officers admitted that the car they stopped did not match any of the information they had about the robbery, it is difficult to imagine any grounds for a finding of probable cause which would sustain the search.

5. People v. Rakas, 46 Ill. App. 3d 569, 360 N.E.2d 1252 (1977).

6. This may have reflected poor defense strategy on the motion to suppress since the defendants could have, for the purposes of the motion, admitted possession or ownership in order to achieve fourth amendment standing. Such admissions could not be used against them at trial. Simmons v. United States, 390 U.S. 377 (1968). In light of the 1980 decisions in United States v. Salvucci, 100 S. Ct. 2547 (1980) and Rawlings v. Kentucky, 100 S. Ct. 2556 (1980), even such admissions may no longer be sufficient to permit a fourth amendment claim.

7. 439 U.S. 128 (1978).

8. *See* Comment, *The Exclusionary Rule, Standing, and Expectation of Privacy for Car Passengers: A Confusion of Concepts,* 31 BAYLOR L. REV. 227 (1979).

9. *See* Burkoff, *The Court That Devoured the Fourth Amendment: The Triumph of an Inconsistent Exclusionary Doctrine,* 58 OR. L. REV. 151 (1979). *See also,* Comment, *The Relationship Between Trespass and Fourth Amendment Protection After* Katz v. United States, 38 OHIO ST. L.J. 709 (1977); Note, *Property Law and Fourth Amendment Privacy Protection,* 58 NEB. L. REV. 1123 (1979).

gers.[10] It is the position of this paper that *Rakas* is not a radical departure from the fourth amendment standards of the 1960's and 1970's. Rather, it can be traced from the vague language and principles of *Katz v. United States*[11] and *Alderman v. United States,*[12] the two cases most frequently cited as authority for a broad interpretation of fourth amendment standing. Moreover, *Rakas* is merely the culmination of a decade-long judicial movement towards re-emphasizing the importance of property rights in deciding fourth amendment cases under the legal standards of *Katz* and *Alderman.*

In order to establish the significance of *Rakas* and its congruence with *Katz* and *Alderman,* this paper will trace the pendulum-like historical development of fourth amendment law from reliance on common law property concepts to emphasizing personal privacy rights and back to its present position amalgamating both these concerns. It will analyze the manner in which *Katz* and *Alderman* presaged a return to property concepts and a re-uniting of judicial tests for deciding standing and substantive fourth amendment issues. Finally, it will discuss the manner in which *Rakas* has been interpreted by subsequent courts and the impact it has had on present fourth amendment law.

I. THE HISTORICAL CONCEPT OF THE FOURTH AMENDMENT AS PREMISED ON COMMON LAW PROPERTY RIGHTS

The fourth amendment, like many provisions of the Bill of Rights, was conceived in response to specific grievances against British colonial abuse. In this instance, the grievance related to the issuance of Writs of Assistance[13] permitting unrestricted searches of colonists' homes and possessions. Such writs were usually employed to permit searches of persons suspected of smuggling, tax evasion, or anti-British political activity.

Almost simultaneously with the 18th Century American protests, a similar practice was being encountered in England where general warrants were being issued against printers, publishers, and others opposing tax laws or government policies.[14] In 1765, Lord Camden, in the often cited case of *Entick v. Carrington,*[15] relied upon traditional concepts of common law property rights to award damages in trespass against royal officers who broke into a home to execute a general warrant.

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10. Rakas v. Illinois, 439 U.S. 128, 157 (White, J., dissenting).
11. 389 U.S. 347 (1967).
12. 394 U.S. 165 (1969).
13. *See* Payton v. New York, 445 U.S. 573, 583-84 n.21 (1980).
14. *See* Wilkes v. Wood, 19 Howell's State Trials 1153 (1763).
15. 19 Howell's State Trials 1029 (1765).

> The great end for which men entered into society was to secure their property. . . . By the laws of England, every invasion of private property, be it ever so minute, is a trespass. . . .
>
> [I]t is now incumbent on the defendants to show the law by which this seizure is warranted. If that cannot be done, it is a trespass.[16]

It is historically significant that Lord Camden did not base his decision on any personal right of the plaintiff and certainly not on what today would be referred to as a privacy interest. *Entick v. Carrington* was a straightforward trespass action in which the plaintiff's burden was to establish the existence of his freehold or leasehold in the property invaded by the defendants. Once the plaintiff's superior right to the property was proven, the trespass was established and the agents liable.

It is therefore not surprising that in dealing with this same problem in a constitutional framework, the United States also attempted to rely on property law concepts. The fourth amendment specifically holds:

> The right of the people to be secure in their persons, houses and effects against unreasonable searches and seizures shall not be violated, and no Warrants shall issue but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized.[17]

For more than one hundred years, enforcement of the fourth amendment, and standing to assert its protections, were premised upon a literal reading of the amendment viewed in terms of common law property rights. The phrase "their persons, houses, papers and effects" was uniformly interpreted as referring to property owned or possessed by the person asserting the fourth amendment right. The owner or possessor was the only one entitled to claim the constitutional protection.

Boyd v. United States[18] became the model for the property rights view of the fourth amendment. The Supreme Court in *Boyd* held that a statute which required an individual to produce certain records and books for government inspection violated the Constitution. In *Boyd,* the fourth and fifth amendments were tied together in a line of reasoning which held that because it was the defendant's property which was being seized,[19] and because the seizure was for the purpose of using that property against the defendant at trial, the attempted seizure was the equivalent of forcing Boyd to testify against himself. The Court noted that:

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16. *Id.* at 1066.

17. U.S. CONST. amend. IV.

18. 116 U.S. 616 (1886).

19. *Boyd* did not involve an actual seizure, but rather involved an order to turn over certain papers. The Supreme Court held this to be the equivalent of a seizure for fourth amendment purposes. Boyd v. United States, 116 U.S. 616, 633-34 (1886).

> the "unreasonable searches and seizures" condemned in the Fourth Amendment are almost always made for the purpose of compelling a man to give evidence against himself, which in criminal cases is condemned in the Fifth Amendment. . . .[20]
>
> . . . .
>
> [A] compulsory production of the private books and papers *of the owner of goods* . . . in such a suit is compelling him to be a witness against himself. . . .[21]

By frequently quoting *Entick v. Carrington* and then linking the protection against unreasonable search and seizure to the self-incrimination clause of the fifth amendment, the Supreme Court in *Boyd* firmly established the principle that the fourth amendment can only be invoked by one with a proprietary right in the goods or area seized. Absent such possession by the defendant, the use of the goods against him would not amount to self-incrimination and the seizure would not be held unconstitutional. Had stolen goods been the object of the search, rather than books belonging to the defendant, *Boyd* implies that the fourth amendment would not apply since a person would not have a legally cognizable right to possession of stolen property.[22]

The orientation of search and seizure law to property rights was so complete in the nineteenth and early twentieth centuries that most fourth amendment actions were couched in terms similar to those of replevin. Even *Weeks v. United States,*[23] the first Supreme Court case authorizing suppression of illegally seized evidence in a criminal case, was couched in common law property terms. The remedy requested in *Weeks* was not the suppression of the evidence, but rather an order forcing the government to return the evidence to the defendant. The rationale for such an order was that since the government seized the property through a trespass, the defendant had a proprietary right to the evidence superior to that of the government. *Weeks* also made the same distinction as *Boyd,* holding that the fourth amendment would not apply to a search and seizure of stolen property because the defendant would lack a lawful property interest in such goods.[24]

The requirement of a property right for assertion of the fourth amendment was formalized and refined in *Hester v. United States*[25] and *Olmstead v. United States.*[26] In *Hester,* the Supreme Court concluded that no fourth amendment violation occurred when federal agents trespassed on a defendant's land in order to get a close look at what they believed to be moonshining activity. By holding that the fields sur-

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20. *Id.* at 633.
21. *Id.* at 634-35 (emphasis added).
22. *Id.* at 624.
23. 232 U.S. 383 (1914).
24. *Id.* at 392.
25. 265 U.S. 57 (1924).
26. 277 U.S. 438 (1928).

rounding the defendant's home were not a "private place," the Court established two vital principles. First, fourth amendment protections were to be determined by physical areas and goods. If an area was a "private place," then the fourth amendment would apply. If not, there was no protection against government search and seizure. Second, the scope of the fourth amendment could even be narrower than that of common law property rights. Not only was the defendant required to have a proprietary right in the area searched, but the area itself had to be a private place for the constitution to apply. If, as in *Hester*, the defendant could prove his ownership of the property, he would still have no right against unreasonable search and seizure unless the area was private in nature as well as in title.

Olmstead not only reiterated the "private place" standard of *Hester*, but further established a requirement that an actual physical intrusion into the "private place" was necessary before fourth amendment rights could be asserted.[27] Wiretapping, electronic bugging, and long distance surveillance were not physical intrusions and hence were not within the purview of the fourth amendment.

It has been said that *Hester* defined what areas were protected by the fourth amendment while *Olmstead* defined the manner in which they were protected.[28] Property rights were dispositive of fourth amendment claims except when the "private places" doctrine was invoked to validate a trespassory search. The defendant's privacy interest in being personally free from unreasonable searches and seizures was never considered by the courts. Moreover, the concept of standing had not yet been applied in a fourth amendment context. Property law was conclusive as to both the substantive issues of fourth amendment rights and the question of who was entitled to assert those rights. Given such a view, a separate doctrine of standing would have been purely extraneous.

II. INADEQUACIES OF THE PROPERTY RIGHTS VIEW OF THE FOURTH AMENDMENT

Regardless of the equity of premising a constitutional right on ownership of property, the property rights view of the fourth amendment was at least adequate to deal with the technological conditions of the 19th century. As a practical matter, most searches and seizures were conducted by means of a physical trespass. Wiretapping, bugs, and other means of electronic surveillance were either not yet invented or extreme-

27. Olmstead v. United States, 277 U.S. at 466. *See also* Goldman v. United States, 316 U.S. 129 (1942) (where the Court refused to overrule the *Olmstead* case).

28. *See* Note, *From Private Places to Personal Privacy: A Post-*Katz *Study of Fourth Amendment Protection*, 43 N.Y.U.L. REV. 968 (1968).

ly rare. Twentieth century advances in electronics and photography, however, made physical trespass obsolete as a means of conducting searches.

In 1928 Justice Brandeis revised his previous interpretation of the fourth amendment by dissenting in *Olmstead*. The basis for his opinion was that the wiretap of Olmstead foreshadowed an era of electronic, non-physical surveillance for which a property rights view of the fourth amendment was wholly inadequate. The dissent stated:

> The progress of science in furnishing the Government with means of espionage is not likely to stop with wire-tapping. Ways may someday be developed by which the Government, without removing papers from secret drawers, can reproduce them in court, and by which it will be enabled to expose to a jury the most intimate occurrences of the home. . . .[29]
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> . . . .
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> [The makers of the Constitution] conferred, as against the Government, the right to be let alone — the most comprehensive of rights and the right most valued by civilized men. To protect that right, every unjustifiable intrusion by the Government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the Fourth Amendment.[30]

Brandeis' view of the fourth amendment as protecting privacy rights was rejected by the majority in *Olmstead* and was not formally accepted until *Katz* was decided forty years later. Yet the problems predicted for the fourth amendment in a technologically sophisticated society proved to be very real and clearly required some judicial response.

While continuing to view the fourth amendment in property terms, the courts attempted to respond to inadequacies by expanding the definition of "protected" or "private places" to include areas not previously believed to be covered. In 1921, protection was extended to offices[31] and stores.[32] In later years, parked cars,[33] taxicabs,[34] hotel rooms,[35] and rented apartments[36] were considered "private places" protected from unreasonable search and seizure. These decisions were piecemeal remedies, however, requiring the courts to make a separate factual determination as to the existence of a "private place" each time a fourth admendment claim was made.

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29. Olmstead v. United States, 277 U.S. 438, 474 (1928) (Brandeis, J., dissenting).
30. *Id.* at 478 (Brandeis, J., dissenting).
31. Gouled v. United States, 255 U.S. 298 (1921).
32. Amos v. United States, 255 U.S. 313 (1921).
33. Gambino v. United States, 275 U.S. 310 (1927).
34. Rios v. United States, 364 U.S. 253 (1960).
35. Stoner v. California, 376 U.S. 483 (1964).
36. Chapman v. United States, 365 U.S. 610 (1961); McDonald v. United States, 335 U.S. 451 (1948).

Another problem with a property rights view of the fourth amendment related to the increasingly accepted idea that a defendant should not be forced to waive one constitutional right in order to avail himself of another. A defendant who wished to challenge the unreasonable search or seizure of property had to admit that he was the owner or possessor of that property. If his fourth amendment claim should fail, however, his admission of ownership could then be used against him at trial. In effect, the defendant was being forced to choose between asserting his fourth amendment rights before trial or his fifth and sixth amendment rights during trial.[37]

Ironically, a third problem caused by viewing the fourth amendment in terms of property rights affected not defendants, but law enforcement officers. As long as fourth amendment motions were treated as quasi-replevin actions, government agents would be prohibited from seizing without a warrant any property in which the defendant could assert a superior property right. Thus, agents were limited to seizure of contraband and instrumentalities of a crime (*e.g.*, guns, burglars' tools) and were unable to impound "mere evidence." While the "open fields/private place" exception of *Hester v. United States*[38] permitted government intrusions into the "curtilege" of otherwise private places,[39] the "mere evidence" rule placed serious limitations on the property they could seize.

This piecemeal, case by case approach of dealing with search and seizure problems was clearly inadequate to meet the needs of an increasingly complex society. With all fourth amendment questions framed in terms of property law and numerous judicial exceptions for various kinds of property, it was virtually impossible for private citizens or law enforcement officers to know what property was protected. It was not until 1960 and the decision in *Jones v. United States*[40] that a workable standard was reached for deciding fourth amendment claims.

III. *JONES V. UNITED STATES* AND THE CHANGE FROM PROPERTY RIGHTS TO PRIVACY RIGHTS

Jones v. United States[41] provided the first major step from a property law view of the fourth amendment to recognition of an individual constitutional right to privacy. *Jones* involved a search of an apartment pursuant to a warrant. At the time the warrant was executed, the de-

37. *See* Accardo v. United States, 247 F.2d 568 (D.C. Cir. 1957); United States v. Eversole, 209 F.2d 766 (7th Cir. 1954); Scoggins v. United States, 202 F.2d 211 (D.C. Cir. 1953); Grainer v. United States, 158 F.2d 236 (4th Cir. 1946); Connolly v. Medalie, 58 F.2d 629 (2d Cir. 1932).

38. 265 U.S. 57 (1924). *See* notes 25-28 and accompanying text *supra*.

39. Care v. United States, 231 F.2d 22, 25 (10th Cir. 1955), *cert. denied*, 351 U.S. 932 (1956).

40. 362 U.S. 257 (1960).

41. *Id.*

fendant was present as a visitor. The police found heroin in a bird's nest outside a window and charged Jones with possession of the drugs. Jones moved to suppress the evidence.[42]

Under prior fourth amendment law, the Court could easily have denied the motion on the grounds that Jones had no proprietary right in the apartment. The Court, however, took the opportunity to attack the very foundation of the property view of the fourth amendment. The Court stated:

> We do not lightly depart from this course of decisions by the lower courts. We are persuaded, however, that it is unnecessary and ill-advised to import into the law surrounding the constitutional right to be free from unreasonable searches and seizures subtle distinctions, developed and refined by the common law in evolving the body of private property law which, more than any other branch of law has been shaped by distinctions whose validity is largely historical.
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> . . . .
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> . . . To do so would not comport with our justly proud claim of the procedural protections accorded to those charged with crime. No just interest of the Government in the effective and rigorous enforcement of the criminal law will be hampered by recognizing that anyone legitimately on the premises where a search occurs may challenge its legality by way of a motion to suppress, when its fruits are proposed to be used against him.[43]

By granting fourth amendment protection to any persons legitimately on the premises during a search, *Jones* replaced the tangled mass of real property concepts with a single clear standard for evaluating fourth amendment claims. No longer would it be necessary to look to the common law status of the property searched or seized. Instead, the focus of judicial analysis was shifted to the individual rights of the person claiming fourth amendment protection. Trespass, ownership, and possession of the property were indicia of whether a defendant was legitimately on the premises during a search. However, they were no longer dispositive.

A significant effect of *Jones's* shifting fourth amendment emphasis to personal privacy was the introduction of the concept of fourth amendment standing. Standing has traditionally dealt not with the merits of a constitutional claim, but with the personal qualifications of a specific person to raise that claim.[44] In federal criminal cases, issues of standing to raise a fourth amendment claim were decided in the context of Rule 41(e) of the Federal Rules of Criminal Procedure, which stated: "[a] person aggrieved by an unlawful search or seizure may move the

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42. *Id.* at 258-59.
43. *Id.* at 266-67.
44. Flast v. Cohen, 392 U.S. 83, 99-101 (1968).

district court . . . for the return of the property on the ground that he is entitled to lawful possession of the property which was illegally seized."[45] Prior to *Jones,* "a person aggrieved by an unlawful search and seizure" was of necessity a person with a property right in the area searched or the item seized. In terms of Rule 41(e), *Jones* expanded the definition of "a person aggrieved" to include all persons legitimately on the premises during the search.

While standing to assert fourth amendment claims had been mentioned as early as 1942 in *Goldstein v. United States,*[46] the sole question would be the defendant's right to the property searched or seized. By establishing the concept of standing in fourth amendment actions, *Jones* in effect constructed a two-step inquiry for deciding search and seizure cases. First, the court focused upon the legal status of the individual against whom the fruits of the search were being used. If that person was legitimately on the premises at the time of the search, he had standing to challenge the search and the second step was reached. At that stage, the court focused upon the behavior of the officers making the search to determine whether they acted with the requisite probable cause.

The advantage of this procedure lies in the fact that it puts all parties on notice of their rights and obligations. Individuals know when and where they are protected by the fourth amendment, and police officers know when and where they have an opportunity to make a legal search. Neither party has to address questions of ownership, title, and possession.

Prior to *Jones,* it was uniformly accepted that a defendant moving to suppress contraband on fourth amendment grounds was required to admit ownership or possession of the goods. This amounted to a waiver of the fifth amendment right against self-incrimination since the defendant's admissions on the fourth amendment issue could later be used against him at trial. If the crime charged was simple possession of contraband, the defendant's fourth amendment statements would amount to a confession of guilt. At an early stage in a criminal proceeding, therefore, a defendant was forced to choose between his fourth and fifth amendment rights. In *Connolly v. Medalie,*[47] Judge Learned Hand explained the draconian nature of this practice:

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45. FED. R. CRIM. P. 41(e).

46. 316 U.S. 114, 121 (1942). Yet when the fourth amendment was based on property rather than privacy concerns the concept of standing, an inquiry into a party's personal qualifications, was meaningless. A claim did not even exist for persons without a property right. For those who did not have such a right, the property interest was dispositive of the claim. Hence, there was no distinction between standing to assert a fourth amendment claim and the substantive merits of such a claim.

47. 58 F.2d 629 (2d Cir. 1932).

> Men may wince at admitting that they were the owners, or in possession, of contraband property; may wish at once to secure the remedies of a possessor [fourth amendment rights], and avoid the perils of the part; but equivocation will not serve. If they come as victims [of an illegal search and seizure] they must take on that role, with enough detail to cast them without question. The petitioners at bar shrank from that predicament; but they were obliged to choose one horn of the dilemma.[48]

The theoretical underpinning of this rule was the principle that fourth amendment rights are personal and can only be claimed by a defendant whose personal constitutional interests were violated; a defendant who in the language of Rule 41(e) was a "person aggrieved." In the pre-*Jones* era of a property-based fourth amendment, possession or ownership were the only means for a defendant to establish such a personal right.

Jones began its analysis by recognizing and reaffirming the general concept of fourth amendment rights as personal and non-derivative. "Ordinarily, then, it is entirely proper to require of one who seeks to challenge the legality of a search as the basis for suppressing relevant evidence that he allege . . . that he himself was the victim of an invasion of privacy."[49] However, having shifted fourth amendment emphasis away from property concerns, the *Jones* Court took the logical step of expanding the definition of "a person aggrieved by an unlawful search and seizure" to include defendants with personal, if not property, interests violated by a search and seizure. "Judge Hand's dilemma is not inescapable. It presupposes requirements of 'standing' which we do not find compelling. . . . In cases where the indictment itself charges possession, the defendant in a very real sense is revealed as a 'person aggrieved by an unlawful search and seizure.' "[50]

Jones, therefore, established a rule whereby any defendant charged with possession of an item would automatically be granted standing to move to suppress that item. This "automatic standing" rule served to eliminate the defendant's dilemma of choosing between fourth and fifth amendment claims. Simultaneously, it resolved the legally inconsistent possibilities that an individual could have enough interest in an item to be convicted of possessing it, while not having a significant interest to claim fourth amendment protection.[51] By removing property law limitations on fourth amendment standing, *Jones* was able to reason that the possibility of a conviction for criminal possession in and of itself made

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48. *Id.* at 630.
49. 362 U.S. 257, 261 (1960).
50. *Id.* at 263.
51. *See generally* Note, *Property Law and Fourth Amendment Privacy Protection,* 58 NEB. L. REV. 1123 (1979).

the defendant a person aggrieved by the search and seizure which produced the contraband. The automatic standing rule did not decide the merits of any fourth amendment claims, but merely held that where possession will convict it will also confer standing to suppress.

Jones was such a fundamental departure from previous law, that most courts were initially reluctant to give it complete acceptance. Although courts after *Jones* spoke of the legitimate presence or privacy rights of the accused, they often continued to base their decisions upon the existence of a property right and a trespass. Even in cases in which the *Jones* standard would have clearly allowed standing to suppress, numerous courts created fictional trespasses to justify invoking fourth amendment protections. In *Silverman v. United States,*[52] for example, the Supreme Court held that eavesdropping via a "spike" microphone constituted a trespass since the microphone made physical contact with a heating duct inside a party wall which was connected to the defendant's home.[53] Similarly, in *Clinton v. Virginia,*[54] a microphone "stuck" into a party wall to a depth equivalent to that of a thumbtack[55] was deemed enough of a trespass to invoke the fourth amendment.[56] This practice of finding fictional trespasses was finally laid to rest in *Warden v. Hayden.*[57] Here the Court held:

> The premise that property interests control the right of the Government to search and seize has been discredited. Searches and seizures may be "unreasonable" within the Fourth Amendment even though the Government asserts a superior property interest at common law. We have recognized that the principal object of the Fourth Amendment is the protection of privacy rather than property, and have increasingly discarded fictional and procedural barriers rested on property concepts.[58]

Thus the Court abandoned the property based view of the fourth amendment and focused upon the privacy interest involved.

IV. *KATZ V. UNITED STATES* AND THE ESTABLISHMENT OF A FOURTH AMENDMENT PRIVACY STANDARD

Just seven months after *Warden v. Hayden,* the Supreme Court in *Katz v. United States*[59] at long last formally overruled *Olmstead* and

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52. 365 U.S. 505 (1961).
53. *Id.* at 510-11.
54. 377 U.S. 158 (1964), *rev'g,* Clinton v. Commonwealth, 204 Va. 275, 130 S.E.2d 437 (1963).
55. Clinton v. Commonwealth, 204 Va. at 280, 130 S.E.2d at 442.
56. 377 U.S. 158 (1964) (Clark, J., concurring).
57. 387 U.S. 294 (1967).
58. *Id.* at 304.
59. 389 U.S. 347 (1967).

Goldman.[60] Perhaps the most significant aspect of *Katz* was its firm establishment of a personal right of privacy flowing from the fourth amendment. The Court recognized that "the Fourth Amendment protects people, not places. What a person knowingly exposes to the public, even in his home or office, is not a subject of Fourth Amendment protection. . . . But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected."[61]

Katz affirmed a constitutional right of privacy against some forms of government intrusion and shifted the emphasis of fourth amendment inquiry from the nature of government acts (*i.e.*, trespass) to the validity of the defendant's expectation of privacy. While the majority opinion in *Katz* is most often quoted for its enthusiastic affirmation of a personal right to privacy, it is the concurring opinion of Justice Harlan which became accepted as the test for determining fourth amendment issues.[62] The concurrence presented the rule as being "a twofold requirement, first that a person have exhibited an actual [subjective] expectation of privacy and, second, that the expectation be one that society is prepared to recognize as 'reasonable.' "[63]

Justice Harlan's construction has been referred to as the paradigm for fourth amendment decision-making. Under this test, as with the *Jones* rule for standing, the issues of property rights and trespass are considered in evaluating a defendant's subjective expectation of privacy and the reasonableness of that expectation. They will not, however, be viewed as determinative.

It is ironic that *Katz*, a case unanimously viewed as intending to expand the concept of a personal privacy centered fourth amendment, in many respects paved the way for a later return to the property rights view of search and seizure. On a substantive level, *Katz's* extensive dicta about privacy and "people, not places" significantly changed the language of fourth amendment law, but contributed little to its actual development or understanding. In 1978, it was written that "[a]lthough *Katz* was decided more than ten years ago, it is still unclear whether the *Katz* rule merely supplements the trespass doctrine or whether it completely supplants it."[64]

The problem is that Justice Harlan's test, while giving the appearance of logic and reason, actually creates a legalistic tautology. The courts,

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60. *Id.* at 353.

61. *Id.* at 351-52 (citation omitted).

62. Mr. Justice Harlan's bi-polar test was later adopted by the Court. *See* United States v. Dionosio, 410 U.S. 1, 8 (1973); Couch v. United States, 409 U.S. 322 (1973); Combs v. United States, 408 U.S. 224 (1972); United States v. White, 401 U.S. 745 (1971); Mancusi v. DeForte, 392 U.S. 364 (1968); Terry v. Ohio, 392 U.S. 1 (1968).

63. Katz v. United States, 347 U.S. at 361 (Harlan, J., concurring).

64. Note, *The Relationship Between Trespass and Fourth Amendment Protection After* Katz v. United States, 38 OHIO ST. L.J. 709, 710 (1977).

and thus society, will recognize a fourth amendment right where the defendant exhibits a reasonable expectation of privacy, but at the same time, an expectation of privacy is only reasonable if society, through the court, believes it to be within the protection of the fourth amendment. Thus, under *Katz*, an individual's fourth amendment rights are governed not by a concrete standard such as the *Jones* "legitimately on the premises" test, but rather, by a totally subjective test subject to political and social pressures and the personal attitudes of individual judges and courts.[65] The obvious danger of such a standard is that the privacy-oriented thrust of *Katz* could be turned completely on its head if a future court should decide that society only views a defendant's expectation of privacy as reasonable when a property right also exists.

On a procedural level, *Katz* also had serious implications for fourth amendment standing. Shortly after *Katz* was decided, it was hailed as a major step in widening the availability of fourth amendment protections.[66] Several courts in fact, cited *Katz* as authority in deciding standing issues, seemingly using it as a replacement for *Jones*.[67]

Yet these cases and articles overlooked the fact that *Katz* was a substantive fourth amendment case which did not deal with the question of standing. The "reasonable expectation of privacy" test was intended to determine the merits of a fourth amendment claim, not the defendant's standing to assert such a claim. By making the test for standing synomymous with the test for determining the merits of an issue, the courts were actually returning fourth amendment standing to its pre-*Jones* status.

Prior to *Jones,* standing was meaningless in the context of the fourth amendment because the same issue, property rights, governed both standing and the merits. Following *Katz,* the distinction between standing and substantive issues again disappeared with the more nebulous "reasonable expectation of privacy" test governing both questions.[68] Once again, despite the intention of *Katz* and its immediate successors to widen access to fourth amendment standing, the stage was set for a drastic restriction of such access if a future court should decide that a reasonable expectation of privacy required a property right in the area searched or the property seized.

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65. *Id.* at 710.

66. *See* Note, *From Private Places to Personal Privacy: A Post-*Katz *Study of Fourth Amendment Protection,* 43 N.Y.U.L. REV. 968, 977 (1968).

67. *Id.*

68. Mancusi v. DeForte, 392 U.S. 364 (1968); Baker v. United States, 266 F. Supp. 461 (D.D.C. 1967), *remanded,* 401 F.2d 958 (D.C. Cir. 1968), *decided,* 301 F. Supp. 973 (D.D.C. 1969), *new trial denied,* 301 F. Supp. 977 (D.D.C. 1969), *aff'd,* 430 F.2d 499 (D.C. Cir. 1970), *cert. denied,* 400 U.S. 965 (1970).

V. *ALDERMAN* AND THE FIRST SIGNS OF A RETURN TO PROPERTY RIGHTS

The ambiguity of *Katz's* "reasonable expectation of privacy" became evident less than two years later in *Alderman v. United States.*[69] *Alderman* was a multi-defendant case in which all defendants moved to suppress tapes of telephone conversations. The conversations had been made by some of those accused, from a store phone belonging to yet another defendant. Unlike *Katz, Alderman* dealt specifically with the issue of standing. The majority opinion of Justice White and the concurring and dissenting opinions of Justices Harlan and Fortas all flow logically from the *Katz* standard. Each opinion, however, displays a sharply divergent belief as to what persons should be allowed to assert fourth amendment claims.

All three Justices adopted the language and general premises of *Katz,* that the fourth amendment protects individual privacy, not physical areas, and that fourth amendment rights may only be claimed by one whose rights were personally violated.[70] Justice White had no difficulty interpreting this to allow standing to those defendants who were actual participants in the conversations. He continued, though, by quoting a literal reading of the fourth amendment and citing the fictional trespass cases such as *Silverman,* as grounds for granting standing to the owner of the store despite the fact that he was not a participant in the conversations.[71] The owner was therefore allowed to raise a fourth amendment claim solely by virtue of his property right. Standing was denied to all other defendants against whom the tapes were being introduced as evidence.

Justice Harlan, who wrote the *Katz* test upon which Justice White ostensibly relied, agreed that standing should be granted to the defendants participating in the conversations and denied to those not personally involved. He dissented, however, with regard to the owner of the store and telephone.

> [W]e have not buried *Olmstead,* so far as it dealt with the substance of Fourth Amendment rights, only to give it new life in the law of standing. Instead, we should reject traditional property concepts entirely and reinterpret standing law in the light of the substantive principles developed in *Katz.* Standing should be granted to every person who participates in a conversation he legitimately expects will remain private — for it is just such persons that *Katz* protects.

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69. 394 U.S. 165 (1969).

70. *Id.* at 174. "Fourth Amendment rights are personal rights which, like some other constitutional rights may not be vicariously asserted." *Id.*

71. *Id.* at 177-78.

> On the other hand, property owners should not be permitted to assert a Fourth Amendment claim in this area if we are to respect the principle [that] "Fourth Amendment rights are personal rights . . . which may not be vicariously asserted." For granting property owners standing does not permit them to vindicate intrusions upon their *own* privacy. . . .[72]

Unlike the majority, Justice Harlan did not view property rights and privacy interests as concurrent or alternative grounds for granting fourth amendment standing. Justice Harlan also rejected any return to a literal reading of the fourth amendment or a "*Silverman*" requirement of trespass or physical intrusion as a basis for fourth amendment claims.[73] Rather, he viewed *Katz* as establishing a pure privacy standard. Under some circumstances, ownership of property could be evidence of a privacy right. The simple fact of ownership, however, could never by itself be a predicate for standing.

Justice Fortas, also concurring in part and dissenting in part, agreed that the actual participants in the phone conversations should be given standing. He also held that all defendants, including the storeowner and other co-defendants should be granted standing as "targets" of the search and seizure. Basing his conclusion on the Brandeis dissent in *Olmstead,* the *Jones* decision, and *Katz's* privacy language, Justice Fortas determined that all parties against whom a government search or seizure was directed should have standing to suppress the fruits of such a search. He stated that:

> this quotation [from *Jones*], read in light of the Court's rejection of property concepts, requires that we include within the category of those who may object to the introduction of illegal evidence "one against whom the search was directed." Such a person is surely "the victim of an invasion of privacy" and a "person aggrieved," even though it is not his property that was searched or seized.[74]

While reaching different conclusions, the Harlan and Fortas tests each set forth a clear, privacy centered basis for determining fourth amendment standing. Justice Harlan, while retaining some of the tautological ambiguities of *Katz* at least clarified the fact that his "privacy" rule was meant to supplant, not supplement the "trespass" and "property rights" views of the fourth amendment. Justice Fortas provided a clear standing regulation, which like *Jones,* would place all parties on

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72. *Id.* at 191-92 (Harlan, J., concurring in part and dissenting in part) (citation omitted) (emphasis in original).

73. *Id.* at 191-92.

74. *Id.* at 208-09. Despite its rejection in *Alderman,* the "target" test advocated by Justice Fortas was adopted by some federal courts, *see* United States v. Cobb, 432 F.2d 716 (4th Cir. 1970); United States v. Rosenberg, 416 F.2d 680 (7th Cir. 1969); and by some state courts, *see* People v. Stojek, 29 N.Y.2d 798, 327 N.Y.S.2d 361 (1971), *rev'g,* 34 A.D.2d 205, 310 N.Y.S.2d 965 (1970).

notice as to exactly who may challenge searches and seizures in a criminal case. Being somewhat broader than *Jones,* the Fortas test would have done away with the need for the automatic standing rule.

It is unfortunate that given a choice between two relatively clear rules for deciding fourth amendment substance and standing, the majority chose a middle ground which incorporated elements of both tests but retained the clarity or consistency of neither. Under Justice White's construction, the distinction between standing and the merits of a fourth amendment claim again became blurred, and the role of property rights in determining fourth amendment standing became uncertain. As with *Katz,* these ambiguities left open the possibility that a future court, by defining a reasonable expectation of privacy solely in terms of property rights, could preserve the language of *Katz* and *Jones* while effectively returning the fourth amendment to the principles of *Olmstead* and *Goldman.*

The case of *Brown v. United States*[75] was representative of the confusion regarding fourth amendment concepts. There the Supreme Court discussed the issues of legitimate presence on the premises, proprietary and possessory rights in the goods seized, and automatic standing, all under the rubric of "reasonable expectation of privacy." Yet between 1971 and 1978, a distinct trend towards defining a reasonable expectation of privacy in terms of common law property rights began to give substance to the warning of diminished fourth amendment protections. Courts spoke of government trespass as a relevant and instructive factor in determining whether a defendant's reasonable expectation of privacy had been violated.[76] In 1976, the Sixth Circuit Court of Appeals held that "we believe it is helpful to rely on property concepts 'simply because they assist in establishing the perimeters of the Fourth Amendment guarantees as they relate to the home.' "[77] Other circuits followed a return to trespass concepts by reviving the notion of "curtilege" and combining it with the "plain view" doctrine of *Warden v. Hayden,*[78] to further limit an individual's reasonable expectation of privacy and to expand police power to search.[79] Under such decisions, it was held that while government agents were not allowed to break into a defendant's home, a police invasion of the defendant's property surrounding his home itself was merely a "technical trespass," and the police could seize whatever they saw in "plain view" inside the house.[80] Significantly, the Seventh Circuit justified the doctrine of "technical trespass" by

75. 381 U.S. 437 (1965).

76. *See, e.g.,* United States v. Ford, 553 F.2d 146 (D.C. Cir. 1977).

77. United States v. Carriger, 541 F.2d 545, 550 (6th Cir. 1976).

78. 387 U.S. 294 (1967).

79. *See* Fixel v. Wainwright, 492 F.2d 480, 483 n.3 (5th Cir. 1974); United States v. Hanahan, 442 F.2d 649 (7th Cir. 1971).

80. United States v. Hanahan, 442 F.2d 649 (7th Cir. 1971).

citing the language of *Katz* that "[w]hat a person knowingly exposes to the public . . . is not a subject of Fourth Amendment protection."[81] Two years after *Hanahan*[82] was decided on "technical trespass" grounds, the Seventh Circuit Court of Appeals explicitly stated that "mere 'technical trespass' did not transform an otherwise reasonable investigation into an unreasonable search."[83] However, it should be noted that these cases did not make any real distinction between the merits of a fourth amendment claim and standing to assert such a claim. Inasmuch as property concepts were being employed in such a way as to deny the defendants' motions to suppress, the standing issue was rarely discussed.

In 1975, the "open fields/private place" doctrine of *Hester*[84] was revived in *Air Pollution Variance Board v. Western Alfalfa Corp.*,[85] applying the fifty year old common law property reasoning of *Hester* with the privacy language of *Katz*. The Court held that an "inspector may operate within or without the [defendant's] premises but in either case he is well within the 'open fields' exception to the Fourth Amendment approved in *Hester*."[86] At approximately the same time, courts also began to hold that an owner of property who relinquishes possession also surrenders his reasonable expectation of privacy.[87]

Perhaps the nadir of confusion and jumbled property/privacy concepts was reached with regard to the issue of the fourth amendment standing in *United States v. Lisk*.[88] *Lisk* involved a defendant who stored a pipe bomb in the trunk of a friend's car. The police illegally broke into the car and Lisk was charged with possessing the bomb. The Seventh Circuit Court of Appeals brushed aside the automatic standing provision of *Jones*,[89] and held that the defendant did not have standing since by giving up possession of the bomb he also gave up his fourth amendment rights in it. The court finally dealt with the issue of the defendant's ownership of the property seized by stating that he may have

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81. Katz v. United States, 389 U.S. 347, 351 (1967) (exposure to a trespassing police officer looking into defendant's window).

82. United States v. Hanahan, 442 F.2d 649 (7th Cir. 1971).

83. United States v. Conner, 478 F.2d 1320, 1323 (7th Cir. 1973); but note that the Fifth Circuit Court of Appeals rejected this rule, and refused to validate "plain view" searches when police committed a trespass to get in position to have a "plain view." *See* United States v. Davis, 423 F.2d 974 (5th Cir. 1970), *cert. denied*, 400 U.S. 836 (1971).

84. Hester v. United States, 265 U.S. 57 (1924). *See* notes 25-28 and accompanying text *supra*.

85. 416 U.S. 861 (1974).

86. *Id.* at 865.

87. Couch v. United States, 409 U.S. 322 (1973).

88. 522 F.2d 228 (7th Cir. 1975), *cert. denied*, 423 U.S. 1078 (1976).

89. Jones v. United States, 362 U.S. 257 (1960). Apparently confusing automatic standing with the "legitimately on the premises" test, the court in *Lisk* denied automatic standing on the grounds that the defendant was not present at the time of the search.

a replevin action to recover possession from the government, but does not have standing to suppress in a criminal proceeding. The Seventh Circuit held that "[t]he owner of a chattel which has been seized certainly has standing to seek its return. It does not necessarily follow that he may also object to its use as evidence. . . ."[90]

By so holding, *Lisk* in effect states that common law property views regarding possession will be incorporated into fourth amendment standing doctrine in so far as they will act to deny a defendant standing. On the other hand, Justice Harlan's view in *Alderman*[91] may be used to disregard property law concerning ownership when it would otherwise act to confirm standing.

The confusion in fourth amendment law, both of substance and of standing was directly attributable to the majority decisions in *Katz* and *Alderman*. For the eleven years between *Katz* and *Rakas* there were no cognizable standards to govern search and seizure cases. Judges were free to decide fourth amendment cases as they pleased, in accordance with personal leanings, political pressure, or societal attitudes. A wide range of rationales, from legitimacy on the premises to replevin was available to justify any decision.

It was against this background of near-anarchical fourth amendment law that *Rakas v. Illinois,*[92] was decided in 1978. Numerous critics and scholars have asserted that *Rakas* was a major departure from the standards of *Katz.*[93] With regard to the spirit of fourth amendment law this is unquestionably true. Just as *Katz* overtly aimed at expanding the availability of fourth amendment rights, *Rakas* made no bones about intending to limit access to such rights. In terms of legal history, however, *Rakas* is actually a logical continuation of the forces and trends set in motion by *Katz* eleven years earlier.

VI. *RAKAS* AND THE ABOLITION OF FOURTH AMENDMENT STANDING

It is significant to note at the outset that *Rakas* continued to use the privacy-oriented language of *Katz* holding that "the Fourth Amendment depends not upon a property right in the invaded place but upon whether the person who claims the protection of the Amendment has a legitimate expectation of privacy in the invaded place . . ."[94] and *Alder-*

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90. United States v. Lisk, 522 F.2d 228, 230 (7th Cir. 1975), *cert. denied,* 423 U.S. 1078 (1976) (footnote omitted).

91. Alderman v. United States, 394 U.S. 165 (1969). *See* notes 69-74 and accompanying text *supra.*

92. 439 U.S. 128 (1978).

93. *Id.* at 156-69. *See also* Note, *The Exclusionary Rule, Standing, and Expectation of Privacy for Car Passengers: A Confusion of Concepts,* 31 BAYLOR L. REV. 227 (1979); Note, *Property Law and Fourth Amendment Privacy Protection,* 58 NEB. L. REV. 1123 (1979).

94. Rakas v. Illinois, 439 U.S. 128, 143 (1978).

man's statement that "Fourth Amendment rights are personal rights which, like some other constitutional rights, may not be vicariously asserted."[95] However, in 1967, *Katz* utilized these principles to widen the concept of fourth amendment standing as enunciated in *Jones*. By so doing, *Katz* clouded many of the distinctions between standing and substantive fourth amendment law, a blurring which had little impact on access to fourth amendment protections as long as most courts shared the Warren Court's liberal privacy leanings.

These distinctions continued to be ignored for the next eleven years. However, during this time public sentiment shifted away from its previous position supporting a liberal construction of the fourth amendment in criminal cases. *Rakas* then formalized the merger of substantive and procedural fourth amendment concerns, using the language of *Katz* to abolish the idea of separate fourth amendment standing altogether. The Court held that "this Court's long history of insistence that Fourth Amendment rights are personal in nature has already answered many . . . traditional standing inquiries, and we think that definition of those rights is more properly placed within the purview of substantive Fourth Amendment law than within that of standing."[96]

The Supreme Court's abandonment of a standing rule separate from substantive fourth amendment claims culminated in *United States v. Salvucci*,[97] which abolished the automatic standing rule of *Jones*. The defendants in *Salvucci* had been indicted for possession of stolen mail. The charges were predicated upon twelve stolen checks seized by police during the search of an apartment leased to a defendant's mother. In upholding standing to suppress, the First Circuit Court of Appeals held that the automatic standing rule was the sole basis for allowing these defendants to assert a fourth amendment claim.

> We agree with the Government that neither defendant has actual standing to contest the lawfulness of the search and seizures. Neither defendant has established a reasonable expectation of privacy in the premises searched or the property seized, nor has either of them ever claimed a proprietary or possessory interest in the premises or the checks.
>
> Both defendants, however, have automatic standing to object to the search and seizures under *Jones v. United States*. . . .[98]

The Supreme Court reversed, holding that the automatic standing rule of *Jones* had outlived its usefulness and was therefore overruled.[99]

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95. *Id.* at 133-34, *quoting* Alderman v. United States, 394 U.S. 165, 174 (1969).
96. *Id.* at 140.
97. 100 S.Ct. 2547 (1980).
98. United States v. Salvucci, 599 F.2d 1094, 1097 (1st Cir. 1979) (citation omitted).
99. United States v. Salvucci, 100 S.Ct. 2547, 2548 (1980).

The *Salvucci* Court considered the automatic standing rule to be an exceptional response to the constitutional problem of forcing a waiver of fifth amendment rights to assert fourth amendment claims.[100] The Court concluded that this was no longer a valid concern because its 1968 decision in *Simmons v. United States*[101] directly addressed the problem of the forced fifth amendment waiver by ruling that a defendant's testimony in support of a fourth amendment motion was not admissible at trial. According to the *Salvucci* majority, this completely eliminated any need for automatic standing, since " 'the self-incrimination dilemma, so central to the *Jones* decision, can no longer occur under the prevailing interpretation of the Constitution. . . .' "[102]

The *Salvucci* decision gave little weight to the argument that the Government should not be allowed to take the contradictory positions that a defendant had sufficient interest in an object to be convicted of possessing it, while not having sufficient interest to merit constitutional protection. Citing *Rakas,* the Court merely said that there is nothing inherently contradictory about such a position:

> The simple answer is that the decisions of this Court, especially our most recent decision in *Rakas v. Illinois,* clearly establish that a prosecutor may simultaneously maintain that a defendant criminally possessed that seized good, but was not subject to a Fourth Amendment deprivation, without legal contradiction. To conclude that a prosecutor engaged in self-contradiction in *Jones,* the Court necessarily relied on the unexamined assumption that a defendant's possession of a seized good sufficient to establish criminal culpability was also sufficient to establish Fourth Amendment "standing." This assumption, however, even if correct at the time, is no longer so.[103]

Salvucci, like *Rakas,* dismantled the doctrine of fourth amendment standing by using privacy-oriented language to permit the reintroduction of property law into search and seizure questions. While *Salvucci* purported to eliminate automatic standing because only defendants with a personal fourth amendment right would be allowed to claim constitutional protection, it is clear that the Court believed that the *Salvucci* defendants lacked a personal fourth amendment right because they did not have a proprietary interest in the apartment searched. By viewing automatic standing as an exception to the rule requiring personal assertion of fourth amendment rights, the *Salvucci* Court rejected *Jones's*

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100. *Id.* "The Court [in *Jones*] found that the prosecution of such possessory offenses presented a 'special problem' which necessitated the departure from the then-settled principles of Fourth Amendment 'standing.' " *Id.* at 2550-51.

101. 390 U.S. 377 (1968).

102. United States v. Salvucci, 100 S.Ct. 2547, 2552 (1980), *quoting* Brown v. United States, 411 U.S. 223, 228 (1973).

103. *Id.* (citation omitted) (footnote omitted).

rationale that a defendant facing the risk of conviction for a possessory crime was by definition an aggrieved party entitled to standing. Instead, *Salvucci* chose to define personal fourth amendment rights in terms of proprietary interests, ignoring the possibility that other interests could be sufficient to raise a reasonable expectation of privacy.

It is clear that the elimination of a separate standing doctrine elevates the importance of property rights in search and seizure cases. What is less clear, however, is the degree to which the elimination of standing will have any procedural impact on consideration of fourth amendment issues. In *Rakas,* Justice Rehnquist purported to replace the two-step standing/substantive analysis of *Jones* with the single-question test of whether the defendant at bar had a reasonable expectation of privacy violated by an illegal search and seizure.[104] Yet it is difficult to discern any practical difference between the *Jones* and *Rakas* tests. In each instance it is necessary to focus first upon the defendant's status to decide if there is a valid fourth amendment interest and then to turn to the conduct of the police to determine whether the defendant's rights were violated. It is irrelevant whether this analysis is accomplished in one paragraph, as *Rakas* suggests, or two, as *Jones* indicates. Theoretically, the same conclusion should be reached by either method.[105] It is only if the courts vary the emphasis placed on the factual considerations of property and privacy that different results would be reached.

The confusion over this issue was reflected in the concurring opinion of Justice Blackmun in *Rawlings v. Kentucky:*[106]

> In my view, *Rakas v. Illinois,* recognized two analytically distinct but "invariably intertwined" issues of substantive Fourth Amendment jurisprudence. The first is "whether [a] disputed search or seizure has infringed an interest of the defendant which the Fourth Amendment was designed to protect," the second is whether "the challenged search or seizure violated [that] Fourth Amendment right[ ]." The first of these questions is answered by determining whether the defendant has a "legitimate expectation of privacy" that has been invaded by a governmental search or seizure. The second is answered by determining whether applicable cause and warrant requirements have been properly observed.[107]

It should be obvious that despite differences in terminology, both Justice Rehnquist and Justice Blackmun are still utilizing the two-tier analysis of *Jones* to resolve search and seizure questions. *Rakas's* conceptual merger of standing with substantive fourth amendment issues

104. *Id.* at 2549 n.4.

105. *See* Rakas v. Illinois, 439 U.S. 128, 148 (1978). The majority in *Rakas* not only claimed that its decision would not have changed the outcome of any previous cases, but specifically stated that the result of *Jones* and *Katz* would not have been altered under the *Rakas* holding.

106. 100 S.Ct. 2556 (1980).

107. *Id.* at 2565 (Blackmun, J., concurring) (citations omitted).

does not, therefore, create any new tests or theories for deciding fourth amendment cases. Rather, *Rakas* and *Salvucci* are important decisions because they have abolished what had been clear guidelines for evaluating a defendant's right to assert a fourth amendment claim. After *Rakas* and *Salvucci*, it is no longer possible to solve threshold fourth amendment questions by looking to such unambiguous signposts as the legitimacy of the defendant's presence or the possessory nature of the charges. Instead, courts are now left with the vague language of *Katz* and may use whatever personal or property concerns they wish in order to determine a reasonable expectation of privacy. Neither the police nor defendants are on notice of what may be constitutionally protected.

VII. *RAKAS* AND THE USE OF PROPERTY RIGHTS TO DETERMINE REASONABLE EXPECTATIONS OF PRIVACY

Katz and *Alderman* attempted to expand the *Jones* formula by holding that the property right is merely one of many factors to consider in deciding fourth amendment issues. *Rakas* carried this line of reasoning to its logical conclusion by holding that the *Jones* test of legitimacy on the premises was not dispositive, and was but one of many issues to consider.[108] *Rakas* distinguished *Jones* not as a matter of law, but as a question of fact, with Justice Rehnquist holding that "we think that *Jones* on its facts merely stands for the unremarkable proposition that a person can have a legally sufficient interest in a place other than his own home so that the Fourth Amendment protects him from unreasonable governmental intrusion into that place."[109] The Supreme Court in *Rakas* therefore used one of the nebulous standards of *Katz* and *Alderman* as a means of limiting rather than expanding fourth amendment rights.

The real significance of *Rakas* lies not in any legal principles it established, for it set forth no rigid guidelines. Courts are still free to consider any of the same factors they considered under *Katz*. *Rakas* attempts to re-shape fourth amendment law by altering the factual emphasis placed by the Court on property rights. In *Rakas*, the Court reasoned that an automobile passenger had no legitimate expectation of privacy in property placed in the glove compartment of a car, because he was not the owner of the car. This was a sharp change from the reasoning of previous cases with similar facts. In 1973, *Schneckloth v. Bustamonte*[110] implicitly recognized fourth amendment standing for

108. Rakas v. Illinois, 439 U.S. 128, 148 (1978). "We would not wish to be understood as saying that legitimate presence on the premises is irrelevant to one's expectation of privacy, but it cannot be deemed controlling."

109. *Id.* at 142.

110. 412 U.S. 218 (1973).

automobile passengers. Numerous cases have also found a reasonable expectation of privacy in concealed areas of a car, such as a glove compartment or trunk, as opposed to the exterior of a vehicle.[111]

For perhaps the first time since *Jones,* the Supreme Court in *Rakas* made it possible for ownership of property to be the sole criteria for deciding a fourth amendment case. The majority, however, specifically disavowed any interpretation that ownership will always be dispositive, and limited itself to the facts of the case.[112] The disquieting aspect of this disavowal lies in two peculiar aspects of the *Rakas* facts. First, the police action in *Rakas* was indisputably illegal and without probable cause. Second, it was equally indisputable that the defendants were guilty. If suppression were granted, their convictions would be reversed and key evidence would be unavailable at a second trial. Thus, the only manner in which an appellate court could deny suppression was to dispose of the fourth amendment issue without considering the legitimacy of the police conduct. That was accomplished by finding that the defendant had no expectation of privacy and therefore no right to complain about the police behavior.

Given these facts, and in view of the majority's frequent mention in *Rakas* of a need to balance society's interest in crime prevention with the defendant's fourth amendment rights,[113] it is logical to conclude that *Rakas* simply allows a court to fall back on common law property concepts when a defendant seems obviously guilty and there is no other means of avoiding suppression.

The two most recent Supreme Court interpretations of *Rakas, United States v. Salvucci*[114] and *Rawlings v. Kentucky*[115] lend credence to this interpretation. Like *Rakas, Salvucci* involved a clearly illegal search and clearly guilty defendants.[116] Moreover, if a motion to suppress were granted, the defendants in *Salvucci* would go completely free since the only charge facing them was possession of the illegally seized material. As in *Rakas,* the Court in Salvucci resolved this problem by holding that the defendants did not have any personal fourth amendment right, thereby avoiding the need to examine the illegal police conduct.[117]

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111. *See* Cardwell v. Lewis, 417 U.S. 583, 590 (1974).

112. Rakas v. Illinois, 439 U.S. 128, 139 (1978).

113. Rakas v. Illinois, 439 U.S. 128, 137 (1978).

114. 100 S.Ct. 2547 (1980).

115. 100 S.Ct. 2556 (1980).

116. *See* United States v. Salvucci, 599 F.2d 1094, 1094-97 (1st Cir. 1979).

117. The distortion inherent in the *Salvucci* characterization of automatic standing as an "exception" to normal fourth amendment standards has already been touched upon. *See* text accompanying notes 97-104 *supra.* Such a view ignores both the personal interest created by an indictment for a possessory crime and the entire concept that a person aggrieved by an illegal search or seizure need not have any property interest.

It should also be noted, however, that Justice Rehnquist's claim that *Simmons* does away with any need for automatic standing is similarly misplaced. While it is true that *Simmons* prevents

The *Salvucci* opinion quoted liberally from *Rakas* and *Alderman* to the effect that fourth amendment issues must be determined by the defendant's reasonable expectation of privacy and that personal and property concerns must both be considered in deciding these issues.[118] Yet in discussing the "totality of the circumstances"[119] affecting the reasonableness of the defendants' expectations of privacy, the Court only saw fit to mention matters of ownership, possession, and interest in places and things as factors contributing to fourth amendment protection. Thus by citing the language which expanded fourth amendment rights in the 1960s the Court achieved a diminution of those same rights without changing the standards or tests of *Katz* and *Alderman*.[120]

In *Rawlings v. Kentucky*,[121] a defendant was accused of possessing drugs which were seized from his girlfriend's purse. The defendant was present at the time of the search and seizure and he admitted ownership of the drugs.[122] Thus, like *Rakas* and *Salvucci*, *Rawlings* involved a guilty defendant and questionable police action which could lead to suppression of the drugs and dismissal of the indictment. The Court in *Rawlings* began by quoting with approval the language of *Katz* and *Rakas* that the trial court should make "an inquiry that focused directly on the substance of the defendant's claim that he or she possessed a 'legitimate expectation of privacy' in the area searched."[123] The conclusion was then reached that the defendant's ownership of the drugs was not sufficient to establish a right to fourth amendment protection because he did not establish a sufficient right in the area searched (*i.e.*, his girlfriend's purse).[124] *Rawlings* thereby expands the court's ability to

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a defendant's fourth amendment testimony being used against him on the Government's direct case at trial, it is doubtful that such testimony would be excluded for impeachment purposes or on rebuttal. Justice Rehnquist himself in *Salvucci* refused to rule out such use, and several recent cases have indicated that impeachment use of illegally seized evidence would be permitted. *See* United States v. Havens, 100 S.Ct. 1912 (1980). *Salvucci* may therefore revive the defendant's dilemma of choosing between his fourth and fifth amendment rights.

118. United States v. Salvucci, 100 S.Ct. 2547 (1980).

119. Rawlings v. Kentucky, 100 S.Ct. 2556, 2558 (1980).

120. *See* notes 59-93 and accompanying text *supra*.

121. 100 S.Ct. 2556 (1980).

122. *Id.* at 2559-60.

123. *Id.* at 2561.

124. *Id.* at 2561 n.3. Note that the Supreme Court accepted a trial court finding that the defendant had no reasonable expectation of privacy based upon a possibly distorted interpretation of the defendant's testimony at the fourth amendment hearing. The suppression hearing in *Rawlings* not only involved the issue of the defendant's reasonable expectation of privacy, but dealt with the question of whether the defendant was under illegal police detention for a period of time prior to the seizure of the drugs. The defendant, apparently in relation to the detention issue, testified that "*as* [he] *sat there*" under alleged police custody, he did not expect the purse to be free from government intrusion. The trial judge, applying this statement to the privacy expectation issues, immediately interrupted and rather gleefully stated: "You know what, I believe this boy tells the truth. . . . Now, no question but what the boy fully understood what was meant by that. None at all in the court's mind. If you want to go ahead, you can do so." *Id.*

There must be a serious question as to whether the trial court intentionally distorted the

decide fourth amendment issues based upon property rights by permitting a selective use of property law. Ownership of the property seized, a concept previously thought to vest a defendant with a right to constitutional protection was deemed insufficient in *Rawlings*.[125] A proprietary interest in the area searched was held to be the key property consideration in deciding if the defendant had a reasonable expectation of privacy.[126]

The dissent in *Rawlings* viewed this development as more regressive than merely returning the fourth amendment to the pre-*Katz* era. It held that *Rawlings* reduces fourth amendment coverage to a lower level than ever before, since areas protected even prior to *Katz* may no longer be covered. Justice Marshall stated:

> In holding that the Fourth Amendment protects only those with a privacy interest in the place searched, and not those with an ownership or possessory interest in the things seized, the Court has turned the development of the law of search and seizure on its head. The history of the Fourth Amendment shows that it was designed to protect property interests as well as privacy interests; in fact, until *Jones* the question whether a person's Fourth Amendment rights had been violated turned on whether he had a property interest in the place searched or the items seized. *Jones* and *Katz v. United States,* expanded our view of the protections afforded by the Fourth Amendment by recognizing that privacy interests are protected even if they do not arise from property rights. But that recognition was never intended to exclude interests that had historically been sheltered by the Fourth Amendment from its protection. Neither *Jones* nor *Katz* purported to provide an exclusive definition of the interests protected by the Fourth Amendment. Indeed, as *Katz* recognized, "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." Those decisions freed Fourth Amendment jurisprudence from the constraints of "subtle distinctions, developed and refined by the common law in evolving the body of private property law which, more than almost any other branch of law, has been shaped by distinctions whose validity is largely historical." Rejection of those finely drawn distinctions as irrelevant to the concerns of the Fourth Amendment did not render property rights wholly outside its protection, however. Not every concept involving property rights, we should remember, is "arcane."
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> In fact, the Court rather inconsistently denies that property

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defendant's statement, ignoring the "*as you sat there*" condition in order to deny fourth amendment standing. *Id.* (emphasis added).

125. Rawlings v. Kentucky, 100 S.Ct. 2556, 2562 (1980). *But see* the dissent of Justice Marshall for a discussion of the precedents allowing fourth amendment protection based upon ownership or possession of the goods seized.

126. Rawlings v. Kentucky, 100 S.Ct. 2556, 2561, 2564 (1980).

> rights may, by themselves, entitle one to the protection of the Fourth Amendment, but simultaneously suggests that a person may claim such protection only if his expectation of privacy in the premises searched is so strong that he may exclude all others from that place. Such a harsh threshold requirement was not imposed even in the heyday of a property rights oriented Fourth Amendment.[127]

It should be realized, however, that *Rawlings,* like *Rakas* and *Salvucci,* does not establish any fixed rule which makes a property right in the area searched a prerequisite for asserting a fourth amendment claim.[128] To the contrary, the *Rawlings* majority specifically rejected such a rule by listing numerous factors other than possession of the purse which could have given the defendant a legitimate expectation of privacy.[129] Just as *Rakas* used the vague language of *Katz* to re-introduce some forms of property law into fourth amendment cases, *Rawlings* seized upon the vague standards of *Rakas* to give courts discretion to selectively use virtually any property law concepts in deciding fourth amendment issues.

The most cogent point raised by the *Rawlings* dissent is that the conclusions reached by the majority are contradicted by even a literal reading of the fourth amendment. Justice Marshall stated that:

> The Court's decision today is not wrong, however, simply because it is contrary to our previous cases. It is wrong because it is contrary to the Fourth Amendment, which guarantees that "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated." The Court's reading of the Amendment is far too narrow. The Court misreads the guarantee of security "*in* their persons, houses, papers, and effects, *against* unreasonable searches and seizures" to afford protection only against unreasonable searches and seizures *of* persons and places.
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> The Fourth Amendment, it seems to me, provides in plain language that if one's security in one's "effects" is disturbed by an unreasonable search or seizure, one has been the victim of a constitutional violation; and so it has always been understood. Therefore the Court's insistence that in order to challenge the legality of the search one must also assert a protected interest in the premises is misplaced. The interest in the item seized is quite enough to establish that the defendant's personal Fourth Amendment rights have been invaded by the government's conduct.
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> . . . .
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> When the government seizes a person's property, it interferes

127. *Id.* at 2568-69 (Marshall, J., dissenting) (citation omitted).

128. *Id.* at 2561. Justice Blackmun, concurring, urges the adoption of such a fixed rule. *Id.* at 2565 (Blackmun, J., concurring). The majority, however, never specifically establishes such a rule.

129. *Id.* at 2561.

> with his constitutionally protected right to be secure in his effects. That interference gives him the right to challenge the reasonableness of the government's conduct, including the seizure. If the defendant's property was seized as the result of an unreasonable search, the seizure cannot be other than unreasonable.[130]

The unbridled discretion *Rawlings* allows trial courts in selectively applying property concepts to fourth amendment cases can thus be used to defeat even a strict construction of the constitution. While *Rawlings* does not explicitly mandate such use, it invites judges to bow to political and social pressures to deny suppression by utilizing any available principles of property law. This point becomes evident from a view of the very facts of *Rakas* and *Rawlings*.

Rawlings held that ownership of seized goods is not sufficient to establish a fourth amendment right.[131] *Rakas,* on the other hand, stated that such ownership would be sufficient.[132] *Rakas* held that passengers in a private automobile had no fourth amendment interest in the locked trunk and glove compartment of the car.[133] Yet *Rawlings* listed a series of considerations which seem to grant protection to just such persons.[134]

In view of these contradictions, it is difficult to reach a conclusion other than that *Rakas* and *Rawlings* allow for the discretionary use of property law in any manner necessary to deny a motion to suppress. Although cynical, such an interpretation is amply supported by the contradictory manner in which the Court has shifted its factual emphasis between ownership of goods, proprietorship of premises, and personal privacy, always to achieve the goal of denying fourth amendment claims. In his dissenting opinion in *Harris v. United States,*[135] Justice Frankfurter noted that "[a] decision may turn on whether one gives that [Fourth] Amendment a place second to none in the Bill of Rights, or considers it on the whole a kind of nuisance, a serious impediment in the war against crime."[136] While the recent Supreme Court decisions in *Rakas, Salvucci,* and *Rawlings* do not require such an unscrupulous pattern of decision making, they have given broad authority to any court which desires to follow that unprincipled course.

This interpretation of *Rakas* as an attempt to restrict access to fourth amendment protections by allowing courts to increase the factual importance of property, as opposed to privacy, interests is also borne out by a review of post-*Rakas* case law. The anticipated "open season" on

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130. *Id.* at 2567-68 (Marshall, J., dissenting) (emphasis in original).
131. *Id.* at 2561-62.
132. Rakas v. Illinois, 439 U.S. 128, 140, 148 (1978).
133. *Id.*
134. Rawlings v. Kentucky, 100 S.Ct. 2556, 2561 (1980).
135. 331 U.S. 145 (1947).
136. *Id.* at 157 (Frankfurter, J., concurring).

automobiles and passengers has not materialized. Some cases have not even construed *Rakas* as a departure from prior law, viewing it as just another example of the legal tradition of affording cars lesser fourth amendment protection than other, less mobile, facilities.[137]

The vast majority of cases purporting to rely on *Rakas* have been Fifth and Ninth Circuit Court of Appeals cases involving marijuana smuggling across the Mexican border. Most of these cases cited *Rakas* in dicta as authority for looking to possession or ownership as evidence of a legitimate expectation of privacy. However, these cases were usually decided on grounds of abandonment because the defendant was not present when a truck or airplane he had stolen or was driving was searched.[138]

A few cases have specifically adhered to the facts of *Rakas,* requiring a property interest for a reasonable expectation of privacy in a car.[139] In *United States v. Ochs*[140] however, the Second Circuit held that a defendant who had borrowed a car with a friend's permission had standing to move to suppress the fruits of a search of the car. Significantly, *Ochs*, while factually distinguishing *Rakas* and rejecting the idea that ownership is dispositive, adopted the *Rakas* view that property interests should be looked to in deciding whether a reasonable expectation of privacy exists.[141] *Ochs* therefore supports the theory that *Rakas* did not really change the fourth amendment concepts of *Katz* and *Alderman,* but increased the weight a court is permitted to give to property rights as a factor in determining privacy rights. Most cases have in fact cited *Rakas* as they would *Katz;* as authority for the requirement of a personal, legitimate expectation of privacy in the place searched.[142] Ironically, in several cases, *Rakas's* emphasis on property law was cited as grounds contributing to the existence of a sufficient privacy right to claim fourth amendment protection.[143]

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137. *See* United States v. Johnson, 588 F.2d 147 (5th Cir. 1979); United States v. Reyes, 595 F.2d 275 (5th Cir. 1979); United States v. Wright, 588 F.2d 189 (5th Cir. 1979).

138. United States v. Reyes, 595 F.2d 275 (5th Cir. 1979); United States v. Culbert, 595 F.2d 481 (9th Cir. 1979); United States v. Beyers, 600 F.2d 1130 (5th Cir. 1979); United States v. Bruneau, 594 F.2d 1190 (8th Cir. 1979).

139. United States v. Belle, 593 F.2d 487, 499 n.19 (3rd Cir. 1979); United States v. Hilton, 469 F. Supp. 94 (D. Me. 1979).

140. 595 F.2d 1247 (2d Cir. 1979).

141. *Id.* at 1253.

142. United States v. Whitmire, 595 F.2d 1303, 1312 (5th Cir. 1979); United States v. Byers, 600 F.2d 1130, 1132 (5th Cir. 1979); United States v. Hodge, 594 F.2d 1163, 1165 (7th Cir. 1979); Scharf v. United States Attorney Gen., 597 F.2d 1240, 1244 (9th Cir. 1979); United States v. Berryman, 468 F. Supp. 793, 796 (E.D. Va. 1979); United States v. Balsamo, 468 F. Supp. 1363, 1378 (D. Me. 1979).

143. United States v. Mazzelli, 595 F.2d 1157, 1160 (9th Cir. 1979); *In re* 2029 Henry Street, Bronx, New York, 464 F. Supp. 164, 172 n.9 (S.D.N.Y. 1979); United States v. Lefkowitz, 464 F. Supp. 227, 230 (C.D. Cal. 1979).

CONCLUSION

Judicial recognition of a fourth amendment based on personal privacy interests was a major departure from the traditional nineteenth century interpretation of the fourth amendment as dependent upon common law property principles. On at least three occasions: in *Jones,* and in the Harlan and Fortas opinion in *Alderman,* the Supreme Court was presented with an opportunity to establish a firm and clear rule for determining standing to assert fourth amendment claims. Such a rule was rejected, however, in favor of the vague, privacy oriented language used by the *Katz* and *Alderman* majority. Consequently, it became settled law that the function of the fourth amendment is to protect "privacy and not property." Unfortunately, the degree to which privacy is dependent upon the existence of a property right was never determined in these cases.

The Burger Court, with its inclination to limit the use of the fourth amendment exclusionary rule, seized upon this uncertainty. The *Katz* test increased judicial reliance upon property concepts in deciding whether a reasonable expectation of privacy exists. *Rakas v. Illinois*[144] was the culmination of this trend, with the Supreme Court holding that under certain circumstances it is possible for property rights to be the sole factor in evaluating an expectation of privacy.

It is easy, but simplistic, to view *Rakas* as returning the fourth amendment to total dependence upon property law. The Supreme Court explicitly disavowed any such intent, and subsequent cases have continued to use the *Katz* test of focusing upon the individual's expectation of privacy. *Rakas* makes clear, however, that a court may look to possession and ownership in deciding issues of privacy. In view of the vague standards of *Katz,* permitting such emphasis on property rights provides serious opportunity for courts to limit fourth amendment protections.

The progression from *Jones* to *Rawlings* provides a painful lesson for those who support a broad view of the fourth amendment. The vague, all-encompassing test of *Katz,* with its dependence on questions of fact for deciding fourth amendment issues, has proved just as useful for restricting constitutional protections late in the 1970's as it was for expanding those protections a decade ago. Ironically, the main hope for a broad interpretation of the fourth amendment now lies in the fact that *Rakas* adopts these same vague legal standards. Courts wishing to continue fourth amendment protections need only, as in *Ochs,* make factual distinctions. Under *Rakas,* and under *Katz,* the fourth amendment remains almost wholly dependent upon the political and social climate and personal judicial leanings.

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144. 439 U.S. 128 (1978).

Choreography, Pantomime and the Copyright Revision Act of 1976

*Martha M. Traylor**

The constitutional mandate of protection for the arts was first made expressly applicable to choreography and pantomime in the Copyright Revision Act of 1976. However, Congress failed to make any special provisions for these art forms. The author discusses the problems attending the copyright of choreography and pantomime, suggesting several ways in which to secure adequate protection.

The General Revision of Copyright Law,[1] which became effective January 1, 1978, for the first time extended copyright protection to the art forms of choreography and pantomime.[2] The addition of these forms of artistry to the ambit of copyright law is part of a worldwide trend towards recognizing and protecting a variety of artistic works and giving artists a means of protecting their intellectual property.[3] However, while legislative intent to expand the scope of copyright protection is clear (the words are specifically mentioned in the new Act's list of ar-

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1. Copyright Revision Act of 1976, 17 U.S.C. §§ 101-810 (Supp. III 1979).

2. 17 U.S.C. § 102(a)(4) (Supp. III 1979). *See generally* COPYRIGHT SOCIETY OF THE UNITED STATES, STUDIES ON COPYRIGHT, Study 28 (1959); A. LATMAN, THE COPYRIGHT LAW: HOWELL'S COPYRIGHT LAW REVISED AND THE 1976 ACT 53 (5th ed. 1979); M. NIMMER, NIMMER ON COPYRIGHT 1011 (1979); Goldstein, *Questions and Answers About the Performance of Music Under the New Copyright Law,* 1977 J. KAN. B.A. 239; Mirell, *Legal Protection for Choreography,* 27 N.Y.U. L. REV. 792 (1952); Ordway, *Choreography and Copyright,* ASCAP COPYRIGHT L. SYMP. 172 (1965); Ringer, *First Thoughts on the Copyright Act of 1976,* 22 N.Y.L. SCH. L. REV. 477 (1977); Ringer, *The Unfinished Business of Copyright Revision,* 24 UCLA L. REV. 951 (1977); Roth, *Common Law Protection of Choreographic Works,* 5 PERFORMING ARTS REV. 75 (1974); Note, *Performers' Rights Under the General Revision of Copyright Law,* 28 CASE W. RES. L. REV. 766 (1978); Comment, *Moving to a New Beat: Copyright Protection for Choreographic Works,* 24 UCLA L. REV. 1287 (1977).

3. *See generally* Abelman & Berkowitz, *International Copyright Law,* 22 N.Y.L. SCH. L. REV. 619 (1977).

tistic works to be protected),[4] legislative elucidation as to the meaning of the words choreography and pantomime is sparse.

Since copyright law has its origins in the protection of literary works, literary terms and concepts abound in, and serve as patterns for, copyright law.[5] When protection is extended to additional art forms some of these terms and concepts require extensive modification. Unfortunately, under the new Act, the boundaries and terms of protection are once again couched in the traditional legal language of copyright. This language evokes traditional legal meanings and therefore is incongruous when applied to the customs and usages of the art forms of choreography and pantomime.[6] Thus, realistic guidelines for enforcing the protection of these two new categories are practically nonexistent.

The special natures of choreography and pantomime will require accommodation and flexibility in the implementation of the new Act if these art forms are to be given protection equal to that afforded literary works. This accommodation and flexibility must depend on the customs and usages which have evolved within the art forms themselves; and, if necessary, a new legal lexicon must be developed. In particular, the choreography of dance will require a broad new idiom to be incorporated into, or impressed upon, the existing body of copyright law. This article will examine the worlds of choreography and pantomime and suggest the modifications in accepted copyright practice that are needed in order to protect the artistry of these worlds. The new Act will be specifically scrutinized with respect to the changes and expansions necessary to accommodate the choreography of dance.

I. THE BACKGROUND OF THE WORLD OF CHOREOGRAPHY AND PANTOMIME

A. Definitions and History

The word "choreography" is derived from the Greek "choreia," meaning "dance," and "grafos," meaning "to record."[7] Thus, the traditional meaning of the word combines the concept of dance with the

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4. *See* Marke, *United States Copyright Revision and its Legislative History*, 70 LAW LIB. J. 121 (1977).

5. *See* M. PETERS, GENERAL GUIDE TO THE COPYRIGHT ACT OF 1976, at 1:1 (Revision Coordinating Committee, U.S. Copyright Office, Sept. 1977). *See generally* Chee, *How to Research Copyright Law*, 7 LAW LIB. J. 171 (1977) (a valuable guide to the copyright law).

6. The portions of this article which describe customs and usages in the American dance world are based on a series of interviews with people in this world: dancers, choreographers, teachers, notators and critics. No one would give permission to be quoted directly, and no one would agree to be interviewed unless promised annonymity.

The author is greatly indebted to her daughter, Kate Traylor, who is a dancer, for help in directing her to these sources, as well as to many written sources. The author is also greatly indebted to her son, David Traylor, who is a mime, for information about the modern world of pantomime and for critical comments on the world of show business generally.

7. FUNK & WAGNALLS NEW STANDARD DICTIONARY OF THE ENGLISH LANGUAGE 475 (1963);

concept of recordation so that the artistic aspects can be preserved and recreated from the recordation to allow later enjoyment of the artistic form. In addition, there is almost always a corollary implication that the dance is created primarily for the pleasure and enjoyment of the observer rather than for that of the participant. In contemporary usage, the word "choreography" has come to mean a dance which embodies artistic creation, expressing beauty or emotion, that is to be presented as an entity for the viewing of a person who only observes and does not participate in the performance. Choreography means not only classic ballet forms, but also modern and various folk and ethnic dance forms.

In America today, choreography assumes an important role in entertainment. The movement of marching bands in parades and in accompanying sports events is choreographed in a way similar to the more traditional dance forms. Careful plans and records are created to assure that the movements will be workable within the space and time limits of the performance and to preserve the form of the movements so that they can be reproduced, if desired, on another occasion. Programs of ice figure skating, both in amateur competition and entertainment spectaculars, are also carefully choreographed to be within a time and space frame. Presentations in sales promotions, such as automobile shows, are choreographed in much the same way. Stage movements of actors and performers in opera, apart from the pure dance portions, are also choreographed. Circus productions are choreographed movements of both humans and animals, again usually set into a time frame. All of these planned movements are set into a framework of accompanying music, and the movement is patterned according to the time frame provided by the music.

All of the choreographies listed above are protectable under the new Act. All of them fall within the modern definition of choreography by virtue of their being art forms expressed in planned movement, set into a time frame, for the benefit and enjoyment of the passive observer. All may be recorded in some way so that they can be recreated at another time to be enjoyed or studied.

Generally, the choreography of dance in America has followed two important paths. First, there is classic ballet. Derived from sources in Europe, classic ballet has many traditional components and constantly places demands on dancers' techniques, physical skills and development. Sources from folk and ethnic dance feed, and are assimilated into, the so-called "classic" ballet tradition.[8] Second, there is the

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THE RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 261 (unabr. ed. 1966); WEBSTER'S NEW WORLD DICTIONARY OF THE AMERICAN LANGUAGE 252 (2d ed. 1972).

8. For further information on dance, *see generally* A. DEMILLE, DANCE TO THE PIPER, (1952); A. DEMILLE, AND PROMENADE HOME (1954); A. HAWKINS, CREATING THROUGH DANCE (1964); L. HORST & C. RUSSELL, MODERN DANCE FORMS IN RELATION TO THE OTHER MODERN ARTS (1961); O. KERENSKY, THE WORLD OF BALLET (1970); J. MARKS, MOTION, IMAGE AND FORM (1967); J.

development of modern dance.[9] In many respects modern dance is a reaction to the more structured forms of classic ballet.

This type of dance is characterized by its freeodm of movement and extemporaneous improvisation within defined boundaries. Such reactions and forms are readily apparent in the interpretive dancing of Isadora Duncan, and in the truly modern dance of Martha Graham.[10] All such dance is choreographed. All is planned and recorded in some way so that it can be reproduced when desired.

Pantomime may be defined as actions and gestures which tell a story or express an emotion without words.[11] Since pantomime is very often a part of dance, there are many pantomime gestures which have traditional meanings within the framework of classic ballet. These gestures are frequently used to move along the story within a dance, or merely to reinforce the expression of an emotion. Pantomime may also stand on its own as an art form, and there are many well known gestures which are used when pantomime is performed without dance. In comparison to dance movements, pantomime gestures are heavily improvised within vague story and character boundaries. Pantomime and dance share the tradition of handing down patterns of movement from one generation of performers to the next. Thus, like dance, mime is often recorded in the memories and bodies of the performers, just as folk tales were preserved before the invention of printing. This tradition has a long and illustrious history stretching from the Commedia d'Arte in the Middle Ages to the Place Pompidou in Paris, the piazzas of Rome, and the streets of New York.

B. Recordation

Along with enhanced possibilities for protecting and compensating artists, another reason cited for including choreography and pantomime in the new Act was the emergence of new technologies. Film or videotape allow easy recordation of these art forms.[12] The availability of these technologies, together with the pre-existing form of recordation-notation systems apparently led the drafters of the new Act to assume that the prerequisites for establishing copyright protection, notice and deposit of a copy, were feasible for choreographic and pan-

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MARTIN, INTRODUCTION TO THE DANCE (1963); W. SORELL, THE DANCE HAS MANY FACES (1966); M. VAN PRAAGH, THE CHOREOGRAPHIC ART (1963); K. WALKER, DANCE AND ITS CREATORS: CHOREOGRAPHERS AT WORK (1972).

9. *See generally* M. ARMITAGE, MARTHA GRAHAM (1966); M. CUNNINGHAM, CHANGES: NOTES ON CHOREOGRAPHY (1977); L. HORST & C. RUSSELL, *supra* note 8. *See also* Gruen, *New Moves by Merce Cunningham,* N.Y. Times, Feb. 17, 1980, § 2 (Arts and Leisure), at 1, col. 1.

10. *See* note 9 *supra.*

11. *See generally* A. ENTERS, ON MIME (1978); I. MAWER, THE ART OF MIME (1970).

12. SENATE COMM. ON THE JUDICIARY, S. REP. NO. 473, 94th Cong., 1st Sess. 51.52 (1975);

tomime works. However, it is important to note that there is a wide discrepancy between the anticipations of the legislators with regard to the utilization of these recordation methods and the actual practices of the artists. In fact, financial considerations and the heavy hold of tradition militate against the routine use of notation, film, or videotape to record choreographed works.[13]

1. Notation Systems

Recordation of dance by writing on paper has a long history.[14] Originally, a simple description of the choreography in everyday language was the best available means for recordation. Soon, titles were given by the artists to often used sequences of movement, such as "ronde de jambe," and these titles were used in the written descriptions as a kind of shorthand of dance. From these early beginnings, modern notation systems developed.[15]

Two modern notation systems dominate the field of written notation today: the Labanotation and the Benesh Notation.[16] Of the two,

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HOUSE COMM. ON THE JUDICIARY, H. REP. NO. 1476, 94th Cong., 2d Sess. 52-53, *reprinted in* [1976] U.S. CODE CONG. & AD. NEWS 5659, 5665-66.

13. *See* Sandler, *BC BC — A Dance Theater Grows in Brooklyn,* N.Y. Times, Jan. 13, 1980, § 2 (Arts and Leisure), at 6, col. 2.

However, two important monetary considerations exist for justifying the extension of copyright protection to choreography and pantomime. Interest in dance and mime has a tremendous upsurge in audiences in America in recent years. People are going to see these art forms as never before. Companies of dancers and mime are springing up all over the country with innumerable performances presented each year. Copyright protection will allow the artists who express their talents in these art forms to be compensated for their work as never before, comparable to the situation of writers and composers.

14. K. WALKER, *supra* note 8, at ch. IV. *See generally* G. CURL, AN ENQUIRY INTO MOVEMENT NOTATION (1966); R. FEUILLET, CHOREGRAPHIE OU L'ART DE D'ECRIRE LA DANSE PAR CARACTERES, FIGURES ET SIGNES DEMONSTRATIFS (1700); N. GOODMAN, LANGUAGES OF ART, AN APPROACH TO A THEORY OF SYMBOLS (1968); M. MORRIS, THE NOTATION OF MOVEMENT (1978); M. WIGMAN, THE LANGUAGE OF DANCE (1975).

15. For example, there were Thoinot Arbeau's "Orchesographie" in 1588; Beauchamps' notation system for the French Royal Academy of Dancing between 1672 and 1704; and Feuillet, whose work appeared in 1700. Feuillet's system, with adaptations, served for almost two hundred years as ballet grew steadily more complicated. Arthur Saint-Leon evolved a system published in a book in Paris in 1852, "La Stenochoregraphie ou l'Art d'Ecrire Promptement la Danse." This system grew again through Albert Zorn in Germany who published in 1887 a book entitled *Grammatik der Tanzkunst* which was translated into English by A. J. Sheafe, in 1905 called *Grammar of the Art of Dancing.*

When the French choreographer Petipa went to the Maryinsky Theater in St. Petersburg in mid-nineteenth century, a notation system created by a Russian dancer Stepanov, was taught and some of Petipa's works were recorded in it. The system was published in Paris in 1892 under the title of "Alphabet des Mouvements du Corps Humain." It was also used by Nicholas Sergeyev who staged the first productions of the Maryinsky ballets for the Royal Ballet in England. Also the dancer Nijinksi evolved his own notation system and recorded his "L'Apres-midi d'un Faune" although his system never came into general use. *See generally* A. GORSKY, TWO ESSAYS ON STEPANOV DANCE NOTATION (1960); V. STEPANOV, ALPHABET DES MOUVEMENTS DU CORPS HUMAIN (R. Lister trans. 1958); A. ZORN, GRAMMATIK DER TANZKUNST (A. Sheafe, Eng. trans. 1905).

16. *See* J. BENESH & R. BENESH, AN INTRODUCTION TO BENESH MOVEMENT NOTATION: DANCE (1969); R. BENESH, AN INTRODUCTION TO BENESH DANCE NOTATION (1955); M. CAUSLEY, AN IN-

Labanotation is the oldest and most widely used. This system was developed by Rudolf von Laban, who worked in Germany between the two world wars as a dance teacher and choreographer. He worked out his system of notation over a period of about twenty-five years and published it in Germany in 1928, under the title of "Kinetographie Laban," using "Schrift-tanz," meaning "written dance." It was translated into English in 1930; and in 1940, the system was built into a New York organization called The Dance Notation Bureau. This Bureau has created Labanotated scores for some of the classics of American ballet. The other contemporary system, Benesh Notation, was created by Rudolf Benesh, who published a book *An Introduction to Benesh Dance Notation,* in 1955, in England. There was also established, based on this system, the Institute of Choreology, where the notation system is taught and notations of dances are made.

Written notation of music is, in some limited aspects, comparable to the written notation of dance, but the analogy is far from complete. Because the notation of music is so easily and simply written down by traditional methods which are well known to almost everyone involved in creating music, the transition of a musical artist's artistic ideas from his or her intellect to the written page is considerably more simple and nexpensive than the notation of choreography. Notation of music is a widespread skill, and is available to one having only a pencil and paper. The skill of notating music and the tools required for it in no way compare with the expense and difficulty of mastering a dance notation system. Equipment for visual recordation or highly skilled interpreters are required to notate dance and to convert the notated dance back into an actual choreographic performance.

The training of dancers requires so many physical and intellectual resources that the training to notate in written form and the skill to recreate choreography from notations is almost always omitted in favor

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TRODUCTION TO BENESH MOVEMENT NOTATION (1958); A. HUTCHINSON, A SECOND BALLET READER (1960); A. HUTCHINSON, LABANOTATION (1954); A. KNUST, HANDBOOK OF KINETOGRAPHY LABAN (1956); J. LABAN, DANCE NOTATION (1946); R. LABAN, CHOREUTICS (1966); R. LABAN, PRINCIPLES OF DANCE AND MOVEMENT NOTATION (1928); R. LABAN, SCRIPT DANCING (1928); R. LABAN, CHOREOGRAPHIE (1976); V. PRESTON, READERS IN KINETOGRAPHY (1966); V. PRESTON, AN INTRODUCTION TO KINETOGRAPHY (1963); M. TOPAZ, CHANGES AND NEW DEVELOPMENTS IN LABANOTATION (1966).

It is also important to mention a contemporary notation system developed by the great choreographer Leonide Massine, which is claimed not only to record dance, but is also an "aid to composition and evaluation with a computerlike ability to detect and expose faults in composition and to ensure that any movement is perfect from the point of view of the harmony of the human body." This system is a universal movement system and not limited to classical ballet. L. MASSINE, MASSINE ON CHOREOGRAPHY (1971). *See generally* N. ESHKOL & A. WACHMANN, MOVEMENT NOTATION (1972).

of more physical and artistic training. Many dancers shy away from learning the notation skills for fear they will never be allowed to perform if they are thought of as notators. The skill of notation is postponed until the later years of a career, when performing is past and the more sedentary aspects of the profession must be utilized in order to earn a living. Thus, very few dancers can write dance notation. Fewer still can read notation and perform the dance without the help of a person who is expert in the very specialized field of recreating dance from written notation.

The next step in notation systems may involve the use of a computer.[17] With the complex data storage and retrieval capability now possible in computers, it would seem to be at least theoretically possible to program a notation of discrete dance movements and attitudes. Such a system would also allow the computer to create interstitial instants of movement that are now beyond the capabilities of other notation systems. In effect, the computer could actually record the entire sweep of a dance movement. Movement could then be called up from the computer memory and recreated either by computer print-out or visually on a computer screen. The use of the increased capability of computers to record and retrieve immense quantities of data would allow the large scale recordation of movement necessary in notating complicated choreography. Such computers could serve not only to record and retrieve, but also to analyze, and possibly synthesize, movements from programmed information. With the computer's flow chart as the intermediary between the choreographer and the dance, either recordation and retrieval of the artistic work of the choreographer or the analyzing and synthesizing of new forms and combinations would be possible. However, it must be kept in mind that the complexity, awkwardness of handling, and expense of notation systems would be compounded with the use of the computer. Therefore, recordation, analysis, and synthesis by computers are still very much projects for the future, if not entirely theoretical at this point.

2. Visual Recordation

Visual recordation is also an important aspect of extending copyright protection to choreography and pantomime. However, this method is expensive, and in some respects cumbersome. Ballanchine,[18] in a

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17. *See* J. THIE, RHYTHM AND DANCE MATHEMATICS (1972).

18. George Ballanchine is a renowned choreographer presently associated with the New York City Ballet Company.

preface to the book *Labanotation,* has some very serious doubts about the feasibility of recordation of dance by film. He says:

> While some people advocate the use of films to record ballet, I have found them useful only in indicating the style of the finished product and in suggesting the general overall visual picture and staging. A film cannot reproduce a dance step by step, since the lens shoots from but one angle and there is a general confusion of blurred impressions which even constant reshowing can never eliminate.[19]

Although it is possible that improved film technology may make recordation by film easier now than in 1954, most of Ballanchine's objections to the inherent difficulties still exist. The same would be true with respect to visual recordation on tape. Visual recordation is now done by most of the important American companies and choreographers; such recordation is done with an acceptance of the limitations involved, and it is not expected to be a complete record of the artistic work. Of course, a combination of techniques is possible, such as both a film or tape and notation by one of the modern systems like Labanotation. This would undoubtedly record a richer content; however, it would also compound the difficulties associated with each system.

3. The Problem with Recordation Technologies

The major difficulty with recordation devices arises from the very nature of choreography. Creation of choreography is very different from an author writing words on paper. A choreographer works with a group of dancers who are trained in the discipline, and with a skeleton music source. The intellectual act of creation occurs when movements are conceived by the choreographer and directed into the trained bodies and intellects of the dancers. Only the thoughts and artistic concepts of the choreographer are manifested. No costumes or settings enhance the visual aspect of the emerging choreography. The dancers' role is to follow the directions of the choreographer.

When the choreographer is satisfied that the dancers in movement express his or her artistic ideas, the choreography, in the language of the dance world, is "set." The concept of setting is a very important one in the dance world, and deserves to emerge as an equally important concept in the copyright protection of dance. When choreography is "set" the artistic work is fixed in a tangible form. It is no longer just an idea in a choreographer's mind. It is in a condition which is readily analogous to an author's having written down the final combination of words on paper, or the last brush stroke applied to a painting which completes the

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19. Ballanchine, *Preface* to A. HUTCHINSON, LABANOTATION ii (1954).

painter's artistic expression of his ideas. Taking into consideration the variation in form of the arts, the "setting" into the memories and bodies of the dancers is just as tangible as the writing on paper which expresses the artistic ideas of an author, or the placing on canvas of a painter's ideas.

The almost universal tradition that choreography is set and preserved in the minds and bodies[20] of the dancers who originally learned it from the choreographer, or from other dancers in whose memories the choreography is set, is perhaps the most unique aspect of choreography as an art form. This custom is pervasive in ballet. Only in relatively recent years has written notation or visual recordation been added to this basic tradition. Most dancers accept this tradition and learn to rely on their memories, or the memories of other professionals, as the storehouse of choreography. Therefore, there is little confidence that the new Act, which requires deposits of copies, can or will be utilized to protect choreographic works.

Economic considerations also limit the utility of the new Act. To notate a work, an expert who can observe dance and record it in a notation system must be called to observe and record the performance. Once the dance is notated, there exists a copy which may be deposited with the copyright office. However, in order to utilize this copy in infringement litigation another expert must be called in to bring the dance out of notation, to study the choreography, and to mount a revival to test its similarity to other choreographic works. Since choreographers often work on budgets stretched to the limit by production costs, the additional expense of expert notators is frequently beyond their reach. Further, calling in camera crews to film a dance or to record it on videotape is prohibitively expensive as well. In order to "see" all the movement of dancing bodies it is necessary to view the movement from many angles, requiring expensive equipment and a recording expert who understands the intracies of dance. Once again, these requirements are beyond the financial resources of most choreographers. If choreography and pantomime are to find copyright protection, these considerations should be taken into account in the implementation of the new Act.

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20. In the vernacular of the dance world, choreography is said to be set into both the minds and bodies of the dancers. Patterns of movement are learned by dancers on such a deep intellectual level that it is felt by the dancer that it is learned by the body. A favorite description by dancers of this phenomenon is the analogy to the circus pony. A circus pony is taught to "dance" to a certain piece of music. No matter when or where in the life of that pony the music is played, the pony will dance, whether it be in the circus ring or some far away meadow in retirement years. Dancers feel that they are programmed this way when choreography has been set using them and their movements. Many times a dancer cannot consciously remember a choreography, but if a group of dancers in whom the choreography was set is brought together again and the music plays, the dancers can dance the choreography almost without thinking, using what to them is the memory of their bodies.

II. APPLICATION OF THE ACT

As previously noted, the Copyright Act of 1976 was expanded to provide copyright protection for the art forms of choreography and pantomime. In section 102(a), copyright protection was extended to "original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived . . . either directly or with the aid of a machine or device."[21] This section specifically includes as copyrightable subject matter pantomimes and choreographic works.[22] While the Act grants specific protection to these art forms for the first time, many problems must be solved before the de jure recognition of the right to protection becomes a de facto reality for the creative artists.

A. Defining Choreography and Pantomime

Although the Copyright Act of 1976 begins with an ambitious section of definitions,[23] which is much expanded from previous incarnations of the copyright law, there is no definition in the Act for either choreography or pantomime. This could express a legislative intent that practice should define the concepts more specifically, or it could merely indicate that the legislature itself did not arrive at a definition of the words. In as much as both terms were encompassed previously, in the same context, by the Berne Copyright Convention,[24] it is also possible that this portion of the Act was merely copied from language in the Berne Convention with an eye to eventual adherence of the United States to that agreement.

Since the artists in choreography and pantomime are plunged immediately into an identity crisis, we must draw on sources other than the Act itself to define these two art forms. Standard English dictionaries' definitions appear to be drawn heavily from the written word available about ballet rather than directly from practice and custom in the dance world, and an unfamiliarity with actual usage in the dance world is apparent. Thus, these sources variously define the meaning of choreography to be "ballet dancing," "written notation of movements of ballet," "the devising of ballet" and even "the art of dancing."[25] A

21. 17 U.S.C. § 102(a) (Supp. III 1979).

22. 17 U.S.C. § 102(a)(4) (Supp. III 1979).

23. 17 U.S.C. § 101 (Supp. III 1979).

24. The Berne Convention speaks directly of "choreographic works." Pantomime, though not directly mentioned, seems to easily fall within the expression "entertainments in dumb show." Berne Convention, Sept. 9, 1886, Paris Act, art. 2, cl. (1) (signed July 24, 1971).

25. FUNK & WAGNALLS NEW STANDARD DICTIONARY OF THE ENGLISH LANGUAGE 475 (1963); THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 238 (1970); THE RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 261 (1966); WEBSTER'S NEW WORLD DICTIONARY OF THE AMERICAN LANGUAGE 252 (2d c. ed. 1972).

search of legal dictionaries and the Act's legislative history is also unrewarding. The few comments during the legislative hearings held while the new Act was being drafted are confined to statements such as "simple routines and social dancing [are not to be included as choreography]."[26]

A different, richer definition emerges when the artists themselves, and the people who are working in this field of art and related fields, are consulted.[27] To these individuals, choreography means the art of creating dance or patterned movement, based on a time frame, which is usually defined by music. For their purposes, the artistic work is considered completed when the choreography is "set"[28] in the memories and bodies of the dancers. Overwhelmingly, the attitude among the artists is that it is from the moment that the choreography is set that an artistic work has been created and given to the critical art world. If the Act is to have meaning and utilization in the choreography and pantomime world, it is from this moment that copyright protection should be given. To almost everyone interviewed, the process of notation or visual recordation by some medium was a process which would have to occur after the choreography was set. In fact, a great body of suspicion and resistance to such notation or recordation was expressed by several of the interviewees, some of whom were very reluctant to allow any recordation. These individuals viewed recordation as an expensive afterthought, and possibly a way for their choreography to be "pirated."[29]

For protection of their artistic work, choreographers would rather rely on their personal control of the dancers and on the condemnation by the dance world of a dancer who would pass on to an unauthorized source the choreography of a dance without permission of the choreographer, than on after-the-fact notation or recordation. The dance world is a closed world with a comparatively small population, and an unauthorized passing-on of a choreography would seldom go undetected. It is a world characterized by a small number of top positions and many aspirants to these positions. Therefore, one holding or aspiring to a top position would seldom contemplate jeopardizing his or her standing by resorting to piracy.[30] This attitude of the artists will have an important effect on the utilization of the Act for the protection of choreography. For instance, if implementation of the Act requires written notation or visual recordation, it will be considered too cumber-

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26. M. PETERS, GENERAL GUIDE TO THE COPYRIGHT ACT OF 1976, at 3:3 (Revision Coordinating Committee, U.S. Copyright Office, Sept. 1977).

27. *See* note 6 *supra.*

28. For a working definition of "set" within the dance community, *see* section I.B.3 *supra.*

29. *See* note 63 and accompanying text *infra.*

30. For cases involving actions for piracy, *see* note 63 *infra.*

some and expensive to comply with and few artists will rely on it for protection. Moreover, a very important function of copyright protection will be lost because secretive measures to hide rehearsals and classes, and pressures within the dance world on the dancers themselves, will continue. A workable definition of copyright law concepts which incorporates the meanings understood by the artists themselves must evolve if the Act is to be utilized and to be of value to the artists or to society at large.

Important components of the definitions of choreography and pantomime also depend upon the meanings attributed to the words "created" and "fixed" as used in the Copyright Act. These terms are specifically defined in section 101 of the Act.[31] "Created" is said to mean the point at which a work "is fixed in a copy . . . for the first time."[32] A work is "fixed" in a tangible medium of expression when "its embodiment in a copy . . . is sufficiently permanent or stable to permit it to be perceived, reproduced or otherwise communicated for a period of more than transitory duration."[33] This language can be applied to the world of dance fairly easily. A choreographic work should be considered "fixed" when it is set into the memories of the dancers. At this instant, the choreography is sufficiently permanent and stable to permit it to be communicated to others through the dancers, in whose memories and bodies the choreography is set, because these individuals consider each piece of choreography they learn as part of their professional expertise.

It is strong and hallowed tradition in the dance world that dancers, once taught the choreography of a particular work, hold it in their memories as part of their professional repertoire. This repository of memory is the most important data bank of the dance world.[34] The ability to learn and retain, for the express purpose of performing and passing on to other dancers a large body of choreography, is an important skill for a dancer; an important part of his or her professional baggage. Additionally, dance companies or choreographers may have one person whose job it is to remember the work and in effect become the living archive for the company or choreographer.[35] Therefore, the greatest part of choreographic work is now handed down from dancer

31. Copyright Revision Act of 1976, 17 U.S.C. § 101 (Supp. III 1979).

32. *Id.*

33. *Id.*

34. *See* K. WALKER, DANCE AND ITS CREATORS: CHOREOGRAPHERS AT WORK 81-82 (1972).

35. The "rememberer" for Mr. Ballanchine is Rosemary Dunleavy, a former dancer. *See* Tobias, *She Knows Ballanchine's Ballets by Heart,* N.Y. Times, Jan. 21, 1979, § 2 (Arts and Leisure), at 7, col. 1. Some companies specialize in "remembering" and performing choreographies. The American Dance Machine is one such company which specializes in choreography from American musical theatre. *See,* Sudol, " 'Living Archive' preserves Broadway Choreography," Newark Star-Ledger, Jan. 22, 1979 at 16, col. 1.

to dancer, very much the way folk tales were passed on before the advent of printing and widespread literacy. Implementation of the Act must reflect this tradition in order to protect the development of this art. Of course, after a choreography is set, it is possible at any subsequent time to record the choreography another way such as by notation or visual recordation.[36] Dancers performing the choreography can be filmed or taped. Persons trained in one of the systems of notation can observe such a performance and write it down in the system of notation. It is also possible to record a choreography by simply describing in detail what the observer sees. However, all of these actions are predominantly after the fact and ancillary to the act of the choreographer-artist creating an artistic work and setting the choreography into the memories of a group of dancers. To be symmetrical with the protection afforded by copyright law to other art forms, protection should attach when these creative thoughts and ideas are embodied in tangible form.[37] However, it is a peculiar attribute of choreography that such a tangible embodiment occurs when choreography is set into the memories of the performers. Thus, any further requirements place a burden on choreographers not expected from other artists.

That the Act speaks of "copies" as "material objects" does not strain this proposed definition.[38] Since the distinction sought to be made is between ephemeral undeveloped ideas and an artistic work where the ideas are completed and expressed in some artistic medium, it certainly does not stretch credibility to assume that the performers themselves could be considered material objects. Any problem anticipated with according material status to a set choreography with respect to the deposit requirements of the Act could easily be resolved by creating another kind of copy for the purpose of deposit. This category of copy would, of course, need to be in a form compatible with the archival methods of the Copyright Office;[39] thus, it could properly assume the form of written notation or visual recordation. On the other hand, for the purpose of initiating copyright protection, the requisite copy could be considered to be deposited in the memories and physical training of the dancers at the point at which the choreography is set.

The distinction has already been made and discussed under the Berne Convention,[40] where copyright protection has previously been extended

36. *See* notes 12-19 and accompanying text *supra.*

37. *See* section B.3 *supra.*

38. Copyright Revision Act of 1976, 17 U.S.C. § 101 (Supp. III 1979).

39. *Id.* § 407. *See generally* Copyright Revision Act of 1976, 17 U.S.C. §§ 401-12 (Supp. III 1979) for the full details of the archival process.

40. The purpose of the Berne Convention is to protect the "rights of authors in their literary and artistic works." Berne Convention, Sept. 9, 1886, Paris Act, art. 1 (signed July 24, 1971). "Literary and artistic works are defined in the Convention to 'include every production in the

to choreography and pantomime. From an early point, the Berne Convention required "fixation" before choreographic works could be granted protection; fixation principally meaning "written" form.[41] At the Intellectual Property Conference of Stockholm in 1967, where proposals for revising the substantive copyright provisions were made and discussed, the extra burden that fixation placed on choreographic artists was noted.[42] Further, the difficulties of adequately writing down dance, and the difficulties for choreography in arranging for such writing, were also noted.[43] Alternatively, the problem presented by infringement and the danger of confusing the artist's performance with the choreographic work were also considered. The Conference concluded that:

> It would seem to be an anomaly to maintain, for this special category of works, a requirement which is not necessary for any other kind of work, although the basic motives in themselves can be invoked for other categories too, e.g., musical works which are not written down but performed direct by the composer/performer. Nor is it possible to ignore the fact that the practical need for protection of choreographic works which are not fixed on some material support is greater now than ever before, in the light of the technical progress made by the cinema and television. It is therefore proposed to delete the requirement that the acting form of choreographic works and entertainments in dumb show should be fixed in writing.[44]

The question of deleting the requirement that choreographic works, and works in dumb show (pantomime), continued to be discussed in both the Western countries and the Socialist countries of Europe. A comment by Ovidiu Ionasco, Conseiller Juridique Principal in Bucharest, Hungary noted:

> With regard to choreographic works and pantomime, the Copyright statutes of socialist countries consider these works protected to the extent that their staging is reduced to writing, by designs or any other similar mode, with the exception of the laws of the Socialist Republic of Czechoslovakia, the Democratic Republic of Germany, and the People's Republic of Hungary, which grant

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literary, scientific and artistic domain, *whatever may be the mode or form of its expression*, such as . . . choreographic works and entertainments in dumb show.' " *Id.* at art. 2, cl. (1) (emphasis added).

41. Under the Berlin revisions to the Convention, only "choreographic works and entertainments in dumb show, the acting form of which is fixed in writing or otherwise" were expressly protected. Berne Convention, Sept. 9, 1886, Berlin Act, art. 2 (signed Nov. 13, 1908).

42. Intellectual Property Conference of Stockholm, Proposals for Revising the Substantive Copyright Provisions 14 (1967).

43. *Id.* at 14-15.

44. *Id.* at 15 (footnote omitted).

> copyright protection to works apart from their mode and form of expression.
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> The obligation of a fixation would constitute with regard to choreographic works and pantomimes an unjustified discrimination in relation to other works and an exception to the basic principle that works are protected whatever may be the mode or form of their expression. As for choreographic works and pantomimes, it is the dance itself, the ballet as such, which as a creative activity in relation to the law, gives rise to a copyright; thus protection is extended to choreographic works and pantomimes and in no way to the recording of the latter by the ballet master.[45]

Thus, the problem concerning the point at which fixation occurs has been resolved in various ways in various countries, but the awareness of the discrimination against choreographic works is generally recognized. The hope is that the European experience with the difficulties of applying traditional copyright prerequisites to the art forms of choreography and pantomime can be drawn from in dealing with the two art forms under the United States' Act.

To define for the purposes of choreography the word "fixed" to mean "set" would give protection to the choreographer at the point in artistic development where it is most needed. This definition, bringing into congruity for the purposes of choreography the meanings of these terms, would provide a stable starting point from which protection acceptable to the dance world could begin. In the view of choreographers, a set choreography has acquired a stability which is analogous to the writing of a literary work or the painting of a picture. By initiating protection at the point a choreography is set will be seen by choreographers as of enough value to justify the effort to comply with the other requirements of the Act. The judicial interpretation of the Act, whether it be by administration in the Copyright Office or by the courts, must align itself with the meanings of the technical words of the art.

B. Applying the Copyright Act of 1976 to Choreography and Pantomime

The definitional problem raised by the Act, discussed in the preceeding portion of this article, derives from section 102's inclusion of choreography and pantomime as copyrightable subject matter. While this definitional problem can be viewed as the basic difficulty in applying the Act to the art forms of choreography and pantomime,

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45. La Protection du Droit D'Auteurs dans les Pays Socialistes, Revue Internationale Du Droit D'Auteur 91 (1971).

other parts of the Act raise questions which also must be dealt with. This section will survey these passages and discuss the potential problems they raise.

Section 102(b) is also significant to the law of choreography. It provides that "[i]n no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle or discovery, regardless of the form in which it is described, explained, illustrated or embodied in such work."[46] This section makes it very plain that the copyright shall lie in the dance itself, in the planned movement of the dancers' bodies, and not in the ideas preceding such completed artistic work. Therefore, as soon as the ideas become a completed work, or set,[47] the work is entitled to copyright protection. Thus, in choreography and pantomime, it follows logically and reasonably that the point at which the idea becomes the dance or the pantomime should be the point at which copyright protection attaches.

Section 103(a)[48] discusses compilations and derivative works, both of which are significant to choreography.[49] Dance components are virtually infinite, including variations of body movements, and variations from performer to performer. Sometimes, due to the personal attributes of a dancer, the performance of an already set work becomes a derivative work, with the performer functioning as a choreographer in addition to the original choreographer. Such derivations and compilations should, in the breadth of protection given, relate to the original choreography in the same way that derivations and compilations of literary works relate to the original author. One would be hard put to deny that many contemporary works are extensively compiled or derived from the great body of existing artistic work, most of which has long since entered the public domain. For example, ballets such as Don Quixote by Ballanchine and Don Quixote by Barishnikof are derived from earlier ballets based on a story, by way of an opera, from a classic literary tale by Cervantes. However, if a new version of Don Quixote by a brilliant new choreographer appears, even though the course is in the

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46. Copyright Revision Act of 1976, 17 U.S.C. § 102(b) (Supp. III 1979).

47. *See* section I.B.3 *supra*.

48. Copyright Revision Act of 1976, 17 U.S.C. § 103(a) (Supp. III 1979).

49. For cases discussing compilations and derivations in other areas of the law *see* H. M. Kolbe Co. v. Armgus Textile Co., Inc., 315 F.2d 70 (2d Cir. 1963); Alfred Bell and Co. v. Catalda Fine Arts, Inc., 191 F.2d 99 (2d Cir. 1951); Dorsey v. Old Surety Life Ins. Co., 98 F.2d 872 (10th Cir. 1938); Wilkie v. Santly Bros., Inc., 91 F.2d 978 (2d Cir.), *cert. denied*, 302 U.S. 735 (1937); Musto v. Meyer, 434 F. Supp. 32 (S.D.N.Y. 1977), *aff'd without opinion*, 598 F.2d 609 (2d Cir. 1979); Desny v. Wilder, 48 Cal.2d 715, 299 P.2d 257 (1956); Stanley v. Columbia Broadcasting Sys., Inc., 35 Cal.2d 653, 221 P.2d 73 (1950); Cary v. Longman, 102 Eng. Rep. 138 (K.B. 1801).

public domain, the work which can be attributed to the new choreographer will be copyrightable.[50] A still subsequent version, including portions contributed by the new choreography as well as new material, could be a derivative from the new choreographer's work, and he or she should be able to obtain appropriate copyright protection for it.

An interesting and profound change may occur in the dance world when it is realized that a copyright exists in any choreography fixed after January 1, 1978.[51] This is true whether the choreography is entirely original, or is a derivation or compilation of previous unprotected work. Further, these post 1978 choreographies warrant the legal protection which can be invoked against piracy of work protected under the new Act. However, if every subsequent choreography of Don Quixote, for example, was worked only from the versions which were already in the public domain, no copyright problem would arise but the evidentiary problem of deciding which of the choreography has come from the sources in public domain, and which is new artistic work, will be immense. In deciding such questions, a court would certainly want to be able to refer to an actual performance of the choreography under examination, and would find written notation and/or visual recordation, explained by an expert, to be additional sources with to determine the comparison.

To further complicate the evidentiary problem, many of the works in the public domain are preserved only in the memories of the dancers. Many variations and divertissements have never been recorded in any manner, but have been preserved among the dancers and have therefore continued to be important artistic works. Experienced dancers, who have as part of their professional training memorized many variations, usually will know to whom the choreography should be attributed. Thus, if our new brilliant choreographer created a ballet which was another version of Don Quixote, the dancers, who would most likely already know the Ballanchine version and the Barishnikof version, would simply add the newly created version to their repertoire. In this manner, the dancers themselves are living archives, indeed the only archives, of the choreographic work. It is often a custom for companies

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50. Section 103(b) of the Act speaks directly to this issue. It provides that:

> The copyright in a compilation or derivative work extends only to the material contributed by the author of such work, as distinguished from the pre-existing material employed in the work, and does not imply an exclusive right in the pre-existing material. The copyright in such work is independent of, and does not affect or enlarge the scope, duration, ownership, or subsistence of any copyright protection in the pre-existing material.

Copyright Revision Act of 1976, 17 U.S.C. § 103(b) (Supp. III 1979).

51. Copyright Revision Act of 1976, 17 U.S.C. § 301(a) (Supp. III 1979). *See* note 71 *infra* for the text of § 301(a).

or choreographers to have one person who does the remembering for the company or the choreographer,[52] who is the living archive and whose job it is to keep the work and pass it on to other dancers.

The Copyright Act must follow the custom of the dance community if it is to be accepted as a workable, practical method for protection of the work. In implementing the Act, it should be acknowledged that the fixing of a dance occurs when it is set in the dancers. At the most, subsequent recordation should be considered as a convenience for archival methodologies, and not a requirement for copyright protection. To do otherwise is to discriminate against the art of choreography as compared to other art forms. Application of the Act must mirror the choreographer's conception that the work is fixed when it is set.

It is not suggested that written notations or visual recordations are of no value, nor is it suggested that such technologies should be dispensed with. Recordations of choreographic works are valuable because they are easily entered into data banks and can provide important historiographic references. They are of immeasurable value as teaching tools, especially for students who do not have access to a dancer in whose memory the choreographic work is set. Moreover, recordations will become even more valuable as time passes in that they will preserve choreographic works which, for various reasons, may pass out of the memories of dancers.

All forms of recordation should be considered when a determination of infringement is to be made. In deciding the degree of similarity between a prior work and a work alleged to be an infringement, the trier of fact should view a performance by the dancers in whose memories the choreographic work has been set; that is, either the work of the original choreographer or his or her artistic descendant. In addition, the trier of fact should view any existing visual recordation and be furnished with testimony from an expert in the interpretation of written notation of a choreographic work. Perhaps the most important expert that the parties will be able to furnish the courts will be the persons designated as the archiver for the company or choreographer. The nature of choreography demands that a judgment of infringement be made only after the trier of fact has examined all of the above mentioned expressions of the artistic work.

Further comparison and analogy to music is valuable to this analysis. Certainly it would be absurd to insist that music is "fixed" at the moment it is first taught to musicians who could then repeat the music from their memories and the parts of their bodies which touch and manipulate their musical instruments. This absurdity arises from the very great difference in the state of the art of notation of music and

52. *See* note 32 and accompanying text *supra*.

state of the art in the notation of dance. Written musical notation is long established and is comparatively simple to learn and execute. A large percentage of all those associated with creating music are able to use the written notation system which is now the acceptable form in most of the world. Children in early school years can learn to read and write modern music, and then carry this ability along with their general literacy throughout their lives.

A very differenct situation exists with present systems of notation of dance.[53] Due to the very nature of dance, any written notation system is necessarily immensely more complex than is the transcribing of a melodic line accompanied by harmonies, time and expression indications. In notating dance, one must not only record the movement and synchronization of the bodies involved, but one must also indicate in some way the relationship of the performers and then structure everything within a time frame. Just to record the movement of one human body on paper is a project considerably more complicated, and more open to omission of subtle declinations than is the mere notation of a melody line of a musical composition. While notating dance in a written form is not impossible, as present systems now in use show, the process is much more complicated and requires considerably more training to execute than does the notation of music. There are relatively few people trained to notate dance, and their services are expensive, especially when several are necessary for complete recordation.

It may very well be that eventually a system of notation will emerge which is as accessible to choreographers and dancers as the present system of music notation is to musicians. If such a system emerges, the written notation of choreography will be acceptable as the form in which the law should consider the work as fixed. For now, however, this simply is not so, and application of the Act must accommodate this discrepancy.

Perhaps the use of videotape or film is a more realistic possibility for the recordation of choreography. Use of such electronic devices is expected in the Act and is becoming widespread, both for recording and subsequent reproducing. However, this method is expensive and completely inaccessible to some choreographers. The Act should not deny a choreographer copyright protection simply because such expensive and relatively sophisticated techniques are not available, especially when there is an available interpretation of the word "fixed" which defines fixation as being synonomous with the "setting" of the choreography.[54]

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53. For information regarding notation of dance or movement, *see generally* N. ESHKOL & A. WACHMAN, MOVEMENT NOTATION (1968); N. GOODMAN, *supra* note 14; A. HUTCHINSON, LABANOTATION (1954); A. HUTCHINSON, A SECOND BALLET READER (1956); A. HUTCHINSON, ENCHAINEMENTS FOR TODAY (1958); M. TOPAZ, *supra* note 16.

54. *See* notes 28-32 and accompanying text *supra*.

To require a choreographer to utilize expensive technologies before copyright protection is extended is asking considerably more from a choreographer than is asked of other artists.

The foregoing recordation comparison between the art forms of music and choreography points out the tension that will occur in the application of the Act to choreography. Recordation in some form is a critical prerequisite to protection due to the Act's deposit requirement.[55] Deposit of a copy for archival purposes must, of course, depend upon the archival technology employed by the Copyright Office; there is no question but that written notation and visual recordation on film or tape are the methods which now meet the deposit requirement for purposes of litigating the copyright.[56] Since deposit of a copy must be met by recordation methods compatible with present archival technology, such recordation and deposit should only be a subsequent step in the establishment of a record of the artistic work. Potentially, this tension can be eased if the implementors of the Act promulgate regulations which countenance the unique problems of the dance world. Further, courts called upon to enforce protection under the Act must be cognizant of these tensions and apply the Act within the framework of the customs of the dance world.

The portion of section 103[57] which extends copyright protection only to the material contributed by the author of the work, as distinguished from the pre-existing material employed in the work, and which does not imply any exclusive right in the pre-existing material, is especially pertinent to choreography.[58] Much of the choreography in current repertoires can be traced back through several transmutations to choreography attributed to early artists such as Petipa. Stories which had their origins in folk tales were set to dance and music and have become vehicles for choreographers; they have been altered many times to accommodate peculiar shortcomings or talents of favorite dancers. Dramatic ballets based on ancient tales, long in the public domain, are

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55. Copyright Revision Act of 1976, 17 U.S.C. § 407 (Supp. III 1979). This section provides, in pertinent part, that:

> the owner of copyright or of the exclusive right of publication in a work published with notice of copyright in the United States shall deposit, within three months after the date of such publication —
>
> (1) two complete copies of the best edition; or
>
> (2) if the work is a sound recording, two complete phonorecords of the best edition, together with any printed or other visually perceptible material published with such phonorecords.

Id.

56. *See* note 50 *supra. See also* Copyright Revision Act of 1976, 17 U.S.C. § 411(b) (Supp. III 1979) which allows the copyright owner of works consisting of sounds and/or images to institute an infringement action based upon "fixation" simultaneous with the first transmission of the work.

57. Copyright Revision Act of 1976, 17 U.S.C. § 103(b) (Supp. III 1979).

58. *See* note 46 *supra,* for the text of § 103(b).

danced again and again.[59] The old stories are well known and loved; the particular divertissements and variations which traditionally carry the story line are watched for and well known to audiences and everyone in the dance world. However, each time a new choreographer mounts a new production of these old tales, the personal imprint of that choreographer is apparent in the performance.[60] Building on the body of choreography and the story line handed down, new manifestations of choreography develop which are the particular choreographer's intellectual property and entitled to copyright protection. Newly developed choreography is often extensively modified, keeping scarcely more than the title of the original work and constituting almost a clear break with the public domain version. Sometimes, however, there are only subtle differences. One of the most exacting tasks that courts will have to face in implementing copyright protection for this kind of artistic work is the development of a methodology for distinguishing the portion of the work to which the modern choreographer is entitled to copyright protection from the portion which remains in the public domain. Adjudication for section 103(b) issues will have to depend on the particular fact of each case, based on comparative viewing of the new versions and previous versions.

The same caution must be applied to a determination of the scope of derivations and compilations under section 103(b).[61] Some contemporary choreography is pure and simple compilation. It is not unusual to find musical excerpts from several composers, as well as choreographic excerpts, hung together with transitional phrases and music to create a particularly appropriate vehicle for an individual dancer's talents and limitations. Possibly, an original sequence of excerpts would be entitled to copyright protection, although the determination of originality would present a very difficult evidentiary problem for courts. Certainly, a careful examination of all possible recordation of

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59. For example, folk tales which have become ballets include "Swan Lake," "The Sleeping Beauty," "La Fille Mal Garde," "La Sylphide," and "Coppelia." Others based on dramas include Shakespeare's "The Taming of the Shrew" and "Othello."

60. *See* Kisselgoff, *Dance: Harlem Troupe in a 'Paquita' Premiere,* N.Y. Times, Jan. 13, 1980, § 1, at 48, col. 1.

61. For purposes of the Act,

> [a] "compilation" is a work formed by the collection and assembling of pre-existing materials or of data that are selected, coordinated, or arranged in such a way that the resulting work as a whole constitutes an original work of authorship. The term "compilation" includes collective works.
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> . . . .
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> A "derivative work" is a work based upon one or more pre-existing works, such as a translation, musical arrangement, dramatization, fictionalization, conversation, or any other form in which a work may be recast, transformed, or adapted. A work consisting of editorial revisions, annotations, elaborations, or other modifications which, as a whole, represent an original work of authorship, is a "derivative work."

Copyright Revision Act of 1976, 17 U.S.C. § 101 (Supp. III 1979).

For the language of § 103(b) pertinent to the copyright of the above forms, *see* note 46 *supra.*

such choreography would be essential when courts are called upon to determine the boundaries to which the copyright should extend.

Section 104 addresses the subject of publication, and section 104(a) specifically extends the protection of the Act to unpublished choreographic works.[62] This protection is easily amenable to the customs of the dance world. Choreography fixed in the memories of the dancers can remain unpublished until the choreographer causes the work to be performed in public. Thus, copyright protection can be extended to the work during the time period between the fixing and performance with intent to publish. In fact, it is during this pre-publication period that pirating of choreography often occurs from unauthorized viewing of rehearsals.[63] This pre-publication period could be the most crucial time for protection, especially for choreographers whose new works are eagerly awaited as sources of fresh new forms and movements. Affording protection to choreographers at this point would allow much more freedom for them to work, and eliminate the elaborate security measures presently thought necessary by some choreographers. Development of the art would be substantially encouraged by establishing firm protection in this early time period, before the tedious and time consuming task of notating is begun or before expensive visual recordation is accomplished. The economics of the dance world being what they are, the monetary expense of notating or visually recording is usually only feasible at a point well beyond the setting of the choreography. It is often not until a work has been performed to critical acclaim and has entered the repertoire of a company that the means are found to record the work.

The protection extended to foreign domiciliaries in section 104 also speaks to an important aspect of choreography.[64] Dance in America today is the direct descendant of a classic tradition, predominantly from

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62. "The works specified by sections 102 and 103, while unpublished, are subject to protection under this title without regard to the nationality or domicile of the author." Copyright Revision Act of 1976, 17 U.S.C. § 104(a) (Supp. II 1978).

63. Judge Weis of the Sixth Circuit has very eloquently expressed the problem of piracy of art forms, and the aid which the Copyright Act may supply:

> To a schoolboy, "piracy" may mean swashbuckling adventure, lumbering merchantmen, booty, and the Jolly Roger. To a musical composer or a record manufacturer, however, piracy means not doubloons, but dollars, not cutlasses, but cut-rate losses, not the creaking of a ship under way, but the almost imperceptible hum of a reel-to-reel tape, and certainly no jollity about unauthorized copies of a musical work. We conclude here that a composer is not defenseless but, using the guns of the Copyright Act, can force the pirate to heave to in response to an injunctive shot across the bow.

Jondora Music Publishing Co. v. Melody Recordings Inc., 506 F.2d 392, 393 (6th Cir. 1974). *See also* Fame Publishing Co. v. Alabama Custom Tape, Inc., 507 F.2d 667 (5th Cir. 1975); Edward B. Marks Music Corp. v. Colorado Magnetics, Inc., 497 F.2d 285 (10th Cir. 1974); Duchess Music Corp. v. Stern, 458 F.2d 1305 (9th Cir. 1972).

64. *See* note 56 *supra*. Copyright protection is extended to certain foreign domiciliaries with respect to published works as well. *See* Copyright Revision Act of 1976, 17 U.S.C. § 104(b) (Supp. III 1979).

Europe. The depth of repertoire of American dance companies and the freedom to perform found in America attracts dancers from more restrictive environments, and their contributions to American dance are immense. Any encouragement given to foster the input of fresh talent and artistic ideas certainly would further the constitutional admonition of promoting the progress of the useful arts.[65]

Section 105[66] is pertinent only obliquely in this discussion since it refers to work of the United States Government. However, this section addresses a very significant aspect of dance in the United States. There is no state related dance company in the United States whose choreographic output could conceivably be considered works of the government within the meaning of this section.[67] All choreographic work in the United States is privately done, and privately funded, with the exception of certain limited funding from the National Endowment for the Arts. This is in stark contrast to the financial structure of the great companies of Europe, such as England's Royal Ballet and Russia's Bolshoi, which are funded and controlled by the government.

Section 106[68] is, again, completely pertinent to choreography. Section 106(1)[69] allows the choreographer alone to reproduce the copyrighted work. Therefore, this section empowers the choreographer to control the dancers in whose memories the work is set through legitimate, legal methods. Written notation or visual recordation can also be maintained under the control of the choreographer. A choreographer would have at his or her disposal legal recourse against a performer in whose memory the choreographic work is fixed. It is suggested that open understanding of the rights of both parties would be preferable to the present situation; one where informal networks of power are relied upon within the dance world for control of the choreography. The choreographer would gain protection for his or her intellectual property which has heretofore been lacking, and the performer would have protection for his or her professional activity which

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65. The United States Constitution provides that "[t]he Congress shall have power . . . 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.

66. Copyright Revision Act of 1976, 17 U.S.C. § 105 (Supp. III 1979). Under this provision, "[c]opyright protection . . . is not available for any work of the United States Government. . . ." *Id.*

67. There is very little government funding for any form of art in the United States. The National Endowment for the Arts, a federal agency, does provide some funding to artists, including choreographers. However, even this aid is usually in the form of seed money for future development and not for sustained support.

On the other hand, it is customary in many other countries to entirely support a national ballet company. Examples of such countries are Canada, England, Russia and Cuba.

68. Copyright Revision Act of 1976, 17 U.S.C. § 106 (Supp. III 1979).

69. *Id.* § 106(1).

could easily be set out in contractual form. The financial returns to both could more easily be determined and protected; both choreographer and performer would be assured of financial returns for their intellectual and artistic work commensurate with the quality and quantity of their work.

Section 106(3),[70] granting the right to distribute copies would, with respect to choreography, allow a choreographer protection in the distribution and sale of the work, again a situation where much piracy occurs. This extra level of control is vital in that it would again allow the choregrapher to control the performers in whose memories the choreography is fixed, and preclude them from unauthorized performance of the work for purposes of viewing or passing the work on to other choreographers or dancers, without the permission of the copyright owner. To give the choreographer the right to "distribute the copies . . . to the public by sale . . . or by rental, lease, or lending"[71] would give the basis for establishing a regime of control over performers in whose memories choreography is set. Section 106(4) and (5)[72] specifically refer to choreography and are straightforward in their application to it. Part 4 grants the copyright owner the exclusive right to "perform" the protected work publicly, while part 5 provides him or her with the same exclusive rights with respect to public "display" of the material. It should be pointed out, however, that "performance" and "display" with respect to choreography, are to be distinguished from "distribution" as used in section 106(3) because of the proposal to treat fixation of the work as being the point when the original material is set in the memories of the dancers.[73]

Section 107,[74] stating the nature of "fair use," applies completely to

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70. *Id.* § 106(3).

71. *Id.*

72. *Id.* § 106(4), (5).

73. For definitions of "performance" and "display," *see* Copyright Revision Act of 1976, 17 U.S.C. § 101 (Supp. III 1979). "Distribution" remains undefined within the Act.

74. **Sec. 107. Limitations on Exclusive Rights: Fair Use**

Notwithstanding the provisions of Section 106, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by 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 copyright 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.

Copyright Revision Act of 1976, 17 U.S.C. § 107 (Supp. III 1979).

For a discussion of fair use in legislative development *see* H.R. REP. NO. 1476, 94th Cong., 2d Sess. 65-66 (1976), *reprinted in* [1976] U.S. CODE CONG. & AD. NEWS 5659, 5678-80.

See also Walt Disney Prod. v. Air Pirates, 581 F.2d 751 (9th Cir. 1978); Meeropol v. Nizer,

choreography. Choreographies of established and traditional artistic works are frequently used as teaching vehicles. For example, it is the normal practice for teachers of advanced classes in classical ballet techniques to use a variation or a divertissement from a classic ballet which is well known to most dancers, as a teaching tool. This practice accomplishes two purposes. Often such variations are superb teaching mechanisms, which, when learned, further the technical expertise of the dancer. Moreover, to learn such a variation adds to the total accomplished repertoire of the student. Sometimes a special class which teaches only well-known variations or divertissements is taught for advanced students. Techniques and patterns comprised of combinations of steps, often created extemporaneously in the class by the teacher, culminate toward the end of the class in the teachings of some well-known variation having a distinguished ballet lineage. Some variations are widely recognized as valuable tools for teaching a certain sequence of movement or to help the dancer develop personal technique. It is expected that each well-trained dancer has in his or her repertoire a collection of these variations for use in further practice, performance or teachings. Such a use of choreography would logically constitute a fair use of a choreographer's artistic work in a manner directly analogous to the use of excerpts of literary works or scholarly articles in classroom study. The criteria for determining fair use would remain the same, depending on the purpose and character of the use and its commercial or nonprofit educational nature. The "nature" of choreography, similar to other art forms particularly in the context of variations, allows it to be an especially valuable teaching tool, and its use, as such, is widespread. In fact, many times this use as a teaching tool is the only way a choreographic work has survived over the years. Sometimes performance of a particular artistic work will skip two or three generations of dancers, only to emerge again as a ballet because it is remembered in classes. Once its vitality and beauty is suddenly rediscovered, the work is rescued from the classroom and again performed in its entirety. Moreover, variations usually constitute only a very small portion of an entire artistic work, and, therefore, fall easily into the "fair use" category as expressed in section 107(3) regarding the amount and substantiality of the portion used. Thus, use of variations as classroom teaching tools should have little or no effect upon the potential market for tickets to performances and so would have limited impact upon commercial returns to choreographers.

In the case of choreography, section 108,[75] with its application to

560 F.2d 1061 (2d Cir. 1977); Williams and Wilkins Co. v. United States, 487 F.2d 1345 (Ct. Cl. 1973), *aff'd by an equally divided court*, 420 U.S. 376 (1975).

75. Copyright Revision Act of 1976, 17 U.S.C. § 108 (Supp. III 1979).

reproduction by libraries and archives would, of course, apply only to recordation which takes place on tape, film or written notation. Such recordations could be easily regulated in the same way that traditic library materials are regulated.

When applied to a copy recorded by tape, film or written notation, section 109[76] is sufficiently straightforward. It grants rights of disposition and display to owners of lawful copies of copyrighted material, while proscribing such uses by anyone in possession, but not ownership, of such copies.[77] However, a copy fixed into the memories of performers simply does not lend itself to such subsequent transfers or prohibitions. Separation of types of recordations and their functions must result if the special nature of dance is accommodated to the new Act.

Chapter 3, dealing with the duration of the copyright,[78] including the statement of pre-emption,[79] again applies particularly to choreography. The statement in the Act regarding pre-emption with respect to works of authorship that are fixed, regardless of the date of creation or whether published or unpublished, is of crucial importance to choreography.[80] Specifically not pre-empted are common law or state level statutes with respect to works not fixed in any tangible medium of expression.[81] This appears to be the icing on the cake for choreographers, reinforcing specifically, common law protection to the intellectual content of works in progress.[82] The development of a choreographic work is an extended, tedious process, involving many people and expensive facilities. Its only counterpart in the artistic world is the conducting of a symphony orchestra. This portion of the Act extends the protection under common law against piracy of ideas and concepts to the earliest creative efforts, often the point at which the freshest creative ideas emerge and where the artist is the most vulnerable to having intellectual

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76. *Id.* § 109.

77. *Id.*

78. *Id.* § 301-5.

79. 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 at any state.

Id. § 301(a).

80. *Id.*

81. 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 section 102 and 103, including works of authorship not fixed in any tangible medium of expression. . . .

Id. § 301(b)(1).

82. At common law, an author has exclusive rights in his or her work prior to any public display of the work. *See* Wheaton v. Peters, 33 U.S. (8 Pet.) 591 (1834); Caliga v. Inter Ocean Newspaper Co., 157 F. 186, 188 (7th Cir. 1907), *aff'd*, 215 U.S. 182 (1909).

property stolen. At this point freedom to try, use or discard new art forms from the earliest point of creation exists, because the art forms are not left unprotected by the Act, but are specifically covered by common law protection such as an action for "misappropriation."[83]

Chapter 4, which sets out the mechanics of notice, deposit and registration[84] will require special interpretation and some modification in order to apply to, and accommodate choreography. The general requirement that notice be "placed on all publicly distributed copies from which the work can be visually perceived, either directly or with the aid of a machine or device"[85] can be adapted easily for the above recommended form of fixation. When a choreography is set and the choreographer intends to take advantage of copyright protection, a printed notice of this intent should be on prominent display before, during, and after the performance, and should be on programs or notes distributed to the viewers. This would have the same effect as the legal copyright notice on other literary or artistic works.[86]

In any event, such notice should not be delayed until the choreography is either taped, filmed, or notated. Too much time might elapse during which precious intellectual property might be lost by appropriation of the choreography by persons without notice that the artist intended to reserve the copyright and not donate the artistic work to the public domain. This will be especially important in the early years of implementation of the Act when utilization of copyright protection becomes the norm in the dance world. Traditional notice should be attached when visual recordation or notation takes place, however display of notice is vital when performance occurs. Although omission of notice will not invalidate the copyright,[87] an innocent infringer will not be held liable for damages.[88] Therefore if a choreographer is to prevail in an infringement action, he or she must take care to provide the requisite notice.

The position of the notice should meet the reasonableness test set out in section 401(c).[89] A visual display of the notice to viewers, when the

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83. *See* Minniear v. Tors, 266 Cal. App.2d 495, 72 Cal. Rptr. 287 (1968).

84. Copyright Revision Act of 1976, 17 U.S.C §§ 401-12 (Supp. III 1979).

85. *Id.* § 401(a).

86. So long as such displays " 'give reasonable notice' of the copyright claim" they would appear to satisfy the requirements of the Act. SENATE COMM. ON THE JUDICIARY, S. REP. NO. 473, 94th Cong., 1stSess. 169 (1975).

87. *See* Copyright Revision Act of 1976, 17 U.S.C. § 405(a) (Supp. III 1979).

88. *Id.* § 405(b). In order to claim the protection of section 405(b) though, the "innocent" infringer must be able to show that "he or she was misled by the omission of notice." *Id.*

89. The notice shall be affixed to the copies in such manner and location as to give reasonable notice of the claim of copyright. The Register of Copyright shall prescribe by regulation, as examples, specific methods of affixation and positions of the notice on various types of works that will satisfy this requirement, but these specifications shall not be considered exhaustive.

Copyright Revision Act of 1976, 17 U.S.C. § 401(c) (Supp. III 1979).

work is first performed in its set or fixed form, both adjacent to the area of performance and also on any program or notes given to the viewers would seem to be consistent with the Act. Failure to do this unnecessarily exposes the choreography to possible infringements. Such exposure is not tolerated in other art forms and exists in choreography only because of the peculiar nature of the medium and the manner in which choreographic artistic works develop.

Section 407(c)[90] allows the Register of Copyright, by regulation, to exempt any categories of material from the deposit requirements. The Register may also arrange for alternative forms of deposit "aimed at providing a satisfactory archival record of a work . . . where the individual author is the owner of copyright in a pictorial, graphic, or sculptural work. . . ."[91] Such flexibility should be applied to choreography in view of the need to protect choreography from the moment it is set or fixed, at least until it is feasible or necessary to deposit copies in a form compatible with data storage methods at the Library of Congress.

CONCLUSION

The Copyright Revision Act represents a major step forward in granting copyright protection to the art forms of choreography and pantomime. In implementing this new protection, the Copyright Office and the courts hearing infringement suits must be cognizant of the traditional character of these art forms. It is suggested that copyright protection for choreography and pantomime should attach at the moment it is "set," within the meaning of the dance world. What is suggested is that the notion of "setting" in choreographic and pantomime terms should be held to be the point at which the work is "fixed" at law. Once this suggestion is adopted by the legal world, then the requirement that the artist give notice to the public will follow easily. Notice of intent to reserve copyright may be given by requiring that the artist display the traditional copyright notice in the area of any publishing or performing subsequent to setting and/or by attaching the notice to any program or notes given to the viewers at the time of performance.

A second suggestion stems from the statutory requirement that a choreographer or mime seeking protection from the usurpation of his or her ideas must have embodied the work in a form of recordation, such as film, tape or written notation, which is compatible with the data storage methods used in the Copyright Office and Library of Congress. Under the new Act, the deposit of such a recordation is a prerequisite to

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90. *Id.* § 407(c).
91. *Id.*

the maintenance of an infringement suit. It is suggested, however, that to carry out the new Act's grant of protection to these art forms such recordation should be considered as only one additional form of fixation of the work. Additionally, courts should consider actual performance of the work and expert testimony in determining the existence of an infringement. It is suggested that this statutory prerequisite is simply too demanding when applied to these art forms.

NOTE

Short-Term Solutions to Long-Term Problems: Petroleum Legislation 1973-1980.

The structure of the United States Government's energy policy 1973-1980 can be traced back to the early 1970's when a combination of inflation,[1] dramatic rises in the costs of,[2] and demand for,[3] imported crude oil and petroleum products resulted in severe dislocations of the economy. In an attempt to combat these economic problems, the government embarked upon a new policy of regulating the economy.[4] As part of this policy, the oil industry became one of the sectors of the economy which was to be tightly controlled.[5] This regulation was intended to be a short-term response to an emergency situation,[6] existing only so long as the crises warranted such intervention.

However, governmental intervention in the oil industry has grown considerably since the early 1970's. Much of this growth occurred under the umbrella of the emergency legislation,[7] in conditions very different

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1. Congress was concerned about a number of factors which contributed to inflation. *See* 116 CONG. REC. 18726, 18727 (1970) (remarks of Sen. Scott), attributing inflation to the rise in federal spending, the Vietnam War, expansion in the nation's money supply, and the rise in interest rates. *See also* 116 CONG. REC. 18427 (1970) (remarks of Rep. Randall), finding the greatest danger facing the country was inflation due to Vietnam expenditures, large federal deficits, and increased national debt. "The fact remains that inflation goes on unchecked and the greatest worry on the minds of most of the people in this country is this cancerous growth of inflation." *Id.*

2. Prices for crude oil had declined throughout the 1960's, but rose after January 1970. *See* note 18 and accompanying text *infra*.

3. In 1965, the ratio of imports to domestic demand was 21.8%; by 1970 it had reached 23.3%; by 1975 it was 36.8%. *See* note 11 and accompanying text *infra*. This was clearly a worrying trend, and simultaneously, the prices of these increasingly necessary imports were rising.

4. The initial means of regulation took the form of broad based legislation. *See* The Economic Stabilization Act of 1970, Pub. L. No. 91-379, 84 Stat. 799 (1970), *as amended by* Pub. L. No. 92-210, 85 Stat. 743 (1971). The Act expired April 30th, 1974. *See also* 12 U.S.C. § 1904 note (1976).

5. Under Phase IV of the Economic Stabilization Program, the petroleum industry was the last major sector of the economy to be brought under the controls of the Act. *See* note 28 and accompanying text *infra*.

6. The Economic Stabilization Act of 1970 was originally due to expire on February 28, 1971. Pub. L. No. 91-379, § 206, 84 Stat. 800 (1970).

7. Successor legislation targeted solely at the petroleum industry followed the Economic Stabilization Act of 1970. *See* Emergency Petroleum Allocation Act of 1973, Pub. L. No. 93-159, 89 Stat. 627 (codified at 15 U.S.C. §§ 751-60 (1976)).

from those that existed when the statutes were first promulgated. The Government's reaction to crises, such as the one which erupted in 1979 as a result of the Iranian revolution,[8] was to propose more regulation of the industry.[9]

This article examines the energy policy initiated by Congress in the early 1970's, particularly with regard to the Economic Stabilization Act and the Emergency Petroleum Allocation Act, and its implementation by successive Administrations. Part I briefly traces the historical background to the legislation. Part II examines the Economic Stabilization Act of 1970 (Stabilization Act), which is still the grant of authority for much of the present administration of the petroleum industry. Its successor, the Economic Petroleum Allocation Act of 1973, which contained more detailed rules for the regulation and administration of the industry, is also reviewed. Part III discusses the administration of the regulations promulgated under these Acts.[10] In particular, the history of the Department of Energy (DOE), and its ability to coordinate energy policy, is discussed. In Part IV, the attempt by the DOE to interpret and enforce the regulations is analyzed. Part V focuses on a new area of concern; the settlement of disputes between the oil companies and the Department of Energy by Consent Orders. This section analyzes the validity of the orders, whether the Department of Energy has the authority to order the restitution of alleged overcharges, and whether its plans for the distribution of these overcharges violate the intent of Congress. The Note concludes that temporary ad hoc measures which are taken in an atmosphere of crisis should be treated as palliatives only. A successful national energy policy depends on coherent objectives which are translated into comprehensible and enforceable laws, and on their consistent application and administration.

I. HISTORICAL BACKGROUND

The United States has imported a certain percentage of its domestic petroleum needs since 1944, but until the early 1970's those imports

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8. For descriptions and analyses of the tumultuous events in Iran, *see* N.Y. Times, Feb. 12, 1979, at 12, col. 1; *id.*, July 9, 1979, at 11, col. 1. For a discussion of the link between Iranian oil cuts and energy shortages in the United States, *see* N.Y. Times, Feb. 13, 1979, at 1, col. 1; *id.*, Mar. 1, 1979, § 4, at 4, col. 6.

9. President Carter introduced a 6 point package of energy proposals intended to save 4.5 million barrels per day of crude imports by July 1990. He also announced the creation of various administrative bodies designed to help in this endeavor, such as the Energy Security Corp., and the Energy Mobilization Corp. *See* N.Y. Times, Jul. 16, 1979, at 1, col. 6.

10. The last version of these regulations is to be found in 10 C.F.R. §§ 200-218.43 (1980). Section 205 deals with administrative procedures and sanctions; section 210 is concerned with general allocation and price rules; section 211 consists of mandatory petroleum allocation regulations; and section 212 consists of the mandatory petroleum pricing regulations.

were relatively minor.[11] The oil industry was confident that historic supply patterns would continue indefinitely, so that discoveries would keep pace with demand and replace depleting reserves. OPEC[12] was not a factor in the world scene; Iran and Saudi Arabia were client states of the consuming countries. It was confidently anticipated that reserves and current supplies from Middle East countries were more than enough to meet future world demand.[13]

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11. The greatest rise in oil imports occurred between 1965 and 1975:

United States Dependence on Petroleum Imports

Year	Domestic Demand '000 barrels p.d.	Imports	Ratio of Imports to Domestic Demand (%)
1947	5 451	437	8.0
1950	6 507	850	13.1
1955	8 459	1 248	14.8
1960	9 661	1 911	19.8
1965	11 304	2 468	21.8
1970	14 697	3 419	23.3
1975	16 288	5 993	36.8

81 EN. USERS REP. (BNA) Reference File: 81:0303(1.13.77).

12. The Organization of Petroleum Exporting Countries was founded in Baghdad in 1960 by Saudi Arabia, Iran, Iraq, Kuwait and Venezuela. By 1968, its membership had expanded to include Qatar, Abu Dhabi, Libya and Indonesia. For a history of OPEC, *See* G. W. STOCKING, MIDDLE EAST OIL 349-53 (1970).

13. Wallace E. Pratt, head physicist for Standard Oil of New Jersey, believed that available deposits existed in volumes proportional to the areas of unmetamorphosed disementary rocks of marine origin; that is, in unlimited supply. Professor Levorsen of Stanford calculated that the world's undiscovered oil resources were sufficient for five hundred years at the 1949 rate of consumption.

Other forecasts predicted the need for imports starting in 1960. Moreover, a Gulf Oil linked study in 1952 anticipated the increasing need for more imports. As Gulf Oil was the half owner of the Kuwaiti concession, its prediction may not have been wholly disinterested. For a critical look at those energy forecasts, *see* H. O'CONNOR, THE EMPIRE OF OIL 78-84 (1955). As late as 1972, M.A. Adelman, a respected oil analyst, forecast that there would be no oil crisis. *See generally* M.A. ADELMAN, THE WORLD PETROLEUM MARKET (1972).

The rapid increase in world demand for oil over the past 10 years kept pace with the analysts' predictions:

World Oil Consumption 1969-1979

	1969	1971	1973	1975	1977	1979
Country/ area		'000 Barrels p.d.				
U.S.A.	13 815	14 845	16 870	15 875	17 925	17 930
Canada	1 440	1 585	1 755	1 735	1 810	1 895
Latin America	2 610	3 035	3 435	3 655	4 010	4 395
Total W. Hemi.	17 865	19 465	22 060	21 265	23 745	24 220
W. Europe	11 440	13 280	15 155	13 505	14 225	14 870
Others	13 485	16 490	19 750	20 910	23 255	25 035

Reflecting this happy state of affairs, the federal government did little to intervene. Oil regulations were kept to a minimum, consisting chiefly of a quota system designed to keep low priced imports[14] out. Oil imports were organized effectively by the "seven sisters,"[15] and except for times of national emergency,[16] remained relatively unregulated, plentiful and inexpensive.

The relationship between the government, oil industry and consumer was revolutionized during the 1970's. The United States became a major importer of crude oil and petroleum products, instead of being a self-sufficient oil producer.[17] The price of oil rose dramatically as a result of increased OPEC militancy, and a tightening international oil supply/demand balance.[18] The rising cost of oil and petroleum products contributed to inflation, and this in turn led to a major shift in policy towards the oil industry by the government. The Nixon Administration considered that the oil industry was no longer able to meet the threat

Total E. Hemi.	24 925	29 770	34 905	34 415	37 480	39 905
WORLD	42 790	49 235	56 965	55 680	61 225	64 125

British Petroleum, Statistics 27 (1979).

14. *See* G. NASH, U.S. OIL POLICY 1890-1964 (1968), which gives a good historical background on the regulation of the oil industry by successive administrations. What becomes very apparent is that there has never been a long term strategy for energy policy. There has been "feast or famine," and energy policy has been tailored according to the present needs of each administration.

In particular, Nash discusses the balancing of such factors as the need to protect the small domestic producers and the importance of American imports of crude oil to the economies of Venezuela and Saudi Arabia. "Political considerations were therefore as important as strictly economic factors." *Id.* at 202. During the 1950's, President Eisenhower tried to maintain a program of voluntary restraints on imports, until abuses became so rampant that the voluntary program was replaced by a mandatory one. *Id.* at 206.

15. The "seven sisters" are the major international oil companies. They include: British Petroleum, Exxon, Gulf, Standard Oil of California, Mobil, Royal Dutch-Shell, and Texaco. For a history of these companies, *see* A. SAMPSON, THE SEVEN SISTERS (1975).

16. *See* G. NASH, U.S. OIL POLICY 1890-1964, at 239-49 (1968). *See also* Summers, *The Case for Decontrolling the Price and Allocation of Crude Oil,* 53 TEX. L. REV. 1275, 1276 (1975).

17. *See* note 11 and accompanying text *supra.*

18. *See* J. BLAIR, THE CONTROL OF OIL 254, 261 (1976). On October 16, 1973, OPEC increased the posted price of Arabian Light crude oil by 60%.

"Over the last two decades oil prices have undergone an erratic evolution:

OPEC 20-Year Crude Oil Price History At A Glance

Representative posted, official and spot prices are shown in dollars per barrel for three primary OPEC crude oil categories in the table below.

The current definitions of "official" and "spot" prices emerged only gradually. "Official" refers to the bulk of oil flows, which move on a long-term contract basis. "Spot" generally refers to prices of single cargoes traded on an open-market basis. Since the spot market didn't emerge fully in its present form until the late 1960s, open-market sales prices to third parties are shown for earlier periods.

In the early 1960s most oil moved at posted prices in term deals between major oil company affiliates. By mid-decade, the pressure of declining open-market or "spot"

posed by nationalistic producer nations,[19] and was contributing to spiralling inflation; indulgent laissez-faire policy gave way to price control and regulation. In addition, the public's attitude towards the oil industry altered; traumas of queuing in gas lines and higher prices,[20] coupled with publication of high industry profits,[21] led to suspicion and hostility towards the oil industry. Consumers perceived the oil industry as failing to meet their needs and pressured for increased government

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prices pushed term contract prices below postings. From then on, posted prices were used solely to figure oil company tax and royalty obligations to producer nations.

As OPEC grew more powerful in the early 1970s, it took control of setting posted prices. But with its takeover of production activities, official government-set selling prices superseded posted prices by 1975. Official prices shown include any clearly defined discounts or premiums applicable to all clients.

Mideast Light Crude-34

Year	Posted Price	Official Price	Spot Price
1960	$ 1.86	$ 1.86	$ 1.63
1961	1.80	1.80	1.57
1962	1.80	1.80	1.52
1963	1.80	1.80	1.50
1964	1.80	1.80	1.45
1965	1.80	1.66	1.42
1966	1.80	1.53	1.36
1967	1.80	1.50	1.33
1968	1.80	1.45	1.32
1969	1.80	1.40	1.27
1970	1.80	1.35	1.21
1971	2.19	1.75	1.69
1972	2.48	1.90	1.82
1973	3.33	†2.64	2.81
1974	11.55	†9.56	10.98
1975	12.38	10.46	10.71
1976	12.38	11.51	11.63
1977	13.33	12.40	12.57
1978	...	12.70	12.91
1979 1st Q	...	13.48	18.35
2nd Q	...	16.15	27.35
3rd Q	...	18.89	32.90
4th Q	...	22.84	38.17
1980 1st Q	...	27.17	36.58
2nd Q	...	28.82	35.52
3rd Q	...	30.21	33.30

Petroleum Intelligence Weekly, Nov. 10, 1980, at 11, col. 1.

19. *See* C.F. DORAN, MYTH, OIL AND POLITICS (1977). Doran credits Gaddafi of Libya with being the major cause in the breakdown of confidence in the major petroleum companies. "But Gaddafi rewrote the textbook on nationalization. It was the threat of the nationalization of corporate assets in the producer countries that ultimately — to use a phrase current in the Middle East during the period — 'broke the back of the majors.' " *Id.* at 59.

OPEC's Teheran pricing decision of 1971, which increasecl the posted prices, was also cited as evidence that market pressures had driven prices upward in a situation of relative scarcity. *Id.*

20. *See* J. BLAIR, THE CONTROL OF OIL 265 (1976).

21. The net income of 26 major international oil companies rose from $6,860 million in 1972 to $11,678 million in 1973, and to $16,371 million in 1974. CHASE ENERGY ECONOMICS, FINANCIAL ANALYSIS OF A GROUP OF PETROLEUM COMPANIES (1978).

intervention.[22] Administrative regulation and later, legislative action were to follow.

II. LEGISLATION FOR THE REGULATION OF THE PETROLEUM INDUSTRY

A. The Economic Stabilization Act of 1970

There can be no clear understanding of present energy policy without reference to the Economic Stabilization Act of 1970.[23] The Stabilization Act was not originally intended to regulate the oil industry in any long-term sense.[24] It was originally passed by Congress in an attempt to respond to public pressure and to grapple with inflation.[25] The Stabilization Act was intended to control inflation throughout the economy, and it authorized the President to issue regulations and orders to "stabilize prices, rents and salaries. . . ."[26] President Nixon then delegated all his authority, in this respect, to the Cost of Living Council, which was established to administer the anti-inflation program.[27]

The Cost of Living Council then organized an Economic Stabilization Program under this mandate, by which inflation was to be fought in stages.[28] The petroleum industry was the last sector of the economy

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22. *See* C.F. DORAN, MYTH, OIL AND POLITICS 49 (1977), in which consumer attitudes to the petroleum industry are traced to a fear of business collusion. Doran discusses Congressional willingness to blame the crisis on the oil companies and describes public dissatisfaction with the industry. *Id.* at 47-51.

23. Pub. L. No. 91-379, 84 Stat. 799 (1970), *as amended by* Pub. L. No. 92-210, 85 Stat. 743 (1971).

24. The original authority to "issue and enforce orders and regulations under this title" expired at midnight on February 28, 1971. Pub. L. No. 91-379, § 206, 84 Stat. 800 (1970).

25. *See generally* 116 CONG. REC. 18426-27 (1970). "When President Nixon initially addressed the nation concerning the matter of economic controls, he spoke of taking decisive action to 'break the vicious circle of spiraling prices and costs'. . . ." University of Southern California v. Cost of Living Council, 472 F.2d 1065, 1066 (Temp. Emer. Ct. App. 1972), *cert. denied,* 410 U.S. 928 (1973).

26. Economic Stabilization Act of 1970, Pub. L. No. 91-379, § 202, 84 Stat. 799 (1970), *as amended by* Pub. L. No. 92-210, § 203, 85 Stat. 743 (1971). Section 203, as amended, provides in pertinent part that "[t]he President is authorized to issue such orders and regulations as he deems appropriate . . . to . . . stabilize prices, rents, wages, and salaries at levels not less than those prevailing on May 25, 1970. . . ."

27. *See* Economic Stabilization Act of 1970, Pub. L. No. 91-379, § 203, 84 Stat. 799 (1970), *as amended by* Pub. L. No. 92-210, § 204, 85 Stat. 746 (1971). This section provided that "[t]he President may delegate the performance of any function under this title to such officers, departments, and agencies of the United States as he deems appropriate. . . ." President Nixon then established the Cost of Living Council to act as an agency of the United States, under Exec. Order No. 11615, 3 C.F.R., 1971 Comp., at 199, *reprinted in* [1971] U.S. CODE CONG. & AD. NEWS 2575, and also "delegated to the Council all of the powers conferred on the President by the Economic Stabilization Act of 1970." *Id.* § 200(3)(a).

28. The Economic Stabilization Program, administered by the Cost of Living Council, developed in five stages. Phase I, August 17, 1971 to November 13, 1971, was a ninety day freeze of prices, wages, rents and salaries at "levels not greater than the highest of those pertaining to a substantial volume of actual transactions . . . during the thirty day period ending August 17,

to be regulated, under Phase IV of the Program. The Cost of Living Council established special rules governing the pricing of crude oil and petroleum products.[29]

Under these special rules, a two-tiered pricing system for crude oil was established.[30] Price controls were imposed for "old" domestic crude oil,[31] whereas "new" domestic crude oil,[32] imported crude oil[33] and other classifications,[34] were exempt from price control on their first sale into domestic commerce. "New" domestic crude could be sold without respect to the ceiling price, as an incentive to producers to increase production levels.[35] No ceiling price on foreign crude oil was imposed when it first entered domestic commerce, in order to encourage needed supplies.[36] The two-tiered pricing system remained effective, though much amended, until its abolition in January 1981.[37] It was controversial, and because oil is "fungible," the temptation was over-

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1971. . . ." Exec. Order 11615, 3 C.F.R. 1971 Comp., at 199, *reprinted in* [1971] U.S. CODE CONG. & AD. NEWS 2575. Phase II, November 14, 1971 to January 10, 1973, tried to maintain flexible controls and wage-price constraints. Phase III, January 11, 1973 to June 12, 1973, was a period of private "voluntary" restraint, with the Council's encouragement. Exec. Order 11695, 3A C.F.R., 1973 Comp., at 150, *reprinted in* [1973] U.S. CODE CONG. & AD. NEWS 3471. Then came a "comprehensive freeze for 60 days maximum on prices of all commodities and services offered for sale, except prices charged for raw agricultural products," because "price behavior was unsatisfactory." Exec. Order 11723, 3A C.F.R., 1973 Comp., at 150, *reprinted in* [1973] U.S. CODE CONG. & AD. NEWS 3496. Following this freeze came Phase IV, and with it, controls on petroluem and petroleum products. Phase IV lasted until April 30, 1974, when controls were lifted from all industries except for the petroleum industry.

29. 6 C.F.R. § 150.351-.400 (1974). These regulations were published one week after consumer prices had been frozen for 60 days. 38 Fed. Reg. 21,933 (1973). The hastiness of the publication is discussed in Standard Oil Co. v. FEA, 453 F. Supp. 203, 206-08, *aff'd sub nom.* Standard Oil Co. v. DOE, 596 F.2d 1029 (Temp. Emer. Ct. App. 1978).

30. 6 C.F.R. §§ 150.353-.354 (1974) divided domestic crude into "new" and "old."

31. "Old" oil could be defined as the "base production control level" for a particular month for a particular property. "If crude petroleum was produced and sold from [a particular] property in every month of 1972, [old oil would be] the total number of barrels of domestic crude petroleum produced and sold from that property in the same month of 1972. . . ." 6 C.F.R. § 150.354 (b) (1) (1974).

32. " 'New crude petroleum' means the total number of barrels of domestic crude petroleum produced and sold from a property in a specific month less the base production control level for the property." 6 C.F.R. § 150.354 (b) (2) (1974).

33. 6 C.F.R. § 150.353 (1974) makes no mention of any control on imported crude oil.

34. One such other classification would be "released crude." *See* 6 C.F.R. § 150.354 (c)(3) (1974).

35. "[A] producer of new crude petroleum . . . may in the month produced . . . sell that crude petroleum without respect to the ceiling price." 6 C.F.R. § 150.354 (c)(2) (1974). "New" crude oil was made subject to a ceiling price, though it was substantially above that for "old" oil, in February, 1976.

36. *See* note 33 and accompanying text *supra.*

37. Oil was to be decontrolled by end September, 1981. Controls were abruptly lifted by President Reagan, Exec. Order 12287, on Jan. 28, 1981; for text, *see* 390 EN. USERS REP. (BNA) 208-29 (Jan. 29, 1981). *See also* OIL & GAS J. Feb. 2, 1981 at 25-29 for a discussion of the implications of decontrol and questions concerning the swiftness of the order with regard to APA rulemaking requirements. *Id.* at 29.

whelming for resellers to reclassify "old" oil as "new," and thus make illegal profits.[38]

The regulations divided the petroleum industry into four major sectors: crude oil producers, refiners, resellers and retailers. The pricing structure revolved around the "base price,"[39] and allowed refiners to pass through their product cost increases on a dollar for dollar basis without being subject to pre-notification requirements or profit margin rules.[40] Later regulations allowed for the "banking," or carrying forward of product cost increases incurred in one month so that they could be recovered in a later month.[41] Refiners could increase prices based on non-product cost increments only after compliance with pre-notification and profit margin limitations.[42] Although there were no specific regulations concerning the banking of these non-product cost increases, this was prohibited in November, 1974.[43] The issue of banked costs was to become a legal and administrative nightmare.[44]

The rules governing the pricing of crude oil and petroleum products were not issued under ideal conditions. During the price freeze which followed Phase IV, proposed petroleum regulations were published in the federal register, but were not completed.[45] The CLC then extended

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38. *See, e.g.*, COMPTROLLER GENERAL OF THE UNITED STATES, REPORT TO CONGRESS: IMPROVEMENTS NEEDED IN THE ENFORCEMENT OF CRUDE OIL RESELLER PRICE CONTROLS (1979) [hereinafter cited as 1979 GAO REPORT]. The 1979 GAO Report describes the ineffectiveness of enforcement efforts in the crude oil reseller area, and outlines the mechanisms of "daisy chains" by which the regulations were circumvented.

39. In Standard Oil Co. v. DOE, the Court defined "base price" as follows:

> The base price for sales of an item by a refiner is the weighted average price at which that item was lawfully priced in transactions on May 15, 1973, or, if none occurred on that date, in the transaction next preceding May 15, 1973, plus increased costs of imports incurred after May 15, 1973. . . .

596 F.2d 1029, 1035 (Temp. Emer. Ct. App. 1978).

40. *See* Standard Oil Co. v. DOE, 596 F.2d 1029, 1035 (Temp. Emer. Ct. App. 1978).

41. The regulations were amended in September, 1973. Thus, if the base price did not include the entire amount of increased costs, the unused portion could be added to the May 15 selling price "to compute the respective base price . . . for a subsequent month." 38 Fed. Reg. 25,688 (1973) (codified in 6 C.F.R. § 150.356(d) (1974)).

42. 38 Fed. Reg. 22,536 (1973).

43. *See* Standard Oil Co. v. DOE, 596 F.2d 1029, 1036 (Temp. Emer. Ct. App. 1978).

44. *See* Standard Oil Co. v. DOE, 596 F.2d 1029 (Temp. Emer. Ct. App. 1978), where the court explores the quagmire of product and non-product cost increases. The only rationale for this different treatment can be found in a press release issued by Dr. J. Dunlap, Chairman of the Cost of Living Council:

> The Council has been very concerned that the final regulations strike a delicate balance between constraining prices while at the same time encouraging the necessary increase in supplies the country must have. The Council is aware that energy prices must be allowed to rise in order to stimulate development of new energy reserves and make possible the purchase of higher cost foreign oil. At the same time, we must prevent unnecessary price increases.

Id. at 1036, *quoting* Phillips Petroleum Co. v. DOE, 449 F. Supp. 760, 771-72 (D. Del. 1978).

45. *See* 38 Fed. Reg. 19,464 (1973).

the freeze on petroleum and petroleum products for a further week. During that week, the petroleum pricing regulations were reconsidered, amended, and finally published.[46] Yet these rules, hastily conceived and dispatched, remained the "cornerstone of the present control mechanisms."[47] Subsequent regulations were piled "helter-skelter" on to the original, giving rise to an observation by a Presidential Task Force that "incomprehensibility is an immediately discernible characteristic of many regulations ... whose complexity derived fundamentally from the fact that layer upon layer of regulations designed to modify market behavior had been superimposed upon an incredibly complex industry comprised of over 300,000 firms."[48]

B. The Emergency Petroleum Allocation Act

In October 1973, OAPEC[49] commenced an oil embargo against the United States and the Netherlands, in retaliation for their support of Israel in the Middle East war.[50] Consumers were enraged and dismayed by the chaos which ensued.[51] The oil industry was perceived to be a failure and strong public pressure for some form of government intervention resulted.[52] In response, Congress passed the Emergency Petroleum Allocation Act of 1973 (EPAA).[53] The purpose of the act was:

> to grant to the President of the United States and direct him to exercise *specific temporary authority* to deal with shortages of crude oil, residual fuel oil, and refined petroleum products or dislocations in their national distribution system. The authority granted under this chapter shall be exercised for the purpose of minimizing

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46. *See* 38 Fed. Reg. 22,536 (1973). For an administrative history and description of the Mandatory Price Regulations, *see* McMillan, *Principled Fairness in the Regulation of Petroleum Prices*, 57 TEX. L. REV. 573, 575-78 (1979).

47. Trowbrige, *Enforcement of Criminal Sanctions for the Violation of Federal Controls on the Prices of Crude Oil and Petroleum Products*, 17 AM. CRIM. L. REV. 201, 211 (1979). This article discusses the enforcement of criminal violations, and criticizes their complexity, which has led to some unwitting violations.

48. REPORT OF THE PRESIDENTIAL TASK FORCE ON REFORM OF FEDERAL ENERGY ADMINISTRATION REGULATIONS 22-50 (1976).

49. OAPEC is the Organization of Arab Petroleum Exporting Countries, formed in 1968 by Saudi Arabia, Kuwait and Libya, to "maximize the benefits derived by its members from their natural resources." Interview with Shaikh Yamani, Oil Minister of Saudi Arabia, in Middle East Economic Survey (Jan. 12, 1968), *quoted in* G.W. STOCKING, MIDDLE EAST OIL 459 (1970).

50. *See* J. BLAIR, THE CONTROL OF OIL 264 (1976).

51. Motorists were forced to wait in lines and householders faced the bleak prospect of a winter with fuel shortages. "In the United States ... the reaction approached pure panic." J. BLAIR, THE CONTROL OF OIL 264 (1976).

52. *See* note 22 and accompanying text *supra*.

53. The Emergency Petroleum Allocation Act of 1973, 15 U.S.C. §§ 751-60 (1976).

> the adverse impacts of such shortages or dislocations on the American people and the domestic economy.[54]

The drafters acknowledged that some of the aims of the EPAA were in conflict. The act was to provide "to the maximum extent practicable"[55] for the preservation of a competitive industry, with the protection of small refiners a priority.[56] Another aim was economic efficiency,[57] and yet another was to allow for the equitable distribution of crude oil and products at equitable prices.[58] Clearly, the aim of protection of small refiners could conflict with the aim of maximizing economic efficiency. Similarly, equitable distribution of crude oil and petroleum products could also reduce economic efficiency. Ultimately, the drafters left it to the Executive to make a policy decision as to which aims were to be accorded priority in a given emergency situation. The legislators recognized that these emergency measures would serve short term interests only,[59] and that in the long term, economic efficiency should be the priority policy consideration. Therefore the House Report stated that "economic efficiency ... is generally better served by competitive markets than by administrative measures,"[60]and so provided this bill with only "temporary authority which will expire approximately 18 months after enactment...."[61]

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54. *Id.* § 751(b) (1976) (emphasis added).

55. *Id.* § 753(b)(1).

56. The statutory language makes clear one of the EPAA's purposes, which is the "preservation of an economically sound and competitive petroleum industry ... and to preserve the competitive viability of independent refiners, small refiners, nonbranded marketers. . . ." *Id.* § 753(b)(1)(D).

57. *Id.* § 753(b)(1)(H).

58. Again, the EPAA is clear in its goal for the "equitable distribution of crude oil, residual fuel oil, and refined products at equitable prices among all regions and areas of the United States and sectors of the petroleum industry. . . ." *Id.* § 753(b)(1)(F). Another aim was "the allocation of suitable types, grades, and quality of crude oil to refineries in the United States to permit such refineries to operate at full capacity. . . ." *Id.* § 753(b)(1)(E).

The Committee explained its reference to equitable prices in that they were "intended to emphasize that the objectives of the mandatory allocation program are to prevent price gouging or price discrimination which might otherwise occur on the basis of current shortages." Report of the House Interstate and Foreign Commerce Committee, H.R. REP. NO. 531, 93d Cong. 2d Sess., *reprinted in* [1973] U.S. CODE CONG. & AD. NEWS 2582, 2596. Again, the emphasis was on the temporary nature of the objective to meet the current situation. At no time does the report discuss the possibility of the Act becoming a permanent fixture.

59. By way of initial emphasis it should be noted that the bill ... is not designed to and should not be interpreted as increasing supplies of these critically short products. . . . Instead, this bill focuses on the short term objectives of seeing to it that during times of shortage our priority needs are met and that whatever limited supplies we have are equitably distributed throughout the nation to meet regional needs and preserve competition in the marketplace.
Report of the House Interstate and Foreign Commerce Committee, H.R. REP. NO. 531, 93d Cong., 2d Sess., *reprinted in* [1973] U.S. CODE CONG. & AD. NEWS 2582, 2583.

60. *Id.* at 2596.

61. *Id.*

The main purpose of the act was to "minimize the adverse impact of shortages...."[62] It was not to provide for the entire long term in-depth regulation of the petroleum industry. Presumably, at the time of drafting, neither the duration of the embargo, nor its repercussions could have been anticipated.[63] Yet the act remained in effect until 1981, surviving the oil embargo, and the "crisis" of 1979.[64] It lived on in an economic environment very different from that which existed when it was drafted.[65]

III. ADMINISTRATION OF THE REGULATIONS

The history of the administration of the energy policy as formulated in the Economic Stabilization Act and the Emergency Petroleum Allocation Act has been checkered. This is primarily because there has never been a consistent, sustained effort to administer these acts. Since 1973, no fewer than four separate agencies have attempted to regulate the oil industry.

The Cost of Living Council which had been established to administer the Economic Stabilization Act, was given extremely broad powers to regulate the economy, and to combat inflation.[66] However, its mandate was too broad for it to focus in detail upon one sector of the economy, especially one as complex as the petroleum industry. Therefore, in the fall of 1973, President Nixon created the Federal Energy Office (FEO).[67] The FEO assumed the powers vested in the Executive Branch for the mandatory allocation of all petroleum products,[68] and the petroleum price authority which had been held by the Cost of Living

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62. 15 U.S.C. § 751(b) (1976).

63. The embargo was lifted in the spring of 1974.

64. *See* note 8 and accompanying text *supra*.

65. The EPAA was amended, and its lifespan extended by the Energy Policy and Conservation Act of 1975, Pub. L. No. 94-163, 89 Stat. 871 (1975) (codified in scattered sections of 15, 42, 50 U.S.C.). It is due to expire in September, 1981. However, recent reports indicate that it may gain yet another lease on life while the decontrol program is phased out in order to allow small refiners more time to adjust. *See* OIL & GAS J., Oct. 13, 1980, at 76.

66. *See* notes 27 & 28 and accompanying text *supra*.

67. Exec. Order No. 11748, 3A C.F.R., 1973 Comp., at 232, *reprinted in* [1973] U.S. CODE CONG. & AD. NEWS 3533. The Administration had created an Energy Policy Office to coordinate energy related activities of federal agencies in the summer of 1973. The Department of the Interior had formed an Office of Petroleum Allocation in the fall of 1973, to administer the allocation program of the EPAA. FEO took over both of these responsibilities, as well as the petroleum price regulations previously controlled by the CLC. *See* [1978] 1 EN. MNGM'T (CCH) ¶ 2512, at 2516.

68. *Id.* Under the mandatory allocation powers vested in the Executive by the EPAA, FEO issued the Petroleum Allocation and Price Regulations. *See generally* 39 Fed. Reg. 1,924 (1974). The purpose of these regulations was:

> (a) to meet imbalances that may occur in the supplies of any product subject to this part, the FEO may order the transfer of specified amounts of any such product from one region or area to another. Further, the FEO may allocate any such supplies of such products among suppliers in order to remedy supply imbalances.

Id.

Council.[69] The FEO was a temporary agency, and was replaced by the Federal Energy Administration (FEA) in 1974.[70]

The FEA was not a resounding success as a regulatory agency. Its jurisdiction over the petroleum industry was broader than that of the FEO, but its authority was by no means comprehensive.[71] Despite this, the FEA was overburdened with responsibilities[72] and was heavily criticized for its tardiness in decision making.[73] Its difficulties with interpretation of the crude oil entitlement program are well documented,[74] and were a grim portent of the future problems facing the Department of Energy. The agency was scheduled to expire on June 30th, 1976,[75] but its life was extended when the petroleum allocation and price control program was continued by Congress.[76] After a confusing period when its statutory authority lapsed and the President reestablished the FEO,[77] the FEA was given a new lease on life through

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69. *See* [1978] 1 EN. MNGM'T (CCH) ¶ 2512, at 2516-17.

70. The President was granted authority by Congress to institute the FEA. *See* Federal Energy Administration Act of 1974, 15 U.S.C. §§ 761-86 (1976 & Supp. III 1979).

71. The FEA had jurisdiction over fuel allocation and pricing regulation, energy data collection, energy conservation, planning and strategic reserves. For a description of the major components of the FEA. *See* [1978] 1 EN. MNGM'T (CCH) ¶ 2512, at 2517-20.

72. In 1975-1976, the FEA had approximately 30,000 cases to decide and consequently, a backlog developed. *See* TASK FORCE ON REFORM OF FEA, FEA REGULATION REPORT OF THE PRESIDENTIAL TASK FORCE — (1977) [hereinafter cited as FEA REGULATION].

73. The list of critical government reports seems endless. *See* COMPTROLLER GENERAL OF THE UNITED STATES, GENERAL ACCOUNTING OFFICE, FEDERAL ENERGY ADMINISTRATION'S EFFORTS TO AUDIT DOMESTIC CRUDE OIL PRODUCERS (1975) [hereinafter cited as 1975 GAO REPORT]; FEA TASK FORCE ON COMPLIANCE AND ENFORCEMENT, FINAL REPORT (1977). Hearings Before the Subcommittee on Energy Conservation and Regulation, 95th Cong. S. REP No. 96 [hereinafter cited as the SPORKIN REPORT]. The Sporkin Report criticized the enforcement program in harsh terms:

> The FEA's enforcement program has historically been ineffective without either the commitment or direction to do the job that, in retrospect, was clearly required. With a lack of singleminded sense of purpose and commitment from the highest levels of the Agency, the enforcement program has floundered and moved from crisis to crisis with few real successes. Under each Administration and subjected to the oversight of one Congressional committee after another, the Agency's enforcement resources were reprogrammed time and again to satisfy a real or imagined crisis-of-the-moment when it should have been comprehensively addressing the more fundamental problems in the industry it was required to regulate.

Id. at 35. *See also* COMPTROLLER GENERAL OF THE UNITED STATES, GENERAL ACCOUNTING OFFICE, REPORT ON PROBLEMS IN THE FEDERAL ENERGY ADMINISTRATION'S COMPLIANCE AND ENFORCEMENT EFFORT 4-6 (Dec. 1974); *Federal Energy Enforcement Activities: Hearings Before the Permanent Subcommittee on Investigations of the Senate Committee on Government Operations,* 93rd Cong., 2d Sess. (1974); STAFF OF HOUSE SUBCOMMITTEE ON ENERGY & POWER AND OF INTERSTATE AND FOREIGN COMMERCE, 96th Cong., 1st Sess., *Memo.* RE: RAMPANT WHITE COLLAR CRIME II (1978); SENATE COMM. ON GOVERNMENTAL AFFAIRS, STUDY ON FEDERAL REGULATIONS, VOL. IV, DELAY IN THE REGULATORY PROCESS, S. DOC. NO. 72, 95th Cong., 1st sess. (1977).

74. *See* FEA REGULATION, *supra* note 72. *See also* Pierce, *The Choice Between Adjudicating and Rulemaking for Formulating and Implementing Energy Policy,* 31 HASTNGS L.J. 1, 3 (1979); Summers, *supra* note 16, at 1290-96 (which analyzes FEA's interpretation of EPAA crude oil entitlement scheme).

75. *See* Federal Energy Administration Act of 1974, 15 U.S.C. §§ 761-86 (1976).

76. Pub. L. No. 94-332, 90 Stat. 784 (1976) (extension to July 30, 1976).

77. Exec. Order No. 11,930, 3 C.F.R., 1976 Comp., at 137, *revoked by* Exec. Order No.

December 1977.[78] However, the FEA was in fact abolished prematurely in October, 1977. When it passed away unlamented, it was succeeded by the Department of Energy.[79]

Today, the DOE is a cabinet-level agency with broad authority over pricing and distribution of oil supplies.[80] President Nixon and later President Ford envisioned it as a central coordinating agency, under which all matters concerned with energy and natural resources would be grouped.[81] However, Congress saw otherwise, so that today the DOE regulates the oil industry, some aspects of the natural gas industry, electric rates, research and development.[82] The DOE does not have power over the Nuclear Regulatory Commission, the Environmental Protection Agency, or the Tennessee Valley Authority.[83] Therefore, its ability to oversee energy policy as a whole is severely impaired. The DOE's creation "marked the administrative culmination of four years of Congressional and Executive efforts to centralize federal energy responsibilities in a single agency, a centralization which did not, in fact, occur."[84]

The DOE was initially intended to be the Administration's solution to the failure of the FEA to regulate the oil industry and the govern-

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11,933, 3 C.F.R., 1976 Comp., at 142.

78. The FEO's reestablishment was intended to be temporary only. After FEO re-operated for 15 days, the Energy Policy and Conservation Act was passed on August 14, 1976, extending the life of FEA to December 31, 1977. Energy Policy and Conservation Act, Pub. L. No. 94-385, § 112, 90 Stat. 1132 (1976).

79. The FEA was abolished, and its functions transferred to the Economic Regulatory Agency (an agency within the DOE) in 1977 through the Department of Energy Organization Act, Pub. L. No. 95-91, 91 Stat. 565 (codified at 42 U.S.C. §§ 7701-7352 (Supp. III 1979)).

80. [1980] 1 EN. MNGM'T (CCH) ¶ 2532, at 2531.

81. S. REP. NO. 826, 95th Cong. 2d Sess., *reprinted in* [1977] U.S. CODE CONG. & AD. NEWS 855, 860, traces the history of Executive and Congressional searches for a coordinating energy agency. Both President Nixon and President Ford had requested the merging of energy with natural resources, and the Report explains the reasons for the whittling away of this grand design, to the "current central focus on energy." *Id.* at 860. Ultimately, the Senate amended President Carter's proposals for a Department of Energy. *Id.* at 863. The Report concluded:

> The course of development which has led to the current proposed Department of Energy has therefore moved from the very broad concept of the Department of Energy and Natural Resources which encompassed all major resource systems as well as energy, through a series of much more specific stop-gap measures that focused on immediate functional needs as to the present recognition that the Nation's energy needs and energy problems must receive centralized, comprehensive treatment in a cabinet-level department — and that they must receive the high priority that a department focused on energy concerns exclusively can give them.

Id. at 863.

A more prosaic reason for the rejection of the plan by Nixon and Ford to create a Department of Energy and Natural Resources has been given. "Congress ... balked at the idea because of the potential effect that the new agency would have on the then-existing committee structure." [1980] 1 EN. MNGM'T (CCH) ¶ 2532, at 2531.

82. [1980] 1 EN. MNGM'T (CCH) 2532 at 2531-32. *See also* Lang, *DOE Organization: The Limits of Regulatory Power*, 30 INST. ON OIL & GAS L. & TAX. 119 (1979).

83. *See* [1980] 1 EN. MNGM'T (CCH) ¶ 2532, at 2531.

84. *Id.*

ment's failure to produce any overall energy policy.[85] The inability to administer the EPAA was perceived by Congress to result from a fragmentation of authority into several competing agencies. The real problem was the inadequacy of the legislation itself to effectuate a coherent long-term policy, with an attendant administrative structure appropriate to carry it out. Instead of tackling the root of the problem, a mere reorganization of existing regulatory agencies was implemented. The DOE assumed the functions previously performed by the FEA, the Energy Research and Development Administration, the Federal Power Commission, Interstate Commerce Commission's regulatory program over oil pipelines, and various other energy related functions performed by non-energy agencies.[86] But, as has been discussed, control over nuclear power, environmental matters, and the influential TVA remain outside the DOE's domain.[87]

Within the DOE, separate "fiefdoms" were immediately established. The Economic Regulatory Administration, the Energy Information Administration and the Federal Energy Regulatory Commission all have separate functions, that in some cases overlap.[88] This overlapping of

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85. Perhaps in no other area of Federal Government responsibility has development and implementation of policy been so hampered by organizational problems resulting from fragmentation of responsibilities. Duplication, overlapping in jurisdiction, fragmentation of responsibilities, and conflicting mandates have severely hampered the Government's ability to formulate, implement, and enforce a coherent and consistent energy policy.

S. REP. NO. 826, 95th Cong. 2d Sess., *reprinted in* [1977] U.S. CODE CONG. & AD. NEWS 855, 856. The report goes on to list the wide varieties of agencies which were responsible for energy in various ways. *Id.* The report makes ironic reading in light of the manner in which Congress actually organized the DOE. *See* note 71 and accompanying text *supra.*

86. *See* Department of Energy Organization Act, 42 U.S.C. § 7172 (Supp. II 1978). *See also* [1980] 1 EN. MNGM'T (CCH) ¶ 2532 at 2531-32; Lang, *DOE Organization: The Limits of Regulatory Power,* 30 INST. ON OIL & GAS L. & TAX. 119 (1979).

87. *See* text accompanying note 83 *supra.*

88. The Economic Regulatory Agency (ERA), *see* note 79 *supra,* is charged with organizing the day-to-day activities of the mandatory allocation and pricing programs. It is therefore the direct descendant of the FEA. It carries out these responsibilities through two offices: a) the Office of Special Counsel for Compliance has the task of enforcing the DOE's allocation and pricing regulations with respect to the thirty-four largest refiners. The office was established in 1977 following the recommendations of the Sporkin Report, *see* note 73 *supra,* which had been very critical of the FEA/DOE efforts to enforce the EPAA. The Office's two year mandate to first audit fifteen of the major refiners has expired, and it is currently seeking to enforce the allegations of violations served upon the major refiners. *See* Lang, *DOE Organization,* 30 INST. ON OIL & GAS L. TAX. 119, 1279 (1979). b) The Office of Enforcement regulates the other sectors of the industry; the remaining domestic refiners, crude oil producers and resellers, and product marketers. *See* [1979] 1 EN. MNGM'T (CCH) ¶ 2532, at 2536.

In its efforts to enforce the EPAA, the ERA is aided by the Energy Information Administration (EIA) which is charged with collating and analyzing energy data. *See* [1979] 1 EN. MNGM'T (CCH) ¶ 2532, at 2535. Information collected by the EIA now supplants industry figures. The DOE obviously is suspicious of industry figures and prefers independently calculated data concerning the industry.

Other offices within the DOE are also concerned with enforcing the EPAA, though on a minor and tangential basis. They include the Office of Petroleum Operations, the Office of

jurisdictions, particularly between the DOE and the FERC is an anomaly hard to rationalize, given the intent of the Department of Energy Organization Act to "bring together in the Department of Energy all the major energy programs in the Federal Government..."[89] and to provide an "appropriate organizational framework for the implementation of energy programs."[90] In addition, the Act was to encourage the "cooperation of Federal, State and local governments, and all other interested parties in the development and achievement of national energy objectives and policies."[91] The subsequent creation of a Department riddled from birth with internal tensions, and given somewhat truncated responsibilities, can only be explained by reference to an attempt to install a "checks and balances" system within the DOE. Although this may avoid the over-concentration of power in one sector of the Department, it also impedes the efficient implementation of policies, and defeats the intention of the drafters. The government's solution to the enforcement of the EPAA was therefore flawed. It is hardly surprising that, under the circumstances, the DOE is also criticized for failure of effective administration of the act.

IV. INEFFICIENT RULEMAKING

The DOE is no more effective than were its predecessors in interpreting regulations and setting guidelines for the industry to follow.

Regulations and Emergency Planning, and the Office of Hearings and Appeals. *See* [1979] 1 EN. MNGM'T (CCH) ¶ 2532, at 2536.

The DOE Organization Act did not, however, give to the DOE complete dominion over the administration and enforcement of the EPAA. Congress gave veto powers to the Federal Energy Regulatory Commission (FERC), an autonomous agency operating within the DOE. *See* 42 U.S.C. §§ 7170-7177 (Supp. II 1978). The FERC is composed of five members, of whom no more than three come from one political party. *See* [1980] 1 EN. MNGM'T (CCH) ¶ 2532, at 2537. The FERC is completely independent of the Secretary of the DOE. The act explicitly states that the FERC members are not to be "responsible to or subject to the supervision or direction of any officer, employee or agent of any other part of the Department." 42 U.S.C. § 7171 (Supp. II 1978). Its principal task is to regulate natural gas, and it has pricing authority over the transmission and sale of interstate natural gas and wholesale electric power. *Id.* § 7172. But in addition, the FERC has been given statutory authority over the regulatory actions of the DOE. *Id.* § 7174. The FERC must review, and may veto, all energy actions proposed by the Secretary of the DOE. It has ultimate appellate review over the adjudicatory decisions of the Office of Hearings and Appeals, another agency within the DOE. *See* 42 U.S.C. § 7173 (Supp. II 1978). Where there are overlaps in authority, as is clearly inevitable, there exists no statutory mechanism for resolving such conflicts. Therefore, the DOE finds itself in the rather strange situation of having its own major policy proposals countered by the FERC, an agency within its own scope of apparent statutory authority; but the FERC, having "power without responsibility," cannot itself initiate rulemaking. *See* Lang, *supra* note 82, which describes the organization of the DOE, and criticizes the lack of "central authority in charge of the Secretary's principal regulatory programs. . . ." *Id.* at 151.

89. S. REP. NO. 826, 95th Cong. 2d. Sess., (1977), *reprinted in* [1977] U.S. CODE CONG. & AD. NEWS 855.

90. *Id.*

91. *Id.*

Persistent criticism has been expressed at the failure of its agencies to set out clear, unambiguous regulations, and to follow established statutory procedures in promulgating these regulations.[92] This failure has been considered to be a major reason for the difficulties in successful implementation and enforcement of the EPAA.[93]

One of the major causes for the imprecision of the regulations and the circumvention of the procedural requirements is that they were hastily conceived due to the emergency situation. At first, when the FEA was still relatively young, the courts were prepared to give it the benefit of the doubt, and allow for irregularities in the promulgation, adoption and interpretation of the regulations. In *Condor Operating Co. v. Sawhill,*[94] a regulation freezing supplier-purchaser relationships in the petroleum industry was upheld, so long as it constituted a *rational* exercise of delegated powers:

> Where the obvious intent of Congress is to give the President and his delegates broad power to do what reasonably is necessary to accomplish legitimate purposes rendered necessary by a recognized emergency, and regulations are fashioned to implement the Congressional mandate, the court should not interfere with the prerogative of the agency to select the remedy which for rational reasons is deemed most appropriate.[95]

However, the court did limit its seemingly broad decision to emergency situations, holding that "[a] limit in time, to tide over a passing trouble,

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92. *See* McMillin, *Principled Fairness in the Regulation of Petroleum Prices,* 57 TEX. L. REV. 573 (1979). *See also* Standard Oil Co. v. DOE, 596 F.2d 1029 (Temp. Emer. Ct. App. 1978); Grigsby v. DOE, 585 F.2d 1069, 1073 n.8 (Temp. Emer. Ct. App. 1978), *cert. denied,* 440 U.S. 908 (1979).

93. For instance, a recent General Accounting Office (GAO) report reviewing the government's handling of crude oil resellers' cases found that the DOE's enforcement efforts were inadequate. *See* 1979 GAO REPORT, *supra* note 38. Three areas were found to be particularly deficient: 1) Coordination with the Justice Department was inadequate, *Id.* at 12-15; 2) Priority was not being given to pricing audits, *Id.* at 27-35; 3) Crude oil resellers had not been effectively audited because key issues involving the interpretation and application of the regulations had not been resolved in an effective and timely manner. *Id.* at 35-44.
The report goes into greater detail:

> DOE and FEA had failed to promptly resolve regulatory issues so that an adequate compliance and enforcement effort could be conducted. . . . Clarification of existing regulations had received a low priority because according to Office of Special Counsel officials, their staff had been overburdened with requirements for developing new regulations.

Id. at 41.

94. 514 F.2d 351 (Temp. Emer. Ct. App. 1975), *cert. denied,* 421 U.S. 976 (1975). The owners of an interest in oil and gas brought an action against the FEA to prevent enforcement of a remedial order requiring the owners to sell their crude oil production to another refiner. The plaintiffs claimed that this violated the fifth amendment, as it was a taking of property without compensation. The court was not impressed, holding that the taking prohibition does not apply to "consequential injuries resulting from the exercise of lawful regulations." 514 F.2d at 361.

95. Condor Operating Co. v. Sawhill, 514 F.2d 351, 359 (Temp. Emer. Ct. App. 1975).

well may justify a law that could not be upheld as a permanent change."[96] The court refused to consider whether the challenged regulation and enforcement order would pass muster as a long continuing response to chronic energy problems.[97]

By 1977, the courts were becoming somewhat impatient with the lack of clarity of the regulations and the inability of the DOE to meet rulemaking requirements. In *Longview Refining Co. v. Shore,*[98] the Temporary Emergency Court of Appeals[99] noted the problems regarding repeated amendments of regulations. In this case, suit was brought against a refiner for violations of the Stabilization Act and the EPAA.[100] The court found that "the pricing formula ... is extremely complicated, and its application calls for expertise."[101] Apparently defendants' overcharges were not deliberate, but the result of their previous accountant being unable to understand the pricing formula under Phase IV regulations. Thus, "he did not have any calculations although he read the formula because he found it beyond his understanding and consequently did not attempt to apply it."[102] The court remarked that: "it is difficult, even for experts, to understand these complex regulations, as is evidenced by the frequent correction, modification, change, and clarifying rulings and by the fact that cross examination of plaintiff's own CPA witness drew admissions that he had twice made substantial errors in calculating the overcharges claimed."[103]

Where the court has found not only ambiguity in the regulations, but also unwillingness on the part of the DOE to clarify them, and a failure to follow established procedures, the court has struck down these

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96. *Id.* at 362, *quoting* Block v. Hirsch, 256 U.S. 135, 137 (1921). *See* National Helium Corp. v. FEA, 569 F.2d 1137, 1146 (Temp. Emer. Ct. App. 1978), where the court held that FEA's failure to adhere to the procedural requirements of the Administrative Procedure Act did not invalidate the regulation, because the change in regulation was largely technical, and ultimately involved no detrimental impact on the rights of the parties regulated. *See also* Tasty Baking Co. v. Cost of Living Council, 529 F.2d 1005, 1014 (Temp. Emer. Ct. App. 1975), where the court held that the validity of consumer price control regulations promulgated by the Cost of Living Council would not be defeated, even if the Council did not explain its reasons, if the court itself could take judicial notice of the emergency nature of the legislation and accompanying regulations. *See generally* McMillin, *supra* note 92 (an analysis of the courts' evolution in attitude to FEA/DOE rulemaking).

97. Condor Operating Co. v. Sawhill, 514 F.2d 351, 362 (Temp. Emer. Ct. App. 1975).

98. Longview Ref. Co. v. Shore, 554 F.2d 1006 (Temp. Emer. Ct. App. 1977).

99. The Temporary Emergency Court of Appeals was established in the amendments to the Economic Stabilization Act of 1970. *See* Economic Stabilization Act of 1970, Pub. L. No. 92-210, § 211(b)(1), 85 Stat. 749 (1971). The court had exclusive jurisdiction to hear appeals of cases arising under the act.

100. Longview Ref. Co. v. Shore, 554 F.2d 1006, 1008 (Temp. Emer. Ct. App. 1977).

101. *Id.* at 1011.

102. *Id.* at 1022.

103. *Id.* at 1023.

regulations. In *Standard Oil Co. v. DOE,*[104] it was held that the FEA had failed to comply with proper administrative procedures and refused to explain its own regulations.[105] The FEA, without complying with notice requirements of either the Federal Energy Administration Act or the Administrative Procedure Act, issued petroleum price control regulations governing the recovery of two categories of costs by oil refiners for the period between January 1, 1975 and January 31, 1976.[106] These regulations retroactively imposed a Non Product Cost Increase (NPCI) last method of calculation on the refiners, and prohibited the banking of these costs.[107] The FEA subsequently refused to consider the correctness of its own rulings.[108] The court found that the "regulations were ambiguous. There was confusion and uncertainty among both FEA officials and the refiners."[109] In addition, although the FEA had been asked for clarification of its regulations by Shell Oil in February, 1975,[110] and by Mobil Oil in April, 1975,[111] it was not until February, 1976 that the FEA responded by setting out the NPCI Last recsequence.[112] Lastly, the court found that the FEA failed to comply with rulemaking requirements of both the Administrative Procedure Act and the Federal Energy Administration Act.[113] *Standard Oil* was important in that it marked a watershed. From then on, the courts were more than willing to strike down regulations that were considered to have failed to satisfy statutory procedural requirements.[114]

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104. 596 F.2d 1029 (Temp. Emer. Ct. App. 1978). This action was consolidated with 15 other refiners' cases. *Id.* at 1033.

105. *Id.* at 1061.

106. *Id.* at 1037-38.

107. *Id.* at 1037 n.13 (illustrates the methods for calculating product and non-product cost increases).

108. *Id.* at 1038.

109. *Id.* at 1052.

110. *Id.* at 1055.

111. *Id.*

112. *Id.*

113. *Id.* at 1069.

114. It would be misleading to suggest that the courts had always allowed FEA/DOE full sway in enforcing the regulations. In 1975, the court warned that repeated technical noncompliance with the provisions of the Administrative Procedure Act would not be tolerated. *See* Nader v. Sawhill, 514 F.2d 1064 (Temp. Emer. Ct. App. 1975); Consumers Union v. Sawhill, 393 F. Supp. 639 (D.C. 1975), *aff'd per curiam sub nom.* Consumers Union v. Zarb, 523 F.2d 1404 (Temp. Emer. Ct. App. 1975). For other cases prior to *Standard Oil, see* Shell Oil Co. v. FEA, 574 F.2d 512 (Temp. Emer. Ct. App. 1978) (pricing rule adopted in violation of the FEA act, and therefore void, because of failure to meet requirements of proper notice and opportunity to comment); Phillips Petroleum Co. v. DOE, 449 F. Supp. 760 (D. Del. 1978), *aff'd on other grounds, sub nom.* Standard Oil Co. v. DOE, 596 F.2d 1029 (Temp. Emer. Ct. App. 1978) (failure to give notice of changes in regulations which were not merely procedural in nature, and failure to produce findings of good cause for the lack of such notice was contrary to public interest). For cases following *Standard Oil, see* Vickers v. DOE, [1979] 4 EN. MNGM'T (CCH) ¶ 26,163, at 27,467 (D.D.C. Sept. 14, 1979); Lakes Gas Co. v. DOE, 477 F. Supp. 187 (D. Minn. 1979).

115. Mobil Oil Corp. v. DOE, 610 F.2d 796 (Temp. Emer. Ct. App. 1979), *cert. denied,* 100 S. Ct. 2156 (1980).

The Supreme Court implicitly approved this trend by refusing to hear an appeal by the DOE from a decision of the Temporary Emergency Court of Appeals in *Mobil Oil Corp. v. DOE,*[115] which struck down a crude oil cost allocation formula. The DOE had amended the formula literally overnight,[116] just before the expiration of the Stabilization Act,[117] without giving any prior notice to interested parties or any opportunity for them to comment. Mobil objected and filed a request for exceptional relief, which was denied.[118] Mobil then sued on the ground that the DOE's actions were "arbitrary and capricious, an abuse of discretion and unsupported by substantial evidence."[119] The DOE claimed that it had "good cause" for making the amendments effective in less than the required thirty days.[120] It maintained that an emergency situation existed, in that the Stabilization Act was due to expire at midnight, and the Department had failed to realize until then the impact that this expiration would have on the pricing formula.[121] The court rejected the DOE's reasoning, commenting that "[t]he expiration of the Stabilization Act was not so unexpected as would have precluded advance notice by the FEA of its own proposed regulations. . . ."[122] Despite anguished pleas from the DOE that this decision would cost consumers about $17 billion, the Supreme Court refused to review the decision of the Temporary Emergency Court of Appeals.[123] Therefore, it is clear that the complexity and ambiguity of the regulations, together with the inability of the DOE and its predecessors to provide clear and consistent guidelines, have resulted in a willingness by the courts to refuse to allow the DOE to enforce such regulations.

V. ENFORCEMENT DIFFICULTIES

The Office of Special Counsel for Compliance (OSC) was established in 1977 following the recommendations of the Sporkin Report.[124] Its mandate was to complete audits of the thirty-four largest refiners within two years.[125] The Office was then to initiate enforcement action against those companies deemed to have violated the regulations. In a flurry of

116. *Id.* at 799.
117. *Id.* at 799-800.
118. *Id.* at 800.
119. *Id.*
120. *Id.* at 802-03.
121. *Id.* at 803.
122. *Id.* at 803, *quoting* Shell Oil Co. v. FEA, 527 F.2d 1243, 1248 (Temp. Emer. Ct. App. 1975).
123. Mobil Oil Corp. v. DOE, 610 F.2d 796, *cert. denied,* 100 S. Ct. 2156 (1980).
124. *See* notes 73 & 88 and accompanyng text *supra.*
125. Audits of the fifteen largest refiners were to be completed by December 31, 1979, and the remaining nineteen were to be finished within a two year period. *See* Lang, *DOE Organization,* 30 INST. ON OIL & GAS L. & TAX. 119, 127 (1979).

activity, the OSC issued Notices of Probable Violation (NPV)[126] to several of the major refiners as these audits were completed, accusing them of pricing violations totalling some $2.5 billion in December, 1979 alone.[127]

Recognizing that its procedures are cumbersome, and that litigation is time consuming and costly, the DOE has entered into settlements with many companies already served with NPVs.[128] These settlements are achieved through Consent Orders,[129] in which a company may be required to roll back prices, refund overcharges, or forego future price increases.[130] They are not an admission that there has been a violation of the regulations.[131]

In theory, this procedure has many advantages. It saves the taxpayer and the consumer the expense of court costs, it expedites the refunding of several million dollars to the consumer, and the oil companies are made to disgorge excess charges. However, the ability of the DOE to arrange such settlements, and the validity of the remedies ordered by the DOE are being questioned by the Justice Department, by the courts, and by consumer groups.

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126. A Notice of Probable Violation (NPV) is the first formal step in the compliance process, after the audit has been completed. 10 C.F.R. § 205 outlines the procedures to be followed by a company which has received an NPV. *See* 10 C.F.R. § 205 (1979).

127. The DOE served NPVs on the following companies in December 1979. This does not pretend to be a complete list. These companies were charged with violations of regulations between 1973-1977:

Shell	alleging $370.6 million
Conoco	alleging $168.3 million
Arco	alleging $208.4 million
Marathon	alleging $ 68.3 million
Sohio	alleging $154.1 million
Chevron	alleging $ 84.5 million
Texaco	alleging $ 31.3 million
Mobil	alleging $504.5 million
Ameradahess	alleging $653.5 million
Gulf	alleging $485.8 million

See 333 EN. USERS REP. (BNA) 11; 332 EN. USERS REP. (BNA) 9; 331 EN. USERS REP. (BNA) 16.

128. Some of the larger settlements with oil refiners are as follows: Getty settled for $75 million. [1979] 1 EN. MNGM'T (CCH) ¶ 9358, at 9028; Cities Service settled for $220 million. [1980] 1 EN. MNGM'T (CCH) ¶ 9361, at 9033; Amoco settled for $280 million. *Id.* ¶ 9346, at 9003; Sohio settled for $16.5 million. *Id.* ¶ 9362, at 9035; Phillips settled for $200 million. *Id.* ¶ 9362, at 9035; Tenneco settled for $22 million. *Id.* ¶ 9328, at 8975.

129. "A Consent Order is a final Order of the DOE. . . ." 10 C.F.R. § 205.199J(b) (1980). The section goes on to describe procedures for the issuance of the Orders.

130. A Remedial Order . . . or a Consent Order may require the person to whom it is directed to roll back prices, to make refunds equal to the amount (plus interest) charged in excess of those amounts permitted under DOE Regulations . . . and to take such other action as the DOE determines is necessary to eliminate or to compensate for the effects of a violation. . . .

10 C.F.R. § 205.199I(a) (1980). Remedial Orders are defined in 10 C.F.R. § 205.199 B (1980).

131. "A Consent Order need not constitute an admission by any person that DOE regulations have been violated, nor need it constitute a finding by the DOE that such person has violated DOE regulations." 10 C.F.R. § 205.199J (1979).

Consent Orders frequently involve the compromising of claims.[132] This settlement of alleged pricing violations has been severely criticized by the Justice Department.[133] When the DOE announced its settlement of disputes with several of the major companies,[134] it was stipulated that the Consent Orders would constitute final settlement of all claims against the companies involved.[135] As a condition of the Consent Order, neither party would admit to liability. However, the Justice Department has claimed that executive branch agencies which do not have independent litigating authority do not have the corresponding authority, unilaterally, to terminate litigation which has been filed on behalf of the United States. Further, the Justice Department claims it must approve any decision to drop a suit filed on behalf of the United States.[136] Therefore, the Justice Department has stated that it will block those settlements which have been reached with companies who are already being sued in the courts.[137]

The spectacle of two government departments wrangling over their respective jurisdictions is hardly edifying, and cannot fail to undermine confidence in the enforcement program as a whole. Lack of cooperation between the departments certainly defeats the intentions of Congress when it provided for the DOE to be a coordinating agency,[138] and when it directed the DOE to bring to the attention of the Attorney General such violations as it felt would be appropriate.[139] Competent

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132. *See, e.g.*, [1979] 1 EN. MNGM'T (CCH) ¶ 9361, at 9033, in which "OSC and Cities Service have agreed to resolve all other matters. . . ."

133. There has in fact been an ongoing feud between the Justice Department and the DOE. *See* 1979 GAO REPORT, *supra* note 38, at 15, which cites lack of cooperation between the two departments as one of the reasons for the ineffectiveness of the enforcement effort.

134. Specifically, the Justice Department was objecting to the Consent Orders made with Cities Service Co. for $220 million in December 1979, 44 Fed. Reg. 75,233 (1979); with Phillips Petroleum Co. for $200 million in November 1979, 45 Fed. Reg. 1934 (1980); and with Standard Oil Co. (Indiana) for $690 million in February 1980, 45 Fed. Reg. 26,747 (1980).

135. Suit had been filed against Cities Service, Mobil Oil, Texaco, Gulf, Amoco, Arco, Shell and Phillips in January, 1979. The actions were consolidated under United States v. Cities Service Co., No. 79-0028 (D.D.C. filed Jan. 5, 1979). This suit was abandoned by the DOE when the Consent Orders were made. *See* 356 EN. USERS REP. 6, May 29, 1980.

136. May 30 letter from Assistant Attorney General John H. Shenefield to Sen. Baucus, in reply to a request from Baucus to clarify federal authority in settling administrative and court actions involving allegations of overcharging by the oil companies. *See* 356 EN. USERS REP. 6, May 29, 1980.

137. Oil & Gas J., June 9, 1980, at 6. Mutual recriminations and accusations of ignorance and jealousy between the DOE and the Department of Justice make lurid reading while reflecting well on neither party. However, the Justice Department and the DOE have recently entered into an agreement whereby the Justice Department may review settlements prior to their finalization. *See* ENERGY USERS REP. Oct. 16, 1980 at 5.

138. *See* note 81 and accompanying text *supra*.

139. *See* 1975 GAO REPORT, *supra* note 73, at 25. For an explanation of referrals to the Justice Department when "willful" violations are suspected, and a critique of the mechanisms by which the DOE circumvents the Justice Department, *see* Trowbridge, *supra* note 47.

enforcement of the nation's energy policy was therefore being marred by an interdepartmental dispute.

The ability of the DOE to issue Consent Orders when litigation has been initiated is not the only controversy surrounding the issue of DOE ordered remedies. Also problematic is the ability of the DOE to require remedies that are not expressly stated in the Stabilization Act,[140] the EPAA,[141] or the Energy Policy and Conservation Act.[142] Therefore, the issue is whether the DOE may order a company to return the excess amounts it has been found to have charged. Alternatively, to what extent may an administrative body such as the DOE hold "equity jurisdiction" as an implied power?

The Stabilization Act explicitly authorized the court to grant restitution.[143] At no point did the act grant to any administrative agency the right to order such a remedy. However, the DOE has promulgated regulations authorizing itself to order refunds or other such remedial measures as it deems necessary.[144] The courts are now divided on this issue, as challenges to the DOE's procedures of ordering "refunds" are beginning to arise.

For example, *Bonray Oil v. DOE*[145] involved an action by an oil company against the DOE under the Emergency Petroleum Allocation Act of 1973.[146] The company wanted to have set aside a Remedial Order[147] requiring it to refund to purchasers all overcharges and interest with regard to crude oil sold as stripper well oil. The company challenged the lawful authority of the FEA/DOE to issue such an order, arguing that under § 209 of the Stabilization Act only the courts have the authority.[148] In the absence of a statutory provision prohibiting the agency from ordering a refund of overcharges,[149] the court looked back to the CLC's own Phase IV regulations. Finding an authorization for Remedial Orders within those regulations,[150] the court concluded that

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140. Pub. L. No. 91-379, 84 Stat. 799 (1970), *as amended by* Pub. L. No. 92-210, 85 Stat. 743 (1971).

141. 15 U.S.C. §§ 751-60 (1976).

142. Pub. L. No. 94-163, 89 Stat. 871 § 205 (1970).

143. Economic Stabilization Act of 1970, Pub. L. No. 91-379, § 206, 84 Stat. 800 (1970), *as amended by* Pub. L. No. 92-210, § 206, 85 Stat. 743 (1971). For relevant legislative history *see* S. Rep. No. 507, 92d Cong., 1st sess. 10, *reprinted in* [1971] U.S. CODE CONG. & AD. NEWS 2283, 2291.

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

145. 472 F. Supp. 899 (W.D. Okl. 1978), *aff'd per curiam* 601 F.2d 1191 (Temp. Emer. Ct. App. 1979).

146. 15 U.S.C. §§ 751-60 (1976).

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

148. 472 F. Supp. 899, 903 (W.D. Okl. 1978).

149. "The court does not find anything in § 209 of the ESA, however, which forbids an agency from ordering a refund of overcharges." *Id.*

150. Remedial orders were defined by the CLC as "orders requiring a person to cease a viola-

there is "much support for the position that the ordering of refunds is an implied power of the FEA under the EPAA."[151]

However, in *United States v. Ringer & Ringer Enterprises,*[152] the court took a very different view of the FEA/DOE's authority to order refunds. Without discussing the *Bonray* rationale, the *Ringer* court held that the Stabilization Act merely authorized the FEA to *request* the Attorney General to file suit in the federal district court seeking redress for violations of the pricing regulations.[153] In *Bonray,* the court found that the FEA's implied power to order refunds was based upon regulations first promulgated by the CLC under the Stabilization Act.[154] The court found that this "long-standing administrative interpretation, applying to a substantially re-enacted statute, is deemed to have received Congressional approval and has the effect of law."[155] However, in lending credence to the express language of the Stabilization Act itself,[156] the *Ringer* court is persuasive.

Had Congress wished for the administrative agency to impose sanctions, it could have included such provisions in the Stabilization Act or in later legislation. However, as the *Ringer* court pointed out, the agency was not without recourse; it could apply to the court for injunctive and restitutionary relief, as well as for the assessment of civil remedies.[157]

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tion or to take action to eliminate or to compensate for the effect of a violation, or both. . . ." 6 C.F.R. § 155.81(b) (1973).

151. 472 F. Supp. 899, 904 (W.D. Okla. 1978). The court found that requiring refunds was a "rational method of accomplishing [the] goal" of achieving one purpose of the EPAA, which was "equitable distribution of crude oil [and certain products] at equitable prices among all regions. . . ." Emergency Petroleum Allocation Act, 15 U.S.C. § 753(b)(1) (1976), *quoted in* 472 F. Supp. 899, 904 (W.D. Okl. 1978). In addition, the court found that because Congress "re-enacted FEA's statutory authority several times while that FEA was ordering refunds of violations [this] can be interpreted as congressional approval of the FEA's interpretation of its statutory powers." 472 F. Supp. 899, 904 (W.D. Okla. 1978).

152. 492 F. Supp. 350 (D. Colo. 1980).

153. *Id.* at 352.

154. *See* notes 149-51 and accompanying text *supra.*

155. 472 F. Supp. 899, 904 (W.D. Okla. 1978), *quoting* Commissioners v. Noel's Estate, 380 U.S. 678, 682 (1965).

156. The language of the Stabilization Act is clear and unambiguous:

> Whenever it appears to any person authorized by the President to exercise authority under this title that any individual or organization has engaged, is engaged, or is about to engage in any acts or practices constituting a violation of any order or regulation under this title, such person may request the Attorney General to bring an action in the appropriate district court of the United States to enjoin such acts or practices, and upon a proper showing a temporary restraining order or a preliminary or permanent injunction shall be granted without bond. Any such court may also issue mandatory injunctions commanding any person to comply with any such order or regulation. In addition to such injunctive relief, the court may also order restitution of monies received in violation of any such order or regulation.

Economic Stabilization Act of 1970, Pub. L. No. 92-210, § 209, 85 Stat. 748 (1971).

157. United States v. Ringer & Ringer Enterprises, 492 F. Supp. 350, 352 (D. Colo. 1980).

In addition to the questionable authority of the DOE to order certain remedies, there is the problematic issue concerning the restitutionary nature of these remedies. Although the Senate seemed to consider it secondary to the injunction as an enforcement method,[158] restitution does appear to be an effective remedy. It provides recompense for those who have been injured, without assessing the culpability of the oil companies.

Traditionally, restitution would be made to the person who had suffered the alleged overcharge.[159] Unfortunately, the drafters of the act did not make clear to whom the refund should be directed.[160] As a result, restitutionary remedies ordered by the DOE do not always ensure that those who have been deprived will be recompensed. In the landmark case of *Porter v. Warner Holding Co.*,[161] which was an enforcement proceeding against a landlord, the United States Supreme Court held that restitution is "in the public interest by restoring the status quo and ordering return of that which rightfully belongs to the purchaser or tenant."[162] *Porter* was a case involving a landlord with a readily identifiable class of tenants to whom he was ordered to refund excessive rents. However, immediately a difficulty arises. It is one thing to grant refunds to a small group of identified tenants. It is quite different when an integrated oil company[163] is ordered to refund in some way the amounts of its alleged overcharges. In the one case, just a handful of wronged tenants are involved, but in the other, hundreds of thousands of transactions have occurred with largely unknown clients, associates and customers. When an oil company is ordered to "refund" its excess overcharges by reducing future prices on certain products, or by foregoing future allowable price increases, the actual restitutionary

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158. The principal enforcement tool to be used by the Government is likely to be an in- tion sought by the Attorney General. Such an injunction may be brought under section 209 of the Economic Stabilization Act, as amended by this bill. . . . In addition to injunctive relief, the court may also order restitution of monies received in violation of any regulation or order. It was not certain that, in these circumstances, there was an inherent equitable power in the court to set things right and order restitution. . . . This provision made clear that the court has power to grant restitution.

S. REP. NO. 507, 92d Cong., 1st Sess., *reprinted in* [1971] U.S. CODE CONG. & AD. NEWS 2283, 2291.

159. "A person obtains restitution when he has been restored to the position he formerly occupied, either by return of the something which he formerly had or by the receipt of its equivalent in money." 66 AM. JUR. 2d, *Restitution and Implied Contracts* § 1 (1973).

160. *See* note 156 *supra*.

161. 328 U.S. 395 (1946).

162. *Id.* at 402.

163. An integrated oil company is one which owns or controls most of the stages of operation, from well production through transportation, refining, distribution and retail sale. Each of the "seven sisters" is an integrated company. For examples of problems which integrated companies experience in complying with refund orders *see* note 164 *infra*.

nature of the remedy looks remote,[164] and its character becomes distinctly reminiscent of Robin Hood's brand of rough justice.

Concern over the restitutionary nature of the ordering of refunds is growing. For example, the *Ringer* court concluded that the term "restitution" could not be stretched so as to be applied to the actions of the FEA when requiring the defendants to sell their fuels to future purchasers at reduced prices.[165] This would invalidate many Consent Orders that the DOE has entered into with major refiners, and could severely curtail the settlement policy.[166] It is reported that the DOE has collected more than $175 million in cash from oil companies accused of federal product price violations, and the DOE is being challenged as to

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164. *See* Stertz v. Gulf and Schlesinger, Civ. No. 78-1813 (E.D.N.Y. March 7, 1980), *reported in* [1980] 4 EN. MNGM'T (CCH) ¶ 26,193, at 27,641. Gulf Oil had been accused by the DOE, and had been served a Notice of Probable Violation, for having overstated the landed costs for certain imported crude oils by $75 million. Gulf denied the allegations, and finally a compromise figure of about $42 million was reached. In return, the DOE promised that it would not institute legal action against Gulf. As the company is one of the largest petroleum firms in the United States, purchasers of its products number in the millions. It would be "extremely difficult to allocate specific overcharges to any particular sales transaction or to identify the specific customers who [had been] overcharged." Petition for Special Redress, [1978 Transfer Binder] 2 DOE EN. MNGM'T (CCH) ¶ 182,540, at 85,104. Therefore, an elaborate procedure was established by which the DOE would make refunds to people who could show that they had been overcharged by Gulf. The consent order also stipulated that Gulf would not be exposed for double liability. For the text of the Consent Order and Supplemental Comments, *See* [1980] 4 EN. MNGM'T (CCH) ¶ 26,193, at 27,647. However, this agreement ran into difficulties, as a class action for treble damages was filed by a consumer group. The action was for $221.7 million against Gulf and against the DOE as holder of the fund. The DOE tried to disassociate itself from the proceeding, claiming that it had never intended to protect Gulf from double liability. The court disagreed vehemently with DOE's contention, finding it incredible that the "Government had the audacity at oral argument ... to contend that that written agreement did not mean what is said." *Id.* ¶ 26,193, at 27,645. Efforts to obtain refunds for proven customers were therefore stalled, since the DOE was enjoined from distributing any of the $42 million pending the disposition of the case.

A similar scheme, in which the Kerr-McGee Oil Co. and the DOE settled all claims of pricing violations for $46 million also ran into difficulties. In order to avoid the problem of double liability, Kerr-McGee and the DOE negotiated a "participation agreement." 44 Fed. Reg. 17,781 (1979). A portion of the refund allocated to motor gasoline purchasers would be distributed through a reduction in the price of motor gasoline at Kerr-McGee outlets. The portion of the refund allocated to resellers would be distributed according to the terms of the "participation agreement," so that they could receive an "appropriate portion of the amount allocated." 44 Fed. Reg. 17,781 (1979). A fund was set up whereby those who did not wish to participate could satisfy judgments against the company. However, those who did agree to participate would agree to release Kerr-McGee from further liability. Again, this agreement could be criticized as lacking as truly restitutionary nature. Those who participate may only be satisfied out of the fund, and disbursements may not necessarily reflect the actual size of the claim against the company. *See* Montgomery, *Recent Developments in DOE Audits of Refiners and Marketers,* 30 INST. ON OIL & GAS L. & TAX. 61, 65-66 (1979). These examples illustrate the difficulties which arise when a major oil company attempts "restitution" to its customers; its transactions are so complex that almost any attempt will fail.

165. United States v. Ringer & Ringer Enterprises, 492 F. Supp. 350, 352 (D. Colo. 1980).

166. Many of the Consent Orders contain provisions to reduce future prices. For example, Getty was to forego $50 million in future price increases; Cities Service would implement a price

its plans for disposition of this significant amount.[167] A lawsuit has recently been filed by 17 customers, labor and public interest groups, who are seeking to void the settlements made between DOE and the oil companies.[168] One of the charges is that DOE has not devised a workable mechanism by which the money could be returned to consumers.[169]

Congress and the GAO are also now investigating the viability of DOE's plans for the money. In particular, they question the distribution of the Getty settlement of $25 million.[170] Again, the issue revolves around who should be entitled to receive restitution. The GAO has accused the DOE of improperly allocating funds to state governments and to the Armed Forces without trying to identify specific individuals who have been overcharged. It is alleged that by so doing, the DOE has ignored its own regulations. It has also overstepped its authority, and violated the intent of Congress. A specific example given is that the DOE earmarked some of the $25 million for low income families in more than a dozen states who had never been Getty customers.[171]

On the other hand, as the DOE points out, it is very difficult, time consuming and not cost effective to try to identify individual purchasers of an oil company's products. However, the DOE proposed solution to set up an office to distribute the refunds can, considering the history of the DOE bureaucracy, be considered inappropriate. Questions of funding, policy and politics all must be raised.

CONCLUSION

This Note has explored the origins of petroleum legislation from 1970-1980, and analyzed some of the causes for the failure of its ad-

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reduction of not less than 3¢ per gallon in its wholesale prices of certain heating oils in order to accomplish an aggregate refund of $20 million; Phillips would buy additional crude oil to refine $22 million of additional middle distillates, and absorb the costs itself, thereby in effect making it available at cheaper prices. Phillips also agreed that the OSC could direct them to reduce prices for gasoline and heating oil to make up any further difference. *See* note 128 and accompanying text *supra*.

167. Wall St. J., Oct. 15, 1980, at 16, col. 3.

168. Oil Daily, Oct. 9, 1980, at 1, col. 1.

169. It is alleged that 80% of the refunds ordered are settled either by price rollbacks on certain products or by allowing refiners to reduce their banks of unrecovered costs. In neither event is the pure meaning of "restitution" applied, because the "cheated" consumer does not personally receive redress. *See* 1 EN. MNGM'T (CCH) Report Letter, Oct. 21, 1980, at 1.

170. The Getty settlement, *supra* note 128, incorporated an agreement that Getty pay $25 million of the $75 million into an escrow account. Similarly, Amoco agreed to place about $71 million in escrow until arrangements are made for its disbursement by the DOE. Cities Service also agreed to place $10 million in escrow to satisfy judgments against the company and to pay approved settlements. The balance would be left to the discretion of "the Treasury or in some other manner to be determined at that time." [1980] 1 EN. MNGMN'T (CCH) ¶ 9361, at 9034. All these agreements may now be invalid. *See* note 128 and accompanying text *supra*. *See also* EN. USERS REP. (BNA) Current Report, Oct. 16, 1980, at 5, *and* note 166 *supra*.

171. Wall St. J., Oct. 15, 1980, at 16, col. 3. *See* 1 EN. MNGM'T (CCH) Report Letter, Oct. 21, 1980, at 1-2.

ministration and enforcement. The prospect of uncontrolled inflation led the government to issue tight controls over the economy under the authority of the Stabilization Act. By 1973, the oil industry was subject to special rules. As a result of the oil embargo of 1973 and the concern over fuel shortages, the government formulated a mandatory allocation program through the EPAA. This program was intended to be temporary only; a response to a specific situation. Then, in order to centralize the administration of energy policy, in particular price regulation and allocation of petroleum, the government established a series of agencies culminating in the DOE. In fact, none of these agencies was a truly coordinating body, and all of them were severely deficient in their ability to enforce and administer the regulations. The administrative program has been hampered by the complexity and ambiguity of the regulations, and by the inability of the agencies to interpret them, or to follow established rulemaking procedures. Moreover, the enforcement effort has been impeded by the controversy surrounding both the ability of the DOE to settle with companies and the nature of these settlements. It appears that the DOE has assumed powers that were not explicitly delegated to it under the Stabilization Act or its successor legislation.

Although the EPAA is due to expire in 1981, its turbulent history will "rule us from the grave" if its lessons are not learned. It is simplistic to pretend to regulate such a diverse and complex sector of the economy as the petroleum industry, which is already subject to external pressures over which the government has no control, on the basis of legislation which was intended to be temporary only.

Detailed regulation of an industry should be developed within the context of a coherent strategy. Energy policy needs to be considered carefully in the light of long term objectives. Its administration should be consistent, not subject to changing winds of politics and fashionable theories. Above all, Congress should consider carefully the implications of its actions. The delegation of sweeping powers of enforcement to the Executive, with no attempt to limit or define them, is an abdication of responsibility by the Legislature. This article has shown that laws regulating the petroleum industry have been neither enforceable, nor properly enforced. Future drafters of energy legislation should beware for "those who cannot remember the past are condemned to fulfill it."[172]

HELEN S. ROSS

COMMENTS

McKinney v. National Dairy Council:[1] The Employee at Will Relationship in Massachusetts

The majority of employees in the United States are employed as employees at will.[2] Employers have traditionally been free to terminate employees at will with or without cause.[3] Consequently, harsh consequences have sometimes resulted because of the common law rule granting employers such broad discretion in the termination of their workers.[4]

As a result, commentators have criticized the employee at will doctrine[5] and some courts have attempted to change it.[6] The multiple ex-

1. 491 F. Supp. 1108 (D. Mass. 1980).

2. Approximately 2/3 of the employees are employees at will, with the remainder of the American work force composed primarily of union and government employees. *See* U.S. BUREAU OF THE CENSUS, DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES: 1979, at 392 (table 644) (total labor force); *id.* at 427 (table 704) (union membership); *id.* at 313 (table 509) (government employees).

3. *See, e.g.*, Davis v. Williams, 617 F.2d 1100 (5th Cir. 1980) (employment at will may be terminated by employer or employee at any time); Hoopes v. Equifax, Inc., 611 F.2d 134 (6th Cir. 1979) (oral contract between parties that does not contain provision as to duration is terminable at will of either party); Schroeder v. Dayton-Hudson Corp., 448 F. Supp. 910 (E.D. Mich. 1978) (employment at will relationship may be terminated by either party with or without cause). 9 S. WILLISTON, A TREATISE ON THE LAW OF CONTRACTS § 1017, at 129-130 (3d ed. 1967). This is in contrast to the protection afforded unionized workers, *see* M. TROTTA, ARBITRATION OF LABOR-MANAGEMENT DISPUTES 230-38 (1974); and the protection given government employees, *see* Chaturvedi, *Legal Protection Available To Federal Employees Against Wrongful Dismissal*, 63 NW. U.L. REV. 287 (1968); J. WEISBERGER, JOB SECURITY AND PUBLIC EMPLOYEES (2d ed. 1973).

4. *See, e.g.*, Taylor v. Brighton Corp., 616 F.2d 256 (6th Cir. 1980) (employee discharged for reporting employer's violation of safety regulations has no claim for relief); Green v. Ameranda-Hess Corp., 612 F.2d 212 (5th Cir. 1980) (employee discharged for pursuing workmen's compensation claim has no cause of action); Hablas v. Armour & Co., 270 F.2d 71 (8th Cir. 1959) (employee discharged without cause after 45 years of employment and one year prior to retirement has no cause of action).

5. *See, e.g.*, Blades, *Employment At Will vs. Individual Freedom: On Limiting the Abusive Exercise of Employee Power*, 67 COLUM. L. REV. 1404 (1967); Blumrosen, *Workers Rights Against Employers and Unions*, 24 RUTGERS L. REV. 480 (1970); Note, *Protecting At Will Employees Against Wrongful Discharge: The Duty To Terminate Only In Good Faith*, 93 HARV. L. REV. 1816 (1980).

6. *See, e.g.*, Frampton v. Central Indiana Gas Co., 260 Ind. 249, 297 N.E.2d 425 (1973) (discharging an employee for filing a workmen's compensation claim is a breach of the employee

ceptions carved into the traditional definition of the employee at will relationship has resulted in much confusion and uncertainty. Thus, trial courts relying on the higher court decisions have experienced difficulty in interpreting the employee at will doctrine.[7] It has also caused problems for the federal district court judges who interpret these same state court decisions.[8] *McKinney v. National Dairy Council*[9] is a recent federal decision that interpreted this confusing doctrine.

In *McKinney*, the United States District Court of the District of Massachusetts held that the plaintiff, an employee at will, was wrongfully terminated by the defendant, his employer.[10] The court interpreted Massachusetts law as prohibiting an employer from discharging an employee at will because of his age.[11] To date, this is the only court which interpreted Massachusetts law to mean that firing an employee at will based on age constituted a breach of the employment relationship.

The purpose of this Comment is to determine whether the *McKinney* court properly interpreted Massachusetts law concerning the employee at will doctrine. This will entail an examination of the status of the employee at will doctrine as interpreted by the Commonwealth's courts. After presenting a brief overview of the employee at will doctrine, the facts and holding of *McKinney* will be discussed. Next, Massachusetts decisions interpreting the doctrine will be analyzed.[12] This Comment will conclude that the *McKinney* decision is inconsistent with Massachusetts law concerning the employee at will doctrine. As a result, the federal district court, rather than the Massachusetts Supreme Judicial Court, altered Massachusetts law.

I. THE EMPLOYMENT AT WILL DOCTRINE

A. History

The view that an employer, absent an express provision in the contract, can discharge an employee with or without cause has been recognized in the United States since the latter part of the nineteenth

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at will relationship); Petermann v. Teamsters Local 396, 174 Cal. App.2d 184, 344 P.2d 25 (1959) (discharging an employee for refusal to commit perjury is a breach of employee at will relationship).

7. For a thorough discussion of the doctrine of stare decisis, *see, e.g.*, Deutsch, *Precedent and Adjudication*, 83 YALE L. J. 1553 (1974); Hardisty, *Reflections On Stare Decisis*, IND. L. J. 41 (1979); Traynor, *The Limits of Judicial Creativity*, 29 HASTING L.J. 1025 (1978).

8. A federal district court judge is required to interpret substantive law according to the law of the forum state. *See, e.g.*, Erie R.R. v. Tompkins, 304 U.S. 64 (1938); Guaranty Trust Co. v. York, 326 U.S. 99 (1945).

9. 491 F. Supp. 1108 (D.Mass. 1980).

10. *Id.* at 1123.

11. *Id.* at 1121.

12. This analysis will include First Circuit Court of Appeals cases that have interpreted employee at will contracts according to Massachusetts law.

century.[13] Although this rule was a departure from the common law,[14] it quickly gained almost universal acceptance.[15] A publication entitled *A Treatise on the Law of Master and Servant*[16] set out a concept that was to govern the employer/employee relationship in the United States. Here the author noted that:

> [t]he rule is inflexible that a general or indefinite hiring is prima facie a hiring at will, and if the servant seeks to make it out a yearly hiring, the burden is upon him to establish it by proof. A hiring at so much a day, week, month or year, no time being specified, is an indefinite hiring, and so presumption attaches that it was for a day even. . . .[17]

This position was eventually endorsed by the United States Supreme Court. In *Coppage v. Kansas,*[18] the leading employment case of the early twentieth century, the Court refused to allow any outside interference with the right of the parties to dictate the terms of their employment agreement.[19] The Court questioned the constitutionality of a statute forbidding an employer from forcing an employee to agree, as a condition of employment, not to join a union.[20] The Court struck down the statute holding that employers have an absolute right to terminate employees.[21] The Court recognized that employers normally enjoy an advantageous bargaining position in employment arrangements, but refused to allow any attempt to equalize the position.[22] Rather, the Court determined that inequality was an inevitable result in a society that recognizes freedom of contract and private property.[23]

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13. *See* 1 C. LABATT, COMMENTARIES ON THE LAW OF MASTER AND SERVANT § 159 (2d ed. 1913); Blumrosen, *supra* note 5, at 480.

14. Prior to the latter part of the nineteenth century there existed a presumption that an employee was hired for a period of one year. An employer was prohibited from discharging an employee during this time unless he could show just cause. This theory of employment evolved from feudal times when there had existed a master-servant relationship, a relationship that imposed rights and obligations on both parties. *See* C. LABATT, *supra* note 13; J. KENT, COMMENTARIES ON AMERICAN LAW 258-66.

15. Some courts continued to follow the common law rule. *See, e.g.*, Moline Lumber Co. v. Harrison, 28 Ark. 260, 194 S.W. 25 (1917); Rosenberger v. Pacific Coast Ry., 111 Cal. 313, 43 P. 963 (1896); Note, *Implied Contract Rights to Job Security,* 26 STAN. L. REV. 335, 341 n. 50 (1974).

16. H. WOOD, A TREATISE ON THE LAW OF MASTER AND SERVANT (1877).

17. *Id.* at 272. For a discussion of the lack of authority to support Wood's position, *see* Note, *supra* note 15, at 341-43.

18. 236 U.S. 1 (1915).

19. *Id. See also* Adair v. United States, 208 U.S. 161 (1908), where the Court struck down a federal statute that barred interstate carriers from dismissing employees for their union membership. The Court held that because the employee could quit his job for any reason, the employer should have the same right to discharge the employee for any reason. *Id.* at 175.

20. Coppage v. Kansas, 236 U.S. 1, 3 (1915).

21. *Id.* at 19-20.

22. *Id.* at 21-22.

23. *Id.* at 17. As the majority opinion provided:

> Indeed a little reflection will show that wherever the right of private property and the right of free contract co-exist, each party when contracting is inevitably more or less in-

The fact that the *Coppage* Court chose to ignore the inequality existing between employer and employees reflects the predominant economic philosophy of the period. This was a time of great industrial and economic growth in America,[24] and to facilitate this growth, laissez-faire and economic individualism were the philosophies adopted by the Court. However, these nineteenth century conditions and principles justifying the terminable at will rule have subsequently changed. In all bargaining relationships, including those between employer and employees, total freedom of contract has given way to legislative and judicial intervention in an attempt to insure minimum standards of fairness and equality.[25] In some instances, the employer's unbridled right to manage his business is being balanced with the employee's right to be protected from unjust discharges.[26] This balancing approach has affected the employee at will relationship in that courts are examining the rights of the parties involved.[27]

B. Judicial Modifications Of The Employee At Will Doctrine

Some courts have attempted to avoid the potentially harsh results of the employee at will doctrine by creating alternatives to it. One alternative permits employees to recover damages if they can prove that their employer promised to retain them for a specific period of time, or if they can prove that they relied on their employer's promise of job security.[28] A second alternative allows employees to recover on a tort

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fluenced by the question whether he has much property, or little, or none; for the contract is made to the very end that each may gain something that he needs or desires more urgently than that which he proposes to give in exchange. And, since it is self-evident that, unless all things are held in common, some persons must have more property than others, it is from the nature of things impossible to uphold freedom of contract and the right of private property without at the same time recognizing as legitimate those inequalities of fortune that are the necessary result of the exercise of those rights. *Id.*

24. *See* R. HOFSTADTER, THE AGE OF REFORM (1955); E. KIRKLAND, INDUSTRY COMES OF AGE (1961); R. WEIBE, THE RESPONSE TO INDUSTRIALISM (1957).

25. *See* Jones, *The Jurisprudence of Contract*, 44 U. CIN. L. REV. 43 (1975); Note, *supra* note 5, at 1826-28.

26. *See, e.g.*, Phelps Dodge Corp. v. NLRB, 313 U.S. 177 (1941) "The course of discussions in this Court since *Adair v. United States* . . . and *Coppage v. Kansas* . . . have completely sapped those cases of their authority." *Id.* at 187; NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937) "Discrimination and coercion by employers against employees . . . is a proper subject for condemnation by competent legislative authority." *Id.* at 33. This balancing approach has also been reflected in federal and state legislation. *See* Civil Rights Act of 1964, § 703 (a), 42 U.S.C. § 2000e-2 (1976) (prohibiting an employee discharge on the basis of race, color, religion, sex or national origin); Fair Labor Standards Act of 1938, 29 U.S.C. §§ 201-19 (1976 & Supp. III 1979) (providing for minimum wage and hours); National Labor Relations Act of 1935, 29 U.S.C. §§ 151-69 (1976 & Supp. III 1979); CAL. LAB. CODE § 1102 (West 1971) (prohibiting discharge because of political activity); MASS. GEN. LAWS ANN. ch. 149, § 24K (West Supp. 1979) (prohibiting discharge because of physical handicap).

27. *See* notes 3 & 6 *supra*.

28. *See, e.g.*, Foley v. Community Oil Co., 64 F.R.D. 561, 563 (D.N.H. 1974) (at will

theory. In *Agis v. Howard Johnson Co.*,[29] the court held that waitresses who were fired alphabetically by a restaurateur in order to pressure them into supplying information on the theft of food in the restaurant, had a cause of action in tort. The court determined that the owner's conduct was "extreme and outrageous," and that he was liable for the intentional infliction of emotional distress.[30]

Courts have created a third alternative to an employee at will contract which is applied when the discharge of employees violates public policy.[31] In *Petermann v. Teamsters Local 396*,[32] the employer instructed an employee to perjure himself when he testified before a legislative hearing.[33] When the employee refused to do so, he was fired.[34] The court held that the termination would discourage future employees from testifying honestly, and therefore violated public policy.[35]

The final alternative to the terminable at will rule is a court imposed obligation on the employer to terminate an employee only in good faith. *Monge v. Beebe Rubber Co.*,[36] is a landmark case which represents the move toward the imposition of a good faith termination standard. In *Monge*, the plaintiff, a female factory worker, was fired because she refused to socialize with the factory foreman.[37] The court's opinion provided that "a termination by the employer of a contract of employment at will which is motivated by bad faith or malice or based on retaliation is not in the best interest of the economic system or the public good and constitutes a breach of the employment contract."[38] Here the court held that a "malicious" termination of the plaintiff had occurred; therefore a breach of the employee at will relationship resulted.[39]

After the *Monge* decision was rendered, the Massachusetts Supreme

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employee moving his family per employer's instructions may constitute consideration for contract between parties); Rabago-Alvarez v. Dart Indust., Inc., 55 Cal. App.3d 91, 97, 127 Cal. Rptr. 222, 225 (1976) (employer's promise not to discharge employee except for just cause if employee will accept position is valid consideration). McKinney tried to employ this tactic, however, he was unsuccessful. *See* note 66 *infra*.

29. 371 Mass. 140, 355 N.E.2d 315 (1976).

30. *Id.* at 144, 355 N.E.2d at 318.

31. *See* notes 135-144 and accompanying text *infra*. *But see* Martin v. Platt, Ind. App. , 386 N.E.2d 1026 (1979) (employee discharged for reporting that superiors were receiving kickbacks does not violate public policy); Geary v. United States Steel Corp., 456 Pa. 171, 319 A.2d 174 (1974) (employee discharged for protesting manufacture of defective product does not violate public policy).

32. 174 Cal. App.2d 184, 344 P.2d 25 (1959).

33. *Id.* at 187, 344 P.2d at 25-26.

34. *Id.*

35. *Id.* at 188-89, 344 P.2d at 27.

36. 114 N.H. 130, 316 A.2d 549 (1974).

37. *Id.* at 131, 316 A.2d at 550.

38. *Id.* at 133, 316 A.2d at 551.

39. *Id.* at 134, 316 A.2d at 552.

Judicial Court decided the case of *Fortune v. National Cash Register Co.*[40] In *Fortune,* the employer terminated an employee in order to avoid paying sales commissions owed.[41] The court, in ordering the employer to pay the commission, found that the termination was in bad faith.[42] Thus in *Fortune,* the Massachusetts court imposed a good faith requirement upon employers in deciding whether to terminate an employee.

II. *McKINNEY v. NATIONAL DAIRY COUNCIL* (NDC)[43]

A. Facts of the Case

In 1953 William McKinney placed an advertisement in a newspaper seeking employment as a sales representative.[44] In the advertisement McKinney indicated that he was interested in a position that would last the remainder of his working life.[45] NDC responded to this advertisement and contacted McKinney.[46]

During an interiew with the defendant, McKinney indicated that he had been offered a higher paying position with another corporation.[47] He also reiterated that he was primarily interested in a position which would last the remainder of his career; thus, job security, not salary, was his primary concern.[48] The defendant's representative stated that NDC's position would be more stable and enduring than the competitor's.[49] As a result of NDC's representation, McKinney accepted the job with them, thereby forfeiting the opportunity to earn an additional one thousand dollars per year.[50]

McKinney was employed by NDC until December, 1972, when they forced him to accept "early retirement," approximately five years prior to his projected retirement date.[51] Consequently, McKinney claimed he was wrongfully terminated by the defendant. He filed suit in the federal district court, maintaining that he and the defendant had entered into an oral contract in 1953 which guaranteed his employment until 1977.[52]

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40. 373 Mass. 96, 364 N.E.2d 1251 (1977).
41. *Id.* at 100, 364 N.E.2d at 1255.
42. *Id.* at 102-05, 364 N.E.2d at 1256-58.
43. 491 F. Supp. 1108 (D. Mass. 1980).
44. *Id.* at 1110.
45. The newspaper advertisement read: "Interested in change which would be the third and must be the last." *Id.*
46. *Id.*
47. *Id.*
48. *Id.*
49. *Id.*
50. *Id.*
51. *Id.* at 1116. McKinney's projected retirement date was April, 1977, when he would reach the age of 65; this was the normal retirement age for NDC employees. *Id.*
52. *Id.* at 1108.

The jury accepted this argument, finding in their answer to the first special interrogatory[53] that McKinney and NDC had entered into a contract "under the terms of which, in the absence of cause for termination, McKinney was to work for National Dairy Council either until he died, or until the National Dairy Council ceased to exist, or until his normal retirement date . . . whichever occurred first."[54] Moreover, the jury found that since the original employment contract between the parties had not been modified,[55] the defendant had breached the contract when it terminated the plaintiff prior to 1977.[56] The determinative factor relied upon by the jury in reaching this conclusion was the belief that McKinney was terminated because of his age.[57]

NDC moved for a judgment notwithstanding the verdict, asserting three major arguments to support their motion.[58] First, NDC maintained that the evidence insufficiently supported the jury's finding that McKinney was guaranteed employment until 1977.[59] NDC further contended that even assuming there was sufficient evidence to support a contract between the parties, the contract was nevertheless unenforceable because of the applicable statute of frauds.[60] Finally, NDC argued that absent a contract, McKinney was employed at will; therefore he could be terminated for any reason, including his age.[61] The court addressed these issues in response to the defendant's motion.

B. Holding

The *McKinney* court determined that there was sufficient evidence to support the jury's finding that McKinney and NDC had entered into a contract that expressly provided for McKinney's employment until

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53. At trial four special interrogatories were submitted to the jury, and each one was answered in favor of the plaintiff. The interrogatories had been submitted after consultation with the parties, and without objection thereto. *Id.* at 1109-11.

54. *Id.* at 1109 n.1.

55. Special interrogatory # 2 asked:

> Did the plaintiff, William B. McKinney, and the defendant, National Dairy Council, modify or amend the original contract in 1972, National Dairy Council offering and McKinney voluntarily accepting early retirement?
> Answer Yes or No. *No*

Id. at 1110 n.1.

56. Special interrogatory # 3 asked:

> Did the plaintiff sustain his burden of proof that the National Dairy Council committed a breach of its contract with William B. McKinney in December 1972?
> Answer Yes or No *Yes*

Id. at 1110 n.1.

57. *See* special interrogatory # 4. *Id.*

58. The fourth NDC argument, that McKinney voluntarily retired, was summarily dismissed by the court, and is not relevant for purposes of this Comment.

59. McKinney v. National Dairy Council, 491 F. Supp. 1108, 1110 (D. Mass. 1980).

60. *Id.* at 1111.

61. *Id.* at 1117.

1977.[62] The court agreed with the defendant's second argument, however, in deciding that the contract was unenforceable under the statute of frauds.[63] Because the contract was not in writing and because there was insufficient written memoranda to take it outside the statute, the original contract was invalid.[64] As a result, the court concluded that McKinney was an employee at will.[65]

Thus, the outcome of the case depended upon whether a breach of an employee at will relationship occurred when the employer terminated an employee because of his age.[66] The court held that under Massachusetts law[67] an employer does breach an employee at will relationship when it terminates an employee because of his age.[68] The basis for the *McKinney* court's decision was the Massachusetts Supreme Judicial Court case, *Fortune v. National Cash Register.*[69] The court interpreted this decision as representing a new turn in Massachusetts law, "which for the first time recognized an implied-in-law term of an at-will employment contract requiring good faith and fair dealing with respect to a decision to terminate the employment."[70] The court further reasoned that this good faith requirement, coupled with the prevailing public policy against age discrimination,[71] constituted an employment breach according to the *Fortune* decision.[72]

C. *The Role of the Erie Doctrine in McKinney v. National Dairy Council*[73]

If *McKinney* had been decided by the Supreme Judicial Court, then that court could properly render any decision, even if it was contrary to

62. *Id.* at 1110.

63. *Id.* at 1112-16. Judge Keeton decided this issue according to the New York Statute of Frauds, despite the plaintiff's contention that Massachusetts law should govern. The court cited Klaxon Co. v. Sentor Elec. Mfg. Co. 313 U.S. 487 (1941), for the proposition that a federal district court sitting in diversity is to apply the conflict of law rules of the forum state. He then looked to Massachusetts law, and predicted that the Supreme Judicial Court, based upon their decision in Choate, Hall & Stewart v. SCA Servs. Inc., 79 Mass. Adv. Sh. 1877, 392 N.E.2d 1045 (1979), would adopt the interest analysis test of the RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 141, 187, 188 (1971). The application of this test indicates that the most significant contacts for purposes of the statute of frauds were in New York. For example, New York was the place of contracting, the place of negotiation, the domicile of the plaintiff and the original place of employment. McKinney v. National Dairy Council, 491 F. Supp. at 1112-16.

64. *Id.* at 1117.

65. *Id.*

66. The plaintiff had also argued that the doctrine of promissory estoppel applied. The court avoided this issue, however, holding that because the plaintiff did not present this theory at trial, he could not now raise it in a post trial motion. *Id.* at 1116-17.

67. For the same reasons cited in note 61 *supra,* the court relied upon the RESTATEMENT (SECOND) OF CONFLICTS OF LAWS §§ 141, 187, 188 (1971). After applying this test for purposes of the breach of contract issue, however, the court held that Massachusetts law applied. *Id.* at 1117-18.

68. *Id.* at 1118-22.

69. 373 Mass. 96, 364 N.E.2d 1251 (1977).

70. McKinney v. National Dairy Council, 491 F. Supp. 1108, 1121-22 (D. Mass. 1980).

71. *Id.* at 1118-22.

72. *Id.*

73. Because *McKinney* was decided in a federal district court, a brief discussion of that court's authority when interpreting law of the forum state is necessary.

precedent.[74] The *McKinney* court, however, did not enjoy that same privilege. Since the United States Supreme Court decision in *Erie Railroad v. Tompkins,*[75] a federal court sitting in diversity must decide substantive law according to the law of the forum state.[76]

This procedural rule has been strictly construed by the federal courts.[77] Even when the law of the forum is uncertain or difficult to ascertain, the federal courts must avoid imposing their view of the law in place of the forum's law. The standard imposed on federal judges was articulated by Judge Franks in *Cooper v. American Airlines Inc.*[78] The standard is: "[w]hat would be the decision of reasonably intelligent lawyers sitting as judges of the highest [state] court, and fully conversant with [state] jurisprudence."[79]

A federal court must adhere to this standard despite any perceived inequity in the law of the forum state. As a Massachusetts Federal District Court asserted in *Pomerantz v. Clark:*[80]

> the never-to-be forgotten caution is that this Court is not free to render such decisions as seems to it equitable, just and in accordance with public policy .... A federal judge sitting in a diversity jurisdiction case has not a commission to do justice or to develop the law according to his, or what he believes to be the sounder, views.[81]

Therefore, a federal district court must follow the law of the forum, notwithstanding any predilections it may have. Thus, in *McKinney,* it is Massachusetts law that must be followed.

III. ANALYSIS

A. Fortune v. National Cash Register Co. *(NCR)*[82]

In *Fortune,* the employee claimed that he had been fired so that his employer would not have to pay him commissions already earned. Fortune was employed by NCR under a written salesman's contract which

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74. *See* note 7 *supra.*

75. 304 U.S. 64 (1938).

76. The *Erie* opinion provided: "Except in matters governed by the Federal Constitution or by acts of Congress, the law to be applied in any case is the law of the State. And whether the law of the State shall be declared by its Legislature in a statute or by its highest court in a decision is not a matter of federal concern." *Id.* at 78. *See also* Commissioner v. Bosch, 387 U.S. 456 (1967).

77. *See, e.g.,* Maclean v. Parkwood, 354 F.2d 700, 772 (1st Cir. 1966) (a federal judge "must proceed with caution to avoid imposing a duty on [the defendant] which would not be imposed by the courts of [the forum]"); City of Newark v. United States, 149 F. Supp. 917 (D.N.J. 1957) "It is the duty of a Federal Court simply to determine what the state law is, and not to attempt to make further changes in that law, even along the lines of an apparent tendency." *Id.* at 922.

78. 149 F.2d 355 (2d Cir. 1945).

79. *Id.* at 359.

80. 101 F. Supp. 341 (D. Mass. 1951).

81. *Id.* at 345. *See also* Loucks v. Star City Glass Co., 551 F.2d 745 (7th Cir. 1977). "[I]t is not our province as a federal appellate court to fashion for [a state] what we are certain many would say was a wise and progressive social policy." *Id.* at 746.

82. 373 Mass. 96, 364 N.E.2d 1251 (1977).

was terminable at will by either party upon written notice.[83] The contract provided that in addition to a weekly salary, Fortune was to receive a commission for sales made within his assigned territory.[84] Seventy-five percent of the commission was to be paid to Fortune at the time the order was placed, and the remaining twenty-five percent at the time of delivery. In this instance, because Fortune was terminated before delivery occurred, he was denied his remaining commission.[85] At the trial, the jury found that NCR acted in bad faith because they fired Fortune solely to avoid paying the commission.[86] The Supreme Judicial Court affirmed this verdict and held that Fortune's termination was motivated by NCR's "desire to pay Fortune as little of [his] bonus credit as [possible]."[87] The *Fortune* court concluded that terminating an employee to avoid paying him money owed amounted to bad faith and a breach of the at will relationship.[88]

The *McKinney* court expanded the *Fortune* court's definition of bad faith, by holding that bad faith was implicated when an employer terminated an at will employee because of his age.[89] Implicit in this conclusion is the concept that an employer is no longer free to terminate an employee at will without reason, or for any reason that the employer may deem appropriate. This extension of *Fortune* was necessary if McKinney were to recover against NDC because McKinney had neglected to satisfy the statutory requirements which might have afforded him a remedy.[90] Absent a statutory remedy, McKinney's only chance of recovery was the novel approach adopted by the *McKinney* court.

This broad interpretation of *Fortune* is flawed for two reasons. First, the *Fortune* court recognized that an employer needs a large amount of control over its work force. As the court expressly provided:

> [We do not] question the general principles that an employer is entitled to be motivated by and to serve its own legitimate business interests; that an employer must have wide latitude in deciding whom it will employ in the face of the uncertainties of the business world; and that an employer needs flexibility in the face of changing circumstances.[91]

The *McKinney* decision, however, detracts from an employer's ability to manage his work force.

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83. *Id.* at 97, 364 N.E.2d at 1253.
84. *Id.*
85. *Id.* at 100, 364 N.E.2d at 1254.
86. *Id.* at 100. 364 N.E.2d at 1255.
87. *Id.* at 105, 364 N.E.2d at 1258.
88. *Id.* at 106, 364 N.E.2d at 1258.
89. McKinney v. National Dairy Council, 491 F. Supp. 1108, 1121-23 (D. Mass. 1980).
90. *Id.* at 1120. *See* notes 133-144 and accompanying text *infra*.
91. Fortune v. National Cash Register Co., 373 Mass. 96, 101, 102. 364 N.E.2d 1251, 1256 (1977).

Second, the *Fortune* court specifically refused to extend its definition of bad faith beyond the situation that was before it. The court chose not to "speculate as to whether the good faith requirement is implicit in every contract for employment at will."[92] Rather, the court held only that "where the principal seeks to deprive the agent of all compensation by terminating the contractual relationship when the agent is on the brink of successfully completing the sale, the principal has acted in bad faith. . . ."[93] Thus, it is apparent that the *Fortune* court applied the "covenant of good faith" solely to insure that an employee would receive money he was owed by his employer. This limited application of this doctrine is consistent with prior Massachusetts decisions.[94]

B. Massachusetts Employee At Will Decisions Prior To Fortune

The Supreme Judicial Court has decided several cases interpreting employee at will relationships.[95] In the first decision in this area, *Harper v. Hassard,*[96] the employer hired the employee pursuant to a contract that provided that the employee would work exclusively for the employer for a period not exceeding three years.[97] After only two months, the employer fired the employee.[98] The *Harper* court held that since there was no express agreement by the employer to retain the employee for three years, and that since the facts did not support the conclusion that such an agreement was implied, the employer could terminate the employee at any time.[99]

In a later case with facts more favorable to the employee, the Supreme Judicial Court reached the same conclusion. In *Campion v. Boston & Maine Railroad,*[100] the employee responded to the employer's advertisement regarding the availability of a "permanent" position.[101] The employee was hired and worked for the employer for aproximately two years until he was fired for insubordination.[102] The employee

92. *Id.* at 104, 364 N.E.2d at 1257.

93. *Id.* at 104, 105, 364 N.E.2d at 1257. Indeed, the plaintiff, Fortune, provided in his brief: "The plaintiff does not deny that the defendant could under its contract with him terminate the contract at any time provided however that the defendant's purpose in so doing was not to deny him commissions." Brief for Plaintiff at 24, Fortune v. National Cash Register Co., 373 Mass. 96, 364 N.E.2d 1251 (1977).

94. To determine what constitutes good faith in Massachusetts, the court relied primarily on RLM Assocs. v. Carter Mfg. Corp., 356 Mass. 718 (1969). The court quoted from that decision: "Because the evidence permitted the conclusion that Carter's termination of the arrangement was in part based upon a desire to avoid paying a commission to RLM, we held that the question of bad faith was properly placed before the Jury." Fortune v. National Cash Register Co., 373 Mass. 96, 103, 364 N.E.2d 1251, 1256-57 (1977).

95. *See* notes 96-130 *infra.*

96. 113 Mass. 187 (1873).

97. *Id.* at 187.

98. *Id.*

99. *Id.* at 190.

100. 269 Mass. 579, 169 N.E. 499 (1927).

101. *Id.* at 580, 169 N.E. at 500.

102. *Id.*

brought suit, contending that he could not be fired because the employer had advertised the position as being "permanent."[103] Despite this fact, the *Campion* court held that the employer could discharge the employee at any time it no longer desired his services.[104]

As these decisions indicate, the Supreme Judicial Court has consistently held that an employee at will can be indiscriminantly discharged.[105] The only exception to this rule is exemplified in *Fortune,* where an employer discharges an employee to avoid paying the employee money that he had accrued but had not yet collected. When this occurred, the Supreme Judicial Court was willing to hold that an employer terminated an employee in bad faith, and had breached the employee at will relationship.[106]

This exception is illustrated in *Malloy v. Goldwater Seafood Corp.*[107] In *Malloy,* the employer hired the employee to act as its broker in New England to sell seafood on a commission basis.[108] The employment agreement provided that it could be terminated by the employer at any time without prior notice.[109] During the course of Malloy's employment, a demand for large orders of fish sticks developed.[110] To avoid paying Malloy the additional commissions he would have earned because of the sudden demand, the employer unilaterally instituted a new oral employment contract whereby commissions would not be paid.[111] Malloy brought suit alleging that the employer acted in bad

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103. *Id.* at 581, 169 N.E. at 500.

104. *Id.* at 582, 169 N.E. at 500.

105. *See, e.g.,* Fenton v. Federal Street Bldg. Trust, 310 Mass. 609, 39 N.E.2d 414 (1942) (without employment provision as to duration, employer or employee can terminate employment at any time); Mechanics Foundry & Mach. Co. v. Lynch, 236 Mass. 504, 128 N.E. 877 (1920) (every person has a legal right to dispose of his own labor as he wishes, and to work for whom he pleases).

106. O'Connell v. Casey, 206 Mass. 520, 92 N.E. 804 (1910) is the first example of this exception. In *O'Connell,* the defendant's husband authorized a broker to sell property at an agreed to price, for an agreed to commission. When the broker found a bona fide purchaser, the husband revoked the broker's authority, and sold the property himself. The court held:

> Where the principal revokes the broker's authority in 'bad faith' in order to secure to himself the fruits of the broker's work without paying him for it, the revocation, being in fraud of the broker's rights, is of no effect so far as those rights and the trades subsequently done is in legal contemplation done while the broker's authority remains unrevoked.

Id. at 528, 92 N.E. at 807. *See also* RLM Assocs. Inc. v. Carter Mfg. Corp., 356 Mass. 718 (1969) (defendant's termination of plaintiff was based upon a desire to avoid paying plaintiff a commission he had earned); Siegel v. Lowe, 327 Mass. 154, 97 N.E.2d 207 (1951) (evidence supported finding that real estate broker was cause of sale and therefore entitled to commission).

107. 338 Mass. 554, 156 N.E.2d 61 (1959).

108. *Id.* at 556, 156 N.E.2d at 62.

109. The terms of the plaintiff's employment are set out in a letter from the defendant's president to Malloy. It expressly provided that "[t]his arrangement can be terminated by us at any time without prior notice." *Id.* at 556, 156 N.E.2d at 62.

110. *Id.* at 557, 156 N.E.2d at 62-63.

111. *Id.* at 559, 156 N.E.2d at 64.

faith.[112] The *Malloy* court held that if "a motive in cancelling was to deprive the broker of commission he would otherwise receive it would be evidence of bad faith, and that if bad faith was found the plaintiff could have a commission."[113]

Thus, the Massachusetts courts have limited the finding of bad faith to cases involving the termination of employees to avoid paying commissions due.[114] This distinction between terminating employees to avoid paying them commissions versus the right of the employer to terminate for any other reason is illustrated in *Gebhard v. Royce Aluminum Corp.*[115] In *Gebhard* the employee was a sales representative, employed by Royce Aluminum on a terminable at will basis.[116] After four years of employment, Royce Aluminum decided to terminate the employee.[117] The employee brought suit contending that his termination was a breach of the employee at will relationship because it was done in bad faith.[118] The *Gebhard* court rejected this argument, holding: "It is difficult to see how an agreement at will can be terminated in bad faith, other than with respect to nonpayment of commissions or other matters already accrued.... It must be clear that when employment is at will the employer is free to terminate ... at any time.[119]

The Supreme Judicial Court has allowed employers to fire at will employees in all instances except when the termination was to avoid paying employees money owed. The *Fortune* decision is consistent with these cases. The "good faith" requirement in *Fortune* means only that employers cannot discharge employees to avoid paying commissions due.[120] With the exception of the *McKinney* decision, cases that have interpreted the *Fortune* opinion support this conclusion.

C. *Recent Interpretations of* Fortune

Recent decisions have relied upon *Fortune* for the proposition that an employer may not discharge an employee at will to prevent the employee from earning accrued commissions.[121] For example, in *Hor-*

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112. *Id.* at 561, 156 N.E.2d at 65.
113. *Id.* at 562, 156 N.E.2d at 65.
114. *See* notes 82-113 and accompanying text *supra.*
115. 296 F.2d 17 (1st Cir. 1961).
116. *Id.* at 18.
117. *Id.*
118. *Id.*
119. *Id.*
120. Fortune v. National Cash Register Co., 373 Mass. 96, 364 N.E.2d 1251 (1977). *See also* notes 82-119 and accompanying text *supra.*
121. *See, e.g.,* Hoefel v. Atlas Tack Corp., 581 F.2d 1 (1st Cir. 1978) (interpreting *Fortune* to mean an "implied covenant of good faith and fair dealing in employment contract violated by employer's termination of at will contract to avoid paying employee's commission...."). *Id.* at

rigan v. General Motors Corp.,[122] the employee alleged that the employer terminated the employment at will relationship in bad faith because the employee was attempting to prevent the imminent accrual of retirement benefits.[123] The employer argued that *Fortune* did not apply because the retirement benefits had not vested at the time of the employee's discharge.[124] Despite this argument, the court held that under *Fortune,* "termination which causes forfeiture ... of benefits almost earned equally constitutes bad faith."[125] Because the employee's complaint contained the claim that he was terminated to prevent the payment of these benefits, it stated a cause of action under *Fortune.*[126]

The most recent Supreme Judicial Court discussion of the *Fortune* decision occurred in *Zapatha v. Dairy Mart Inc.*[127] In *Zapatha,* the plaintiff and defendant entered into a franchise agreement in which the plaintiff would operate one of the defendant's stores.[128] The contract provided that either party could terminate their relationship without cause upon giving ninety days notice.[129] When the defendant chose to exercise this option, the plaintiff claimed that the relationship was terminated in bad faith.[130]

The Supreme Judicial Court disagreed with this contention, and held for the defendant. In so doing, the court discussed the meaning of the *Fortune* decision:

> [w]e held that where an employer terminated an at will employment contract in order to deprive its employee of a portion of a commission due to him the employer acted in bad faith. ... [We concluded] that the law imposed an obligation of good faith on the employer and that the employer violated that obligation in terminating the relationship in order to avoid the payment of amounts earned, but not yet payable.[131]

6; Cheney v. Automatic Sprinkler Corp. of America, 79 Mass. Adv. Sh. 179, 385 N.E.2d 961 (1979) "[W]e have recently held that an employer may not in bad faith discharge an employee employed at will, so as to prevent the employee from earning commissions which would have been payable in the normal course." *Id.* at 188, 385 N.E.2d at 996; A. John Cohen Agency Inc. v. Middlesex Ins. Co., 79 Mass. App. Ct. Adv. Sh. 1587, 392 N.E.2d 862 (1979) "[T]here is no allegation of conduct of the type found indicative of bad faith in *Fortune*; termination to avoid payment of bonus credits." *Id.* at 1593, 392 N.E.2d at 864.

122. No. 77-3302-7 (D. Mass. filed August, 1980).

123. *Id.* at 2.

124. *Id.* at 3.

125. *Id.*

126. The court held that "in *Fortune,* the Supreme Judicial Court observed that bad faith termination of benefits almost earned equally constituted breach of contract." *Id.*

127. 80 Mass. Adv. Sh. 1837.

128. *Id.* at 1837.

129. *Id.* at 1839.

130. *Id.* at 1841. The plaintiff also alleged that the termination was unconscionable, an unfair method of competition and deceptive act.

131. *Id.* at 1850-51.

The court held that Dairy Mart did not breach the good faith requirement because Zapatha was not terminated to avoid payment of money owed.[132] Thus, the *Zapatha* decision is entirely consistent with all other Massachusetts decisions.

D. McKinney *and Public Policy*

The *McKinney* court relied on *Fortune's* good faith requirement in deciding that NDC breached the employee at will relationship. The Supreme Judicial Court in *Fortune,* however, did not define good faith,[133] or "speculate as to whether the good faith requirement is implicit in every contract for employment at will."[134] Therefore, the *McKinney* court had to determine whether the dismissal of an employee because of age violated the covenant of good faith. In determining that a violation did occur, the court relied upon the public policy against age discrimination evidenced by federal and state statutes.[135] The *McKinney* court reasoned that since the Supreme Judicial Court in *Fortune* recognized an implied covenant of good faith in employee at will relationships, and since statutory law prohibits age discrimination, "it is but a short step to conclude that an action which violated such a clear public policy is a breach of implied covenant of good faith and fair dealing."[136]

The *McKinney* court cited one federal and two Massachusetts statutes to support its holding.[137] The federal statute provides that it shall be unlawful for an employer "to discharge any individual or otherwise discriminate against any individual . . . because of his age."[138] The statute further provides, however, that plaintiffs shall have a civil remedy only if they satisfy certain time and notice requirements.[139] Plaintiffs who fail to meet these requirements are denied access to the courts.[140] Since McKinney did not fulfill these requirements,

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132. *Id.* at 1853.
133. Fortune v. National Cash Register Co., 373 Mass. 96, 364 N.E.2d 1251 (1977).
134. *Id.* at 104, 364 N.E.2d at 1257.
135. McKinney v. National Dairy Council, 491 F. Supp. 1108, 1118-22 (D. Mass. 1980).
136. *Id.* at 1121.
137. *Id.* at 1118-22.
138. Age Discrimination in Employment, § 102, 29 U.S.C. § 623(a) (1) (1967).
139. 29 U.S.C. § 626 (d) (1967) provides:

> No civil action may be commenced by any individual under this section [623] until the individual has given the Secretary [of labor] not less than sixty days notice of an intent to file such action. Such notice shall be filed—
>
> 1) within one hundred and eighty days after the alleged unlawful practice occurred, ... Upon receiving notice of intent to sue, the Secretary shall promptly notify all persons named therein as prospective defendants in the action and shall promptly seek to eliminate any alleged unlawful practice by informal methods of conciliation, conference, and persuasion.

140. *See, e.g.,* Reich v. Dow Badische Co., 575 F.2d 363 (2d Cir. 1978) (failure to meet 60 day notice requirement of the Age Discrimination in Employment Act terminates employee's right to

he could not seek a civil remedy through this statute. Analogous procedural requirements prohibited McKinney from recovering in a civil suit based on the Massachusetts age discrimination statutes.[141]

These three age discrimination statutes are part of comprehensive legislative schemes that provide their own specific procedures and remedies. In respecting the legislatures' intentions, courts have not allowed plaintiffs to obtain statutory relief when they do not follow the prescribed procedures.[142] The *McKinney* court circumvented the requirements of these three statutes by coupling the policy against age discrimination with the implied covenant of good faith.[143] The court concluded that these two concepts, considered together, amount to a

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commence private civil action); Benima v. Smithsonian Inst., 471 F. Supp. 62 (D. Mass. 1979) (plaintiff must notify Secretary of Labor of intent to sue in civil suit under Age Discrimination in Employment Act within 60 days if suit is to be allowed); Woodford v. Kenney Shoe Corp., 369 F. Supp. 911 (N.D. Ga. 1973) (plaintiff may not maintain a civil suit under Age Discrimination in Employment Act unless he has notified Secretary of Labor of his intent, and allowed Secretary an opportunity to eliminate dispute by conciliation and persuasion). In addition, in Massachusetts, application to the Massachusetts Commission Against Discrimination is a prerequisite to the filing of an action under 29 U.S.C. 623 (1967), and such application must be made within six months after the act complained of. *See* Fitzgerald v. New England Tel. & Tel. Co., 437 F. Supp. 635 (D. Mass. 1977).

141. Unlawful Discrimination Against Race, Color, Religious Creed, National Origin Or Ancestry, MASS. GEN. LAWS ANN. ch. 151B, § 4 (West 1971), provides that it is unlawful for an employer to discharge an employee because of his age: "It shall be an unlawful practice: 1. For an employer . . . because of the . . . age . . . of any individual . . . to discharge from employment such individual or to discriminate against such individual . . . unless based upon a bona fide occupational qualification." *Id.* Sections 5, 6 and 9, however, require plaintiffs to file their grievance before the appropriate Massachusetts agency, and court review may be had only upon appeal from the agency decision. *Id.* §§ 5, 6 & 9. Likewise, MASS. GEN. LAWS ANN. ch. 149, § 24A (West 1971), entitled Discrimination Against Certain Persons In Employment On Account Of Age, does not provide a civil remedy. The statute reads: "Whoever dismisses from employment any person between the ages of forty-five and sixty-five, or refuses to employ such person because of his age, shall be punished by a fine of not more than five hundred dollars." *Id.* This conclusion was reached by the Supreme Judicial Court in Johnson v. United States Steel Corp., 348 Mass. 168, 202 N.E.2d 816 (1964). In *Johnson*, the defendant discharged the plaintiff at age sixty-three without cause. The plaintiff contended that this clearly violated MASS. GEN. LAWS ANN. ch. 149, § 24A (West 1971), and the court agreed. Despite this fact, the court held that the plaintiff did not have a civil remedy because the statute did not provide for one. "Nowhere in c. 149 is any express civil remedy provided for the violation of Sec. 24A. And there is no basis for implying one." *Id.* at 169, 202 N.E.2d at 817.

142. Indeed, Judge Keeton recognized this, providing in his opinion:

> The remedial schemes condition the relief they grant upon compliance with certain conditions, such as timely filing of a complaint and submission of a complaint to an administrative agency. These statutory prerequisites to relief would be circumvented by the recognition of a cause of action for breach of contract based on a violation of the policy the statutes enumerate. Moreover, it may reasonably be argued that the remedial schemes would have been unnecessary had the statutes manifested an intent that they augment common law rights. The remedial schemes are the product of the respective legislatures weighing and balancing of competing concerns of employer and employee. Courts should not lightly undertake action that would alter the balance the legislatures have struck.

McKinney v. National Dairy Council, 491 F. Supp. 1108, 1120 (D. Mass. 1980).

143. *Id.* at 1118-21.

breach of the employee at will relationship.[144] This conclusion is erroneous not only because of the Supreme Judicial Court's narrow interpretation of what constitutes a breach of good faith, but also because it ignores the intent of the legislatures that enacted the statutes by sidestepping the procedural prerequisites for relief.

CONCLUSION

The *McKinney* decision may be consistent with the current trend in contract law. In this area, legislative and judicial impositions of minimum standards of fairness are commonplace.[145] The decision may also be consistent with the prevailing trend regarding the employee at will doctrine. Courts have been reluctant to endorse the occasional harshness that the doctrine can create for discharged employees.[146]

The *McKinney* decision is not, however, consistent with the law in Massachusetts. Without exception, the Supreme Judicial Court has held that it is only when employees are terminated to avoid paying them commissions will a breach of the employee at will relationship occur.[147] In applying the good faith doctrine in the *McKinney* case, the court misinterpreted the precedent which it was obligated to follow.[148]

While this decision may appeal to concepts of fairness, the federal court overstepped its authority.[149] It is the Supreme Judicial Court's right to decide when the termination of an employee amounts to a breach of the at will relationship. Until that court chooses to do so the federal courts are bound by Massachusetts law. According to Massachusetts law, National Dairy Council did not breach the employee at will relationship when they chose to terminate William McKinney.

JOHN P. DEDON

144. *Id.*
145. *See* notes 25-27 and accompanying text *supra.*
146. *See* notes 4-6 and accompanying text *supra.*
147. *See* notes 82-132 and accompanying text *supra.*
148. *Id.*
149. *Id.*

Lydon v. Commonwealth: Double Jeopardy and the De Novo System — Challenging the Sufficiency of the Evidence Presented at the Original Trial

> *The right to a fair trial is a fundamental liberty secured by the Fourteenth Amendment. . . . The presumption of innocence, although not articulated in the Constitution, is a basic component of a fair trial under our system of criminal justice. . . .*
>
> *To implement the presumption, courts must be alert to factors that may undermine the fairness of the fact-finding process. In the administration of criminal justice, courts must carefully guard against dilution of the principle that guilt is to be determined by probative evidence and beyond a reasonable doubt.*[1]

Massachusetts maintains a two-tiered system for trying criminal defendants. A defendant tried in the first tier is provided with a jury trial in the first instance, unless he files a written waiver and consents to a bench trial.[2] The first instance jury trial acts as a final determination of guilt or innocence, with the defendant having a statutory right to appellate review therefrom.[3] A defendant who elects a bench trial in the first instance, however, is limited to appealing for a trial de novo if he is dissatisfied with the outcome of the bench trial.[4] He is only granted appellate review based upon the record of the second trial.[5]

The constitutionality of this procedure was recently challenged in *Lydon v. Commonwealth.*[6] The challenge was based upon the United States Supreme Court's decision in *Burks v. United States.*[7] In *Burks*

1. Estelle v. Williams, 425 U.S. 501, 503 (1975).
2. MASS. ANN. LAWS ch. 218, § 26A (Michie/Law. Co-op Supp. 1980).
3. *Id. See also* MASS. ANN. LAWS ch. 218, § 27A (Michie/Law. Co-op Supp. 1980).
4. MASS. ANN. LAWS ch. 218, §§ 26A, 27A (Michie/Law. Co-op Supp. 1980); MASS. ANN. LAWS ch. 278, §18 (Michie/Law. Co-op Supp. 1980).
5. *See* note 4 *supra. See generally* Lydon v. Commonwealth, 80 Mass. Adv. Sh. 1915, 409 N.E.2d 745 (1980).
6. 80 Mass. Adv. Sh. 1915, 409 N.E.2d 745 (1980).
7. 437 U.S. 1 (1978).

the court departed from its prior position[8] and held that the double jeopardy clause barred the reprosecution of a defendant whose conviction was reversed due to insufficient evidence, as distinguished from trial error.[9] In *Lydon,* the defendants, who had elected a bench trial in the first instance,[10] claimed that they had been convicted on legally insufficient evidence and that to try them again would be a violation of the double jeopardy clause, as interpreted by the Supreme Court in *Burks.*[11] The Massachusetts Supreme Judicial Court rejected the defendants' challenge primarily on two grounds. First, it held that the defendants had, in effect, waived their rights to claim a double jeopardy violation.[12] It then distinguished *Burks,* thereby limiting its application to the Massachusetts criminal judicial system.[13] This decision not only affects the rights of a substantial number of defendants in Massachusetts,[14] but may have ramifications for those in many other states.[15]

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8. *Id.* at 10. *See* notes 104-07 and accompanying text *infra.*

9. *Id.* at 14-18. *See* notes 108-10 and accompanying text *infra. Burks* was decided as a federal question, however, the decision was made applicable to the states by Green v. Massey, 437 U.S. 19 (1978).

10. 80 Mass. Adv. Sh. at 1916, 409 N.E.2d at 747.

11. *Id.* at 1915-16, 409 N.E.2d at 748-49.

12. *Id.* at 1918, 409 N.E.2d at 748.

13. *Id.* at 1918-19, 409 N.E.2d at 748-49. Two companion cases were decided by the court on the same day. In Gibson v. Commonwealth, 80 Mass. Adv. Sh. 1933, 409 N.E.2d 741 (1980), the court rejected a claim similar to the one presented in *Lydon.* However, *Gibson* arose prior to 1978 when the de novo system was reformed. *See* notes 45-56 and accompanying text *infra.* As such, the defendant was not given the choice of having a jury in the first instance with the right to appellate review therefrom. The court held that the principles of *Burks* applied only where an appellate court had made a determination regarding the sufficiency of the evidence. *Id.* at 1935, 409 N.E.2d at 755. Therefore, there was no forum in Massachusetts in which to make such a determination, *Burks* was inapplicable. *Id.*

In A Juvenile v. Commonwealth, 80 Mass. Adv. Sh. 1939, 409 N.E.2d 755 (1980), the court was again faced with a case arising before the 1978 court reform. The procedure for juveniles was similar to that undergone by adults. *See* MASS. ANN. LAWS ch. 119, § 54 (Michie/Law. Co-op 1975); MASS. ANN. LAWS ch. 119, § 56 (Michie/Law. Co-op 1975). In *A Juvenile,* the court held that "the juvenile's double jeopardy argument must fall. His situation is not significantly different from the defendant's in *Gibson.*" 80 Mass. Adv. Sh. at 1942-43, 409 N.E.2d at 757. The system in effect today for treating juveniles is substantially the same as the two-tiered system in effect for trying adults. *Compare* MASS. ANN. LAWS ch. 119, § 55A (Michie/Law. Co-op 1980), *with* MASS. ANN. LAWS ch. 218, §§ 26A, 27A (Michie/Law. Co-op 1980).

14. A study done from January 1, 1979 through June 30, 1979, indicated that 91% of the people tried in the first tier elected to waive their right to a jury trial in the first instance. [1979] OFF. CHIEF ADM. JUSTICE OF THE TR. CT. ANN. REP. 35 & 37, *cited in* Lydon v. Commonwealth, 80 Mass. Adv. Sh. 1915, 1918 n.5, 409 N.E.2d 745, 748 n.5 (1980).

15. The two-tiered system of trying criminal defendants has been enacted in various forms. The common characteristic of the following state procedures is the requirement that a defendant tried in the first tier is limited to a trial de novo as his sole avenue of relief therefrom. ARK. STAT. ANN. §§ 44-501 to -509 (1977); IND. CODE ANN. § 35-1-13-3 (Burns, 1979); KAN. STAT. ANN. § 22-3610 (1974); ME. DIST. CT. CRIM. R. 37, 40; MD. CTS. & JUD. PROC. CODE ANN. § 12-401 (1980); MICH. STAT. ANN. § 28-1226 (1978); MISS. CODE ANN. § 99-35-1 (1973); MONT. REV. CODES ANN. §§ 46-17-311 to -409 (1979); NEV. REV. STAT. § 189.010 (1973); N.H. REV. STAT. ANN. §§ 502.18 (Supp. 1973), 502-A:11 (Supp. 1979), 502-A:12 (1968), 599:1 (1974); N.M. STAT. ANN. §§

This Comment will begin by presenting the procedural history and holding in *Lydon v. Commonwealth.*[16] Section II will examine the historical background of the decision. This will include a review of the Massachusetts de novo system, and an examination of two Supreme Court cases which rejected constitutional challenges to both the Kentucky de novo system[17] and the Massachusetts system in effect prior to 1978.[18] This section will then focus upon the Supreme Court's decision in *Burks v. United States.*[19] The *Lydon* decision will be analyzed in Section III. This will include an examination of the majority's treatment of the effectiveness of the defendants' waiver of their constitutional rights and an analysis of the decision in light of the history and purpose of the double jeopardy clause. This Comment will conclude that the majority misconstrued the decision in *Burks* and improperly rejected the defendants' double jeopardy claim.

I. STATEMENT OF THE CASE

A. *Procedural History*[20]

The defendants in *Lydon v. Commonwealth*[21] waived their right to a jury trial in the first instance, electing to have a bench trial in the Boston Municipal Court.[22] After the prosecution rested its case at the bench trial, the defendants refrained from putting on a defense. Instead, they argued that the evidence presented by the Commonwealth did not support a finding of guilt. The judge rejected this contention and found both defendants guilty.[23] They then exercised their right to a trial de

35-13-2(A), 35-15-10 (1978); N.C. GEN. STAT. § 15A-1431 (1979); N.D. R. CRIM. P. 37(g); TEXAS CRIM. PRO. CODE ANN. tits. 44.17, 45.10 (Vernon, 1979); VA. CODE § 16.1-136 (Supp. 1980).

Minnesota provides a defendant with the right to appellate review if the trial judge was learned in the law. If he was not, the defendant has a right to a trial de novo. MINN. R. CRIM. P. 28.01.

The following states provide for appellate review of the first-tier trial if there is an adequate record of that proceeding, otherwise a defendant is limited to appealing for a trial de novo. ARIZ. REV. STAT. ANN. § 22-374 (1975); COLO. R. CRIM. P. 37(g); IDAHO CODE § 1-2213 (1979).

For a general discussion of how the lower tier courts operate *see* 47 AM. JUR. 2d, *Justices of the Peace,* §§ 49-120 (1969). For a general critique of these courts *see* Note, *Limiting Judicial Incompetence: The Due Process Right to a Legally Learned Judge in State Minor Court Criminal Proceedings,* 61 U. VA. L. REV. 1454 (1975); Robertson, *De Novo Should be Eliminated,* 56 MASS. L. Q. 347 (1971); Walker, *In Defense of De Novo,* 56 MASS. L. Q. 359 (1971).

16. 80 Mass. Adv. Sh. 1915, 409 N.E.2d 745 (1980).

17. Colten v. Kentucky, 407 U.S. 104 (1972).

18. Ludwig v. Massachusetts, 427 U.S. 618 (1976).

19. 437 U.S. 1 (1978).

20. As acknowledged by the court, the substantive aspect of the case is not pertinent to the issues involved, Lydon v. Commonwealth, 80 Mass. Adv. Sh. 1915, 1918, 409 N.E.2d 745, 748 (1980), therefore, they will not be considered in this article.

21. 80 Mass. Adv. Sh. 1915, 409 N.E.2d 745 (1980).

22. *Id.* at 1916, 409 N.E.2d at 746.

23. *Id.* at 1916, 409 N.E.2d at 747. The defendants were sentenced to two years in the house of correction. Brief for Respondent at 2, Lydon v. Commonwealth, 80 Mass. Adv. Sh. 1915, 409 N.E.2d 745 (1980).

novo. Before the second trial began they filed a motion to dismiss based upon the claim that the evidence presented at the bench trial was insufficient as a matter of law to support a finding of guilt and, therefore, that a new trial was barred by the double jeopardy clause. This motion was denied.[24] The defendants then filed a petition for relief in the single justice session of the Supreme Judicial Court.[25] The justice stayed the trial and, accepting the defendants' claim that the evidence at the bench trial did not warrant their convictions, reversed and reported the case to the full bench.[26]

B. The Holding

The *Lydon* majority held that the de novo system, as it existed in Massachusetts, did not create a situation in which the double jeopardy clause was implicated.[27] There were two primary rationales behind this holding. The first stemmed from the fact that the defendants had voluntarily chosen a bench trial and, in effect, had also chosen the subsequent de novo trial.[28] Although it was not articulated as such, presumably the majority reasoned that the defendants had waived their right to claim a double jeopardy violation.[29] In addition, the majority distinguished *Burks v. United States,*[30] stating that in *Burks* an *appellate court* had determined that there was insufficient evidence.[31] In Massachusetts there was no forum in the judicial process in which to make an appellate determination of the sufficiency of the evidence at the district court bench trial. Therefore, the court concluded that the *Burks* holding was inapplicable to the Massachusetts de novo system.[32]

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24. 80 Mass. Adv. Sh. at 1916, 409 N.E.2d at 746.

25. *Id. See* MASS. ANN. LAWS ch. 211, § 3 (Michie/Law. Co-op Supp. 1974).

26. Lydon v. Commonwealth, 80 Mass. Adv. Sh. 1915, 1916, 409 N.E.2d 745, 747 (1980). There were two questions reserved and reported to the full bench:

1. Is it a denial of a defendant's right not to be placed in double jeopardy to require him to go through a jury trial, requested by him without waiving his rights, when the evidence at the bench trial was insufficient to warrant a conviction?
2. Assuming that a jury trial in such an instance would be a denial of a defendant's right not to be placed in double jeopardy, may the issue of the sufficiency of the evidence at the bench trial be considered again at the trial court level, assuming, of course, that the judge at the bench trial has denied an appropriate request for a ruling that the evidence at the bench trial was insufficient?

Id. at 1916-17 n.3, 409 N.E.2d at 747 n.3. This article only focuses on the first of these two issues since the majority held that a trial de novo would not place a defendant in double jeopardy.

27. *Id.* at 1918, 409 N.E.2d at 748.

28. *Id.*

29. Later in the opinion the majority clearly set forth their argument in terms of waiver. They stated that "[w]e have never indicated that in making such an election [of a bench trial in the first instance] the defendant must have knowingly considered and voluntarily waived all potential errors of constitutional dimension." *Id.* at 1922, 409 N.E.2d at 750. The dissent also treated the majority's assertion as implicating a waiver argument. *Id.* at 1929-30, 409 N.E.2d at 754 (Liacos & Abrams, JJ., concurring in part and dissenting in part).

30. 437 U.S. 1 (1978).

31. 80 Mass. Adv. Sh. at 1919, 409 N.E.2d at 748-49.

32. *Id.* at 1919, 409 N.E.2d at 749. The lack of an appropriate forum to review the suffi-

The majority further justified its position by noting that the distinction between a convicted defendant and an acquitted defendant, in terms of double jeopardy principles, had long been established[33] and had recently been reconfirmed.[34] The opinion then responded to the argument that the state had no interest in retrying the defendants by stating that it was the defendants, and not the Commonwealth, who had sought a trial de novo.[35] According to the majority, the Commonwealth would have been content with the disposition of the district court.[36] It was noted that the two-tiered system had already withstood constitutional challenge and that it was "difficult to conceive that the Supreme Court intended in its *Burks* decision to hold, by implication, that such a widely adopted system for dealing with less serious crimes is unconstitutional."[37] The majority then listed certain advantages that accrue to a defendant who elects to have a bench trial followed by a jury trial.[38] Finally, the majority stated that,

> [a]llowing a defendant to have a trial de novo, like requiring "a criminal defendant to stand trial again after he has successfully invoked a statutory right of appeal to upset his first conviction[,] is not an act of governmental oppression of the sort against which the Double Jeopardy Clause was intended to protect."[39]

A vigorous dissent referred to the majority opinion as a "sophistical exercise."[40] In responding to the majority's argument that the defendants, by choosing a bench trial, had waived their constitutional right not to be twice placed in jeopardy, the dissent noted that the majority had made no provision to determine whether the defendants understood that they were waiving their right to immediate appellate review by their choice of a bench trial in the first instance.[41] Therefore, since there was no guarantee that the choice was made intelligently, the defendants

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ciency of the evidence provided the sole basis for the majority's holding in the companion case of Gibson v. Commonwealth, 80 Mass. Adv. Sh. 1933, 409 N.E.2d 741 (1980). *See* note 13 *supra*.

33. Lydon v. Commonwealth, 80 Mass. Adv. Sh. at 1921, 409 N.E.2d at 749, *citing* United States v. Ball, 163 U.S. 662 (1896).

34. 80 Mass. Adv. Sh. at 1921, 409 N.E.2d at 749, *citing* United States v. Scott, 437 U.S. 82 (1978).

35. 80 Mass. Adv. Sh. at 1921, 409 N.E.2d at 749-50.

36. *Id.* at 1921, 409 N.E.2d at 749.

37. *Id.* at 1922-23, 409 N.E.2d at 750. States that currently employ a form of the de novo system are listed at note 15, *supra*.

38. *Id.* at 1924, 409 N.E.2d at 751. The advantages listed by the majority were that:

> (a) bench trial serves as a means of discovery and recordation of the prosecutor's testimony. Indeed, the judge may find the defendant not guilty. That would end the matter. A bench trial takes less time than a jury trial, offering the defendant a less expensive and less time consuming process. And, if the defendant does not like the result, he may obtain a second chance . . . unfettered by the adverse decision previously made.

39. *Id.* at 1925, 409 N.E.2d at 751, *citing* United States v. Scott, 437 U.S. 82, 91 (1978).

40. 80 Mass. Adv. Sh. at 1930, 409 N.E.2d at 754 (Liacos & Abrams, JJ., concurring in part and dissenting in part).

41. *Id.*

could not be considered to have waived their right to claim a violation of their rights under the double jeopardy clause.[42]

The dissent also stated that by imposing the precondition of an appellate determination regarding the sufficiency of the evidence at the bench trial, the majority had disregarded the "substantive mandate of *Burks* and fixed upon a formal nicety wholly unrelated to the purposes of the double jeopardy clause."[43] The dissent concluded that the very evil that was supposedly prevented — forcing a defendant to endure a second trial — was exactly the situation now faced by the defendants.[44]

II. BACKGROUND OF THE *LYDON* DECISION

A. The Massachusetts De Novo System

The first tier of the Massachusetts de novo system consists of the district courts and the municipal court for the city of Boston.[45] These courts have original jurisdiction[46] of criminal offenses punishable by imprisonment for not more than five years.[47] Under the procedure in effect prior to 1978, a defendant who was charged with one of these offenses was required to undergo a bench trial in the district court. If dissatisfied with the outcome of the bench trial, the defendant could invoke his constitutional right to a jury trial by "appealing" for a trial de novo.[48] This appeal vacated the judgment of the bench trial.[49] Consequently, the whole case was tried anew, with a fresh introduction of evidence.[50]

This procedure was modified under the Court Reorganization Act of 1978.[51] Although for the most part the district courts' jurisdiction remained unchanged,[52] under the modification a defendant now has the

42. *Id.*

43. *Id.* at 1928, 409 N.E. 2d at 753.

44. *Id.*

45. MASS. ANN. LAWS ch. 218, § 1 (Michie/Law. Co-op 1974).

46. This jurisdiction is concurrent with that of the Superior Courts, which make up the second tier of the Massachusetts criminal court system. MASS. ANN. LAWS ch. 218, § 25 (Michie/Law. Co-op Supp. 1980).

47. *Id.* The actual offenses enumerated by the statute are "all violations of by-laws, orders, ordinances, rules and regulatons, made by cities, towns and public officers, all misdemeanors, except libels, all felonies punishable by imprisonment in the state prison for not more than five years, the crimes mentioned in sections sixteen, seventeen, eighteen, nineteen, twenty-eight and forty-nine of chapter two hundred and sixty-six, and the crimes of escape or attempt to escape from any penal institutions, forgery of a promissory note, or of an order for money or other property, and of uttering as true such a forged note or order, knowing the same to be forged."

48. MASS. ANN. LAWS ch. 278, § 18 (Michie/Law. Co-op Supp. 1980); MASS. ANN. LAWS ch. 218, § 27A (Michie/Law. Co-op 1974).

49. Enbinder v. Commonwealth, 368 Mass. 214, 330 N.E.2d 846, *cert. denied sub nom.* Enbinder v. Massachusetts, 423 U.S. 1024 (1975).

50. Mann v. Commonwealth, 359 Mass. 661, 271 N.E.2d 331 (1971).

51. 1978 Mass. Acts ch. 473.

52. The crime of escaping, or attempting to escape from any penal institute was added. MASS. ANN. LAWS ch. 218, § 26 (Michie/Law. Co-op Supp. 1980).

right to be tried by a jury in the first instance.[53] However, a defendant may elect a bench trial in the first instance, provided that he first file a written waiver of the jury trial.[54] If the defendant elects a jury trial at the outset and is dissatisfied with the judgment, appellate review is available at the intermediate level.[55] However, a defendant who elects a bench trial in the first instance, and is later dissatisfied with the outcome, must then proceed to a trial de novo in the district court. Appellate review is provided only on the basis of the record of the de novo trial.[56]

B. Prior Constitutional Challenges to the Two-Tier System

1. *Colten v. Kentucky*

Colten v. Kentucky[57] was the first case in which the United States Supreme Court considered the constitutionality of a state two-tiered system.[58] In the first tier court, Colton was found guilty of disorderly conduct and fined twenty dollars.[59] He then exercised his right to a trial de novo in the second tier where he was again found guilty and fined fifty dollars.[60] His conviction was affirmed by the Kentucky Court of Appeals,[61] whereupon he took a writ of certiorari to the United States Supreme Court. Colten claimed that the Kentucky system violated both the due process clause and the double jeopardy clause of the United States Constitution.[62]

The due process challenge was based upon the defendant's interpretation of *North Carolina v. Pearce*.[63] Colten claimed that *Pearce* barred

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53. MASS. ANN. LAWS ch. 218, § 26A (Michie/Law. Co-op Supp. 1980).

54. *Id.* This waiver will only be received by the court if the defendant is represented by counsel or has filed a written waiver of counsel. *Id.*

55. MASS. ANN. LAWS ch. 218, § 27(g) (Michie/Law. Co-op Supp. 1980).

56. MASS. ANN. LAWS ch. 218, §§ 26 & 27A (Michie/Law. Co-op Supp. 1980); MASS. ANN. LAWS ch. 278, § 18 (Michie/Law. Co-op Supp. 1980).

57. 407 U.S. 104 (1972).

58. In Callan v. Wilson, 127 U.S. 540 (1888), the Supreme Court considered the validity of the District of Columbia's two-tier system. Like the former Massachusetts procedure, it only provided for a jury trial in the second tier courts. The Supreme Court struck down the procedure, holding that, except in petty offenses, the right to an impartial jury is to be secured from the very first moment in whatever court. *Id.* at 557. In Ludwig v. Massachusetts, 427 U.S. 618 (1976), the Supreme Court distinguished the applicability of the *Callan* holding to a state two-tiered system based upon the fact that the right to a jury trial in a federal court was mandated by the Constitution, U.S. CONST. art. III, § 2, cl. 3, in addition to the sixth amendment. *Id.* at 629-30.

59. Colten v. Kentucky, 407 U.S. at 107-08.

60. *Id.* at 108.

61. Colten v. Commonwealth, 467 S.W.2d 374 (Ky. 1971).

62. Colten also claimed that his first amendment rights had been violated. He had stopped to help a friend who had been stopped by the police. He claimed that his actions were protected under the first amendment since he was disseminating and receiving information. The court stated that this was "a strained, near-frivolous contention." 407 U.S. at 109. Colten also claimed that the statute he was charged under, KY. REV. STAT. § 437.016(1)(6) (Supp. 1968), was impermissibly broad or vague. This too was rejected by the court. *Id.* at 108-10.

63. 395 U.S. 711 (1969).

stricter penalties following a successful appeal. In rejecting this claim the Supreme Court held that the critical factor in *Pearce,* which was absent in the Kentucky de novo system, was the element of vindictiveness, as exhibited by the purposeful use of enhanced penalties as a punishment for having successfully appealed the first conviction.[64] The Supreme Court noted that the second tier court was independent from the original court in which Colten was convicted.[65] No rationale was offered from which to conclude that the de novo court would deal any more strictly with those who exercise their right to a new trial.[66]

The Court also found that the de novo system was a simple, speedy, and inexpensive arrangement for dealing with less serious offenses. The system was not "designed or equipped to conduct error-free trials, or to insure full recognition of constitutional freedoms."[67] It was noted that the initial trial provided a defendant with the opportunity to learn about the prosecution's case without revealing his own since, even if found guilty, the trial de novo represented an independent determination of guilt or innocence.[68] In approving this system the Court stated that,

> in reality [the defendant's] choices are to accept the decision of the judge and the sentence imposed in the inferior court or to reject what in effect is no more than an offer in settlement of his case and seek the judgment of judge or jury in the superior court, with sentence to be determined by the full record made in that court.[69]

Finally, the Court noted that a defendant could avoid the whole procedure by pleading guilty and immediately securing a de novo trial.[70] The Court stated that, in light of these factors, "[w]e cannot say that the Kentucky trial de novo system, as such, is unconstitutional or that it presents hazards warranting the restraints called for in *North Carolina v. Pearce.*"[71] Thus it is evident that the Court did not intend to give sweeping approval to the de novo system. Rather, the decision was limited to the issue of whether enhanced penalties at the trial de novo violated the due process clause.[72]

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64. 407 U.S. at 116.
65. *Id.* at 116-17.
66. *Id.* at 117.
67. *Id., citing* Colten v. Commonwealth, 467 S.W.2d 374, 379 (Ky. 1971).
68. 407 U.S. at 117-18.
69. *Id.* at 119.
70. *Id.* at 118-19.
71. *Id.* at 119.
72. *Id.* Colten also contended that the double jeopardy clause prohibited the imposition of enhanced penalties at the trial de novo. The Court summarily dismissed this claim, stating that the same issue had been previously decided in *Pearce.*

The basis for the Court's decision in *Pearce,* however, was that the Constitution imposed "no limitations whatever upon the power to *retry* a defendant who has succeeded in getting his first conviction set aside." North Carolina v. Pearce, 395 U.S. 711, 720 (1969). This proposition was repudiated by the Supreme Court in Burks v. United States, 437 U.S. 1 (1978), *see* notes 101-02 *infra,* which undermines any reliance on *Colten* as indicative of the Supreme Court's willingness to uphold the de novo system in all respects.

2. *Ludwig v. Massachusetts*

In a split decision, the United States Supreme Court rejected a broader challenge to the de novo system in *Ludwig v. Massachusetts*.[73] There, the petitioner was challenging the procedure in effect prior to 1978, which required a defendant to submit to a full bench trial before he could appeal for a trial de novo before a jury.[74] The issues before the Court were: (1) whether the Constitution required that a defendant be afforded a jury trial in the first instance, and (2) whether the Massachusetts procedure violated the double jeopardy clause of the fifth amendment.[75]

Ludwig had been charged with driving so as to endanger the lives and safety of the public. Prior to the bench trial he moved for a speedy trial by jury. The motion was denied, and he was found guilty and fined twenty dollars.[76] He then appealed for a trial de novo. Prior to this trial the defendant filed a motion to dismiss on the grounds that he had been deprived of his federal constitutional right to a speedy jury trial and that he had already been placed in jeopardy. The motion was denied and Ludwig was again found guilty and fined twenty dollars.[77] The Massachusetts Supreme Judicial Court affirmed the conviction,[78] whereupon Ludwig appealed to the United States Supreme Court.

The Supreme Court first noted that the system did afford an accused charged with a serious offense the absolute right to a jury trial.[79] The real issue, according to the Court, was whether the de novo procedure unconstitutionally burdened the exercise of that right "(1) by imposing the financial cost of an additional trial; (2) by subjecting an accused to a potentially harsher sentence if he seeks a trial *de novo* in the second tier; and (3) by imposing the increased psychological and physical hardships of two trials."[80] Although the Court recognized that financial burdens did exist, it held that they did not impose an unconstitutional burden on the exercise of the right to a jury trial.[81] The accused could avert these costs by "admitting to sufficient findings of fact." This procedure requires that the trial court merely hear enough evidence to assure itself that there was probable cause to believe that the defendant was guilty.[82]

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73. 427 U.S. 618 (1976).
74. *See* notes 48-50 and accompanying text *supra*.
75. 427 U.S. at 620.
76. *Id.* at 623.
77. *Id.*
78. Commonwealth v. Ludwig, 368 Mass. 138, 330 N.E.2d 467 (1976).
79. 427 U.S. at 625.
80. *Id.* at 626.
81. *Id.*
82. This procedure achieves essentially the same result as pleading guilty in the Kentucky system. *See* note 70 and accompanying text *supra*. While the defendant preserves his right to appeal for a trial de novo, a conviction is entered. Ludwig v. Massachusetts, 427 U.S. at 621-22, *citing* 30 K. SMITH, MASSACHUSETTS PRACTICE, CRIMINAL PRACTICE AND PROCEDURE § 754 (1970).

The Court also noted that indigent defendants were under no additional burden because they were provided with counsel.[83] Finally, the Court justified the procedure based upon an argument utilized in *Colten*,[84] noting that the accused "may utilize [the bench trial] fruitfully as a discovery tool and find the strengths and weaknesses of the State's case against him."[85]

Regarding the issue of harsher penalties at the second tier trial, the Court concluded that *North Carolina v. Pearce*,[86] and *Colten v. Kentucky*,[87] established the principle that the "mere possibility" of a harsher sentence did not unconstitutionally burden the right to a trial by jury.[88] Although not "oblivious to the adverse psychological and physical effects that delay in obtaining the final adjudication of one's guilt or innocence may engender . . . ,"[89] the Court held that Ludwig had not presented any evidence to show that he would have obtained a quicker determination had Massachusetts not employed a de novo system.[90] Furthermore, the Court stated that "it is nearly always true that an accused may obtain a faster adjudication of his guilt or innocence by waiving a jury trial even in those states where he may have one in the first instance."[91]

The Court then turned to Ludwig's second contention that the de novo system violated the double jeopardy clause in that it forced an accused to be subjected to the risk of two trials. This argument was considered to be without substance, because the decision to secure a new trial rested with the accused alone.[92] Furthermore, it noted that

> [a] defendant who elects to be tried *de novo* in Massachusetts is in no different position than is a convicted defendant who successfully appeals on the basis of the trial record and gains a reversal of his conviction and a remand of his case for a new trial. Under these circumstances, it long has been clear that the State may reprosecute.[93]

The dissent took issue with the majority's conclusion that this burden on the exercise of one's right to a jury trial could withstand constitu-

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83. 427 U.S. at 627.
84. *See* note 68 and accompanying text *supra*.
85. 427 U.S. at 627.
86. 395 U.S. 771 (1969).
87. 407 U.S. 104 (1972).
88. 427 U.S. at 627.
89. *Id.* at 628.
90. *Id.* at 629.
91. *Id.*
92. *Id.* at 631.
93. *Id.* at 631-32, *citing* United States v. Ball, 163 U.S. 662 (1896). While this statement retains some validity, it must be remembered that in *Burks* the Supreme Court distinguished reversals based upon trial error from those based upon insufficient evidence. *See* notes 107-09 and accompanying text *infra*. In the latter situation, a remand for a new trial is no longer constitutionally permissible.

tional review. Greater emphasis was placed upon the financial and psychological burdens imposed upon the defendant.[94] Furthermore, the second trial was never the same as the first. Lawyers and witnesses are stale and the impeachment opportunities at the second trial would be exposed at the bench trial.[95] The first trial would influence cross-examination tactics and furthermore, strategy in a nonjury trial may be different than in a proceeding before a jury.[96] In addition, the procedure of admitting to sufficient facts did not adequately protect a defendant's rights since he was forced to admit to facts which may either be false or misleading.[97] The harm caused by this procedure was compounded by the fact that the initial proceeding, regardless of the availability of a trial de novo, would have an adverse effect on the defendant. The dissent noted that "[a]part from any legal consequence, the finding certainly tarnishes the defendant's reputation."[98] Furthermore, the inherent danger that the judge or jury at the second tier trial might be aware of the prior conviction, thereby compromising the presumption of innocence.[99] In conclusion, the dissent stated that "[t]he burden on the right to a jury trial imposed by Massachusetts is especially unacceptable because the Commonwealth has offered no legitimate justification for its *requirement* of a first-tier nonjury trial."[100]

C. *Burks v. United States*

Burks v. United States[101] involved a defendant who was tried and convicted in the United States District Court. The Court of Appeals for the Sixth Circuit reversed the conviction on the grounds that the evidence was insufficient to support a guilty verdict, and remanded the case "for a determination of whether a directed verdict of acquittal should be entered or a new trial ordered."[102] The defendant appealed this holding to the Supreme Court, contending that the appellate reversal was the "operative equivalent" to the judgment of acquittal by the district court which, had the district court so ruled, would have barred a second trial.[103]

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94. 427 U.S. at 635 (Stevens, Brennan, Marshall & Stewart, JJ., dissenting).
95. *Id.*
96. *Id.*
97. *Id.* at 636.
98. *Id.* at 637. An example of the possible legal consequences can be found in Boyle v. Registrar of Motor Vehicles, 368 Mass. 141, 331 N.E.2d 52 (1975). In that case the defendant was found guilty of driving under the influence. He appealed for a trial de novo in the superior court, yet, as a result of his conviction in the initial proceeding, he had his driver's license revoked pursuant to MASS. ANN. LAWS ch. 90, § 1(b) (Michie/Law. Co-op 1975).
99. 427 U.S. at 637.
100. *Id.* at 637-38 (emphasis in original).
101. 437 U.S. 1 (1978).
102. 547 F.2d 968, 970 (6th Cir. 1976), *cited in* Burks v. United States, 437 U.S. 1, 4 (1978).
103. 437 U.S. at 5.

The Supreme Court began by noting that "[t]he position advanced by petitioner has not been embraced by our prior holdings."[104] However, after reviewing the relevant case law, the Court commented that the "holdings in this area, beginning with *Bryan,* can hardly be characterized as models of consistency and clarity."[105] The Court did find one proposition emerging from these cases. That is, that a defendant "who *requests* a new trial as one avenue of relief may be required to stand trial again, even when his conviction was reversed due to failure of proof at the first trial."[106] In this instance, Burks had explicitly requested a new trial. However, the Court ordered that the case be dismissed, holding that the Court of Appeals, in effect, had found that the District Court had erred in failing to grant a judgment of acquittal in the defendant's favor. In this situation, to allow the case to be remanded, with the possibility of a new trial, "would create a purely arbitrary distinction between those in petitioner's position and others who would enjoy the benefit of a correct decision by the District Court."[107]

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104. *Id.* at 6.

105. *Id.* at 9. The common ancestor of the line of cases referred to in *Burks* is United States v. Ball, 163 U.S. 662 (1896). *See* Burks v. United States, 437 U.S. at 13. In *Ball,* the defendant's conviction had been reversed due to a fatally defective indictment. In response to his claim that a second trial would place him in double jeopardy, the Court stated simply that "a defendant who procures a judgment against him upon an indictment to be set aside, may be tried anew upon the same indictment, for the same offense of which he had been convicted." 163 U.S. at 672, *cited in* Burks v. United States, 437 U.S. at 13. The cases interpreting this decision, as set forth by the court in *Burks,* commence with Bryan v. United States, 338 U.S. 552 (1950). There, the defendant's conviction was reversed due to insufficient evidence. Without citing *Ball,* the Court rejected the defendant's double jeopardy claim, stating that "where the accused successfully seeks review of a conviction, there is no double jeopardy upon a retrial." United States v. Burks, 437 U.S. at 6, *citing* Bryan v. United States, 338 U.S. at 560, *quoting* Francis v. Resweber, 329 U.S. 459, 463 (1947).

Five years after *Bryan,* the Supreme Court was faced with a similar claim in Sapir v. United States, 348 U.S. 373 (1955). The defendant's conviction had been reversed due to insufficient evidence, and his case remanded for a new trial. In a brief per curiam opinion the Court reversed the decision to remand. However, Mr. Justice Douglas stated in a concurring opinion that:

> The granting of a new trial after a judgment of acquittal for lack of evidence violates the command of the Fifth Amendment. . . . If the jury had acquitted, there plainly would be double jeopardy to give the Government another go at this citizen. . . . I see no difference when the appellate court orders a judgment of acquittal for lack of evidence.

Burks v. United States, 437 U.S. at 7, *quoting* Sapir v. United States 348 U.S. at 374 (Douglas, J., concurring). It would seem, at this point, that Mr. Justice Douglas was contradicting the holding in *Bryan.* However, he then went on to distinguish *Bryan,* stating that in that case the petitioner had asked, in the alternative, for a new trial, while Sapir had solely appealed the denial of his motion to acquit. Burks v. United States, 437 U.S. at 7, *citing* Sapir v. United States, 348 U.S. at 374.

This reasoning was subsequently adopted by the Court in Yates v. United States, 354 U.S. 298 (1957). There, the Court ordered acquittals for some defendants, and new trials for others. The final case cited by the Court in *Burks* was Forman v. United States, 361 U.S. 416 (1960). There, the defendant's conviction had been reversed due to trial error. The Supreme Court upheld the decision to remand the case for a new trial, even though the defendant had moved for a judgment of acquittal and a new trial. The Court distinguished *Sapir* on two grounds: (1) that the *Sapir* decision was based upon a finding of insufficient evidence, and (2) that Sapir had made no motion for a new trial in the district court. Burks v. United States, 437 U.S. at 9, *citing* Forman v. United States, 361 U.S. at 425.

106. 437 U.S. at 10 (emphasis in original).

107. *Id.* at 11.

The Supreme Court limited its holding to cases involving insufficient evidence, as distinguished from trial error. The substantive basis for this distinction was that reversal for trial error involves a defect in the judicial process and implies nothing with respect to the guilt or innocence of the defendant.[108] In this situation, society retains a strong interest in having the defendant tried anew, while the defendant's interest is in obtaining a fair trial.[109] These interests do not prevail in the case where a conviction is reversed due to insufficient evidence. The Court stated that, in these circumstances, the state was given its one fair opportunity to gain a conviction and failed.[110] Thus, the double jeopardy clause bars any retrial.

In conclusion, the Court stated that it was insignificant whether the defendant had "sought a new trial as one of his remedies or even as his sole remedy. It cannot be meaningfully said that a person 'waives' his right to a judgment of acquittal by moving for a new trial."[111] Therefore, the only "just" remedy under the circumstances was for the appellate court to direct a judgment of acquittal in favor of the defendant.[112]

III. AN ANALYSIS OF *LYDON V. COMMONWEALTH*

A. The Defendant's Waiver of Their Double Jeopardy Rights

The majority in *Lydon* concluded that "the defendants voluntary choice of a bench trial and subsequent choice of a trial de novo create a situation in which double jeopardy is not implicated."[113] In support of this conclusion, they noted that the procedure by which a defendant elects a bench trial in the first instance "is not casual."[114] However, by limiting their inquiry to the procedure of electing a bench trial, the majority failed to scrutinize the scope of the defendants' waiver.

The requirements for an effective waiver of constitutional rights were set forth in *Johnson v. Zerbst* where the Supreme Court stated that "a waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege."[115] The determination of whether there has been a valid waiver is made by examining the surrounding circumstances.[116] One of the factors looked to by the courts is whether the

108. *Id.* at 15.
109. *Id.*
110. *Id.* at 16.
111. *Id.* at 17.
112. *Id.* at 18.
113. Lydon v. Commonwealth, 80 Mass. Adv. Sh. 1915, 1918, 409 N.E.2d 745, 748 (1980).
114. *Id.* at 1923, 409 N.E.2d at 751. Safeguards are provided in that a defendant who elects to waive his right to a jury trial in the first instance must be represented by counsel, or have signed a written waiver of counsel. *See* note 54 and accompanying text *supra.*
115. Johnson v. Zerbst, 304 U.S. 458, 464 (1938). *See also* Brady v. United States, 397 U.S. 742, 748 (1970); Fay v. Noia, 372 U.S. 391, 439 (1963).
116. Schneckloth v. Bustamonte, 412 U.S. 223, 224-25 (1973); Brady v. United States, 397 U.S. 742, 749 (1970).

waiver was done "with sufficient awareness of the relevant circumstances and likely consequences."[117] Although constitutional rights may be waived,[118] courts generally "indulge every reasonable presumption against waiver of fundamental rights."[119] Moreover, while courts have traditionally been less sympathetic to claims by defendants who been represented by counsel,[120] this by no means precludes further inquiry into the effectiveness of the waiver where important constitutional rights are involved.[121]

Clearly, in the context of *Burks* and the sufficiency of the evidence issue, the choice of a district court bench trial in the first instance involves a waiver of the right not to be twice placed in jeopardy. Beyond this, however, the de novo system also effects a defendant's right to a fair trial.[122] By electing a bench trial in the first instance, a defendant may be waiving his right to an acquittal, even if the evidence does not

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117. Tacon v. Arizona, 410 U.S. 351, 355 (1973); Brady v. United States, 397 U.S. 742, 748 (1970); United States v. Quinones, 613 F.2d 47, 49 (3rd Cir. 1980).

118. Singer v. United States, 380 U.S. 24, 34-35 (1965); Commonwealth v. Torres, 367 Mass. 737, 741, 327 N.E.2d 871, 875 (1975); Board of Assessors of Saugus v. Leo, 363 Mass. 47, 51, 292 N.E.2d 676, 678 (1973).

119. Johnson v. Zerbst, 304 U.S. 453, 464 (1938); Commonwealth v. Hooks, 78 Mass. Adv. Sh. 1356, 1360, 376 N.E.2d 857, 860 (1978); Commonwealth v. Mcgrath, 365 Mass. 631, 632, 301 N.E.2d 601, 602 (1974). *See also* Ciummei v. Commonwealth, 79 Mass. Adv. Sh. 1838, 392 N.E.2d 1186 (1979). In Schneckloth v. Bustamonte, 412 U.S. 218 (1973), the United States Supreme Court stated that "a strict standard of waiver has been applied to those rights guaranteed to ensure that [a defendant] will be accorded the greatest possible opportunity to utilize every facet of the constitutional model of a fair criminal trial." *Id.* at 241.

120. In Henderson v. Morgan, 426 U.S. 637 (1976), the Supreme Court stated that "it may be appropriate to presume that in most cases defense counsel routinely explain the nature of the offense in sufficient detail to give the accused notice of what he is being asked to admit." *Id.* at 647. (However, it should be noted that the Court in *Henderson* rejected the guilty plea of a defendant represented by counsel who had a low mental capacity and had not been told that intent was an element of first degree murder. *Id.*) *See generally* Dix, *Waiver in Criminal Procedure: A Brief for More Careful Analysis,* 55 TEX. L. REV. 193 (1977); Spritzer, *Criminal Waiver, Procedural Default and the Burger Court,* 126 U. PA. L. REV. 473 (1978).

121. United States v. Christian, 571 F.2d 64, 68-69 (1st Cir. 1978).

122. The accuracy of the district court bench trial sessions was the subject of a study sponsored by the Boston Bar Association. In that study, the authors conclude:

> [O]ur data suggests that in too many cases the courts simply fail to respond to the efforts that an attorney makes. Instead they appear to prejudge defendants and cases with too little regard for the elements of due process. The de novo system itself seems to spawn some of the inequalities. More than one judge told us that it was not necessarily important how a case was handled in the district court, since every defendant had a second chance in the superior court. . . .
>
> Great disparities appear even after we have considered possible differences between types of crimes and defendants who appear before these judges. It seems that the availability of legal defenses and the differences in the particular needs of defendants give way to the idiosyncracies of judges and the culture of the court in which they sit. Defendants will simply fare differently depending upon where and before whom they are tried.

W. ROSE & R. SPARGENBERG, ACTION PLAN FOR LEGAL SERVICES PART 2: REPORT ON CRIMINAL DEFENSE SERVICES TO THE POOR IN MASSACHUSETTS 228 (1978). *See also* A. COX, THE REPORT OF THE GOVERNOR'S SELECT COMMITTEE ON JUDICIAL NEEDS 32 (1976); S. BING & S. ROSENFELD, THE QUALITY OF JUSTICE IN THE LOWER CRIMINAL COURTS OF METROPOLITAN BOSTON 25-27, 83, 96-98 (1970); Robertson, *Trial De Novo Should be Eliminated,* 56 MASS. L. Q. 347, 352-53 (1971).

prove beyond a reasonable doubt that he was guilty.[123] Due to the important ramifications that the election of a first-instance bench trial imposes upon a defendant,[124] then, the majority should have utilized a strict standard of review in judging the scope of the defendants' waiver.[125] Instead, they relied entirely upon the presence of counsel in

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123. This proposition is so contrary to traditional concepts of jurisprudence that it raises the question of whether it may be waived under any circumstances. One court has stated that "the requirement that the prosecutor prove every essential element of the crime charged beyond a reasonable doubt is something much more than a 'legal technicality.' It is no less than the very essence of the due process of criminal law required by our common law and constitutional traditions." Sumpter v. DeGroote, 552 F.2d 1206, 1211 n.17 (7th Cir. 1977). *See also* Mullany v. Wilbur, 421 U.S. 684 (1975); *In re* Winship, 397 U.S. 353, 361-64 (1970). Van Alstne, *In Gideon's Wake: Harsher Penalties and the "Successful" Criminal Appellant,* 74 YALE L. J. 606, 617 (1965).

In both *Colten* and *Ludwig* the Supreme Court emphasized the power of the second-tier court to mitigate any constitutional error. Colten v. Kentucky, 407 U.S. 104, 117 (1972); Ludwig v. Massachusetts, 427 U.S. 618, 626-27 (1976). "This is not to say that we are unaware of a remote possibility that an accused in Massachusetts may be faced at his first trial with an overzealous prosecutor and a judge who is either unable or unwilling to control him. But in such a case, he may protect himself from questionable incarceration by appealing, and insisting upon a trial by jury." *Id. See also* Note, *The De Novo Procedure — Assessment of its Constitutionality Under the Sixth Amendment Right to Trial by Jury and the Due Process Clause of the Fourteenth Amendment,* 55 B.U. L. REV. 25, 39 n.110 (1975). To rely upon the second trial to correct this particular error (that is, the sufficiency of the evidence at the first trial), however, offends the foundation of the double jeopardy clause by permitting multiple trials. United States v. Wilson, 420 U.S. 332, 342, 343 (1975); Stroud v. United States, 251 U.S. 15 (1919).

124. The Supreme Court has held that where several important federal rights are involved in a waiver, the waiver cannot be presumed from a silent record. Boykin v. Alabama, 395 U.S. 238 (1969). There, the Court was faced with a plea of guilty which, in effect, waives the privilege against compulsory self-incrimination, the right to a trial by jury, and the right to confront one's accusers. *Id.* at 243. Although the choice of a bench trial in the de novo system is not, in itself, a conviction, it still involves the waiver of two important federal rights — the right not to be placed in double jeopardy, and the right to have one's guilt proven beyond a reasonable doubt based upon probative evidence. In *Lydon,* no evidence affirmatively appeared in the report or the record as to effectiveness of the defendants' waiver. Lydon v. Commonwealth, 80 Mass. Adv. Sh. at 1930, 409 N.E.2d at 754 (Liacos & Abrams, JJ., concurring in part and dissenting in part).

In Ciummei v. Commonwealth, 79 Mass. Adv. Sh. 1838, 392 N.E.2d 1186 (1979), the court stated that the waiver of a trial by jury, although an important election, still left in place another form of fact-finding process, therefore, it did not carry as much weight or consequence as a guilty plea. *Id.* at 1843, 392 N.E.2d at 1189. The court in that case, however, was dealing with the waiver of a jury in the superior court. As such, the defendant was assured that if the judge ruled incorrectly, he could have his conviction reversed and case dismissed by the appeals court. The total loss of the right to have guilt proven beyond a reasonable doubt, as well as the waiver of double jeopardy rights, was not at stake.

125. One factor that may have influenced the standard of review employed by the majority was their assertion that they did not require criminal defendants to "have knowingly considered and voluntarily waived all potential errors of constitutional dimension." Lydon v. Commonwealth, 80 Mass. Adv. Sh. at 1922, 409 N.E.2d at 750. This assertion was prefaced, however, by a statement from *Burks.* "In short, reversal for trial error, as distinguished from evidentiary insufficiency, does not constitute a decision to the effect that the government has failed to prove its case." *Id., quoting* Burks v. United States, 437 U.S. at 15. This statement explicitly distinguishes evidentiary insufficiency and, therefore, does not provide any basis of support for the majority's assertion, as applied to the circumstances in *Lydon.* If the issue before the court dealt with waiver of some type of trial error, then the waiver would not necessarily require the same degree of scrutiny, and the majority's position could be substantiated.

determining that the defendants had waived their constitutional rights.[126]

An examination of the circumstances surrounding the choice of a bench trial, however, suggest that the defendants may not have intended, either expressly or impliedly, to waive other constitutional rights. Undoubtedly, bench trials may serve a defendant's interest by providing a quick determination of guilt or innocence, while avoiding the cost of a jury trial.[127] However, the benefit of the system also imposes a danger in that an innocent defendant, who does not anticipate having to endure a second trial, would opt for the bench trial without giving due consideration to the protection of his constitutional rights.[128] In this instance, it should be the judge's duty to ensure that the defendant understands the ramifications of his actions.

Furthermore, it is doubtful whether counsel could have adequately advised the defendants with respect to their double jeopardy rights in

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126. In a footnote in *Lydon*, the majority noted that a district court procedural rule that went into effect after the defendants had been arraigned requires that a defendant be told, before he chooses a first instance bench trial, that if he is not satisfied with the results of the trial he will be able to appeal for a trial before a jury. 80 Mass. Adv. Sh. at 1923 n.13, 409 N.E.2d at 751 n.13. Commenting upon this new rule, the majority stated that: "[i]n light of this opinion, consideration might be given to enlarging the consent form so that the defendant acknowledges that his only avenue of relief from any error in the bench trial is a trial de novo." *Id.* On the one hand, the majority is stating that the defendants' choice was an informed one, while on the other it suggests expanding a consent form which is already more probing than the one signed by the defendants in *Lydon*.

127. Bench trials are quicker in that there are no jurors empanelled, and there is no need to interrupt the trial on their behalf. Also, one study has concluded that there are far less motions made by defense counsel in these trials. *See* S. BING & S. ROSENFELD, note 122 *supra* at 78-81.

Although the defendants in *Lydon* were represented by appointed counsel, the influence of obtaining an expedited hearing was still present. Had they not been represented by appointed counsel, the factors influencing the choice of a first instance bench trial would have been that much stronger, casting a greater doubt upon the scope of the defendant's waiver. As one commentator noted:

> The proper perspective is to focus on the individual standing before the magistrate being told that he can now be tried and the matter thus put to an end, or appeal to the next term of the Superior Court and later have his day in court. What must not be overlooked is the psychological effect of encouraging acceptance of the expediency of the district court and foregoing the right to trial by jury.

Hasler, *De Novo Juries, Misdemeanor Counsel and Other Problems: Changes Ahead for the Maine District Courts?*, 26 ME. L. REV. 63, 83 (1971). *See, e.g.*, State v. Gerry, 68 N.H. 495, 509 38 A. 272, 279 (1896). Moreover, in Boyd v. United States, 116 U.S. 616 (1886), the Supreme Court stated that:

> Illegitimate and unconstitutional practices get their first footing . . . by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed.

Id. at 635, *cited in* Schneckloth v. Bustamonte, 412 U.S. 218, 228 (1973). There, the Supreme Court reiterated (in the context of a search and seizure by a policeman) that "no matter how subtly the coercion was applied, the resulting 'consent' would be no more than a pretext. . . ." *Id.*

128. In Henderson v. Morgan, 426 U.S. 637 (1976), the Supreme Court stated that: "[a] plea may be involuntary . . . because the accused does not understand the nature of the constitutional protections that he is waiving." *Id.* at 645 n.13.

light of the *Burks* decision. An examination of Massachusetts statutory and case law prior to *Lydon* leads to a conclusion that a double jeopardy challenge, founded upon an insufficiency of the evidence claim, could have been raised before the judge at the de novo trial, prior to the commencement of that trial. Therefore, by holding that *Burks* was inapplicable to the de novo system, it may be argued that the defendants in *Lydon* forfeited their constitutional rights without the requisite information upon which to make an intelligent waiver.[129]

Massachusetts General Laws, chapter 277, section 4(A), states that all appropriate defenses are to be raised by way of a motion to dismiss before the judge at the trial de novo.[130] In *Costarelli v. Commonwealth,*[131] the Supreme Judicial Court held that the defense of double jeopardy was within the bounds of this statute.[132] Therefore, after the United States Supreme Court decided *Burks,* it would have been reasonable to conclude that a defendant convicted at the bench trial based upon insufficient evidence could have brought a motion to dismiss before the judge at the de novo trial.[133] However, the majority in *Lydon*

129. *Id.*

130. In Connaughton v. District Court of Chelsea, 371 Mass. 301, 356 N.E.2d 1221 (1976) (held in the context of a criminal defendant's claim that he was denied his right to have a stenographer present at his probable cause hearing), the court stated that the "Superior Court . . . has *plenary* power, subject to appellate review where available, to afford any appropriate relief, including holding evidentiary hearings, the ordering of new probable cause hearings, dismissal of indictments, or other measures. *Id.* at 302, 356 N.E.2d at 1222-23.

131. 374 Mass. 677, 373 N.E.2d 1183 (1979).

132. The defendant in *Costarelli* was charged with larceny of a motor vehicle. *Id.* At the completion of the presentation of the evidence, the bench trial judge dismissed the larceny case, while informing the police prosecutor to bring a new complaint charging the defendant with driving without authority. *Id.* at 678, 377 N.E.2d at 1185. The defendant was then tried anew and convicted on the lesser charge. *Id.* The Supreme Judicial Court held that the dismissal of the larceny count, apparently on the basis of insufficient evidence, precluded the state from charging the defendant with the lesser included offense of driving without authority. *Id.* at 683, 373 N.E.2d at 1188.

It is interesting to note the court's treatment of the issue of the defendant's waiver of his double jeopardy rights. Even though the defendant had not raised it before the second district court bench trial, *Id.* at 678, 373 N.E.2d at 1185, the court rejected the Commonwealth's contention that he had waived his rights. It held that "[a] defendant has 'an unfettered right of appeal' from a District Court conviction . . . and, on the exercise of that right, the District Court judgment is vacated. . . . The value of the de novo appeal process would be significantly reduced if we limited the defenses that a defendant could assert at the de novo trial to those he had raised in the original trial. This limitation would also cast a serious constitutional cloud over the entire procedure." *Id.* at 681, 373 N.E.2d at 1187 (citations omitted).

Certainly, the choice of a first-instance bench trial (as occurred in *Lydon*) can be analogized to Costarelli's submission to a second trial without making any objection whatever. Consequently, it is this article's position that, as noted by the court in *Costarelli,* there now hangs "a serious constitutional cloud over the entire procedure."

133. The same conclusion was apparently reached by the United States District Court for the District of Massachusetts in Tinder v. Sister Rose Paula, 468 F. Supp. 792 (D. Mass. 1979). There, the district court dismissed a habeas corpus petition brought by a defendant who claimed that he was convicted on insufficient evidence at a district court bench trial. The basis of the court's holding was that the defendant had failed to take his de novo appeal (presumably to present his claim to the second tier court by way of a motion to dismiss) on the authority of *Ludwig* and Costarelli

qualified its holding in *Costarelli* by stating that all "valid" double jeopardy claims could be raised by a motion to dismiss.[134] In light of the discord in the state of the law prior to this holding, as well as the factors that might influence the choice of a bench trial, it cannot be presumed that the defendants' choice of a bench trial in the first instance constituted a knowing and voluntary waiver of other constitutional rights. Therefore, the majority's reliance upon the mere presence of counsel was unfounded.

B. Double Jeopardy Considerations Emanating from Burks v. United States

In *Lydon,* the majority stated that the holding in *Burks v. United States* was that "the Double Jeopardy Clause precludes a second trial *once the reviewing court has found the evidence legally insufficient.*"[135] Therefore, since no court had reviewed the sufficiency of the evidence, and "[u]nder the two-tiered system as it was designed to operate, no court would ever consider this issue,"[136] the *Burks* decision was inapplicable to the Massachusetts de novo system.[137] Ostensibly, this reason-

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v. Massachusetts, 421 U.S. 193 (1975). (This was an earlier *Costarelli* case. There, the defendant had appealed to the Supreme Court directly from the initial bench trial, wherefore the Court dismissed for want of jurisdiction.) As such, the District Court concluded, he had failed to exhaust his state remedies. Brief for Petitioner at 17-18, Gibson v. Commonwealth, 80 Mass. Adv. Sh. 1933, 409 N.E.2d 741 (1980).

Furthermore, two Superior Court judges agreed with the contention that a defendant was entitled to bring a motion to dismiss before the judge at the de novo trial to determine whether the evidence at the initial proceeding was legally insufficient. Brief for Petitioner at 18-19, Gibson v. Commonwealth, 80 Mass. Adv. Sh. 1933, 409 N.E.2d 741 (1980). These cases are not cited as precedent, rather, their purpose is limited to the issue of whether, prior to *Lydon,* counsel *could* have informed the defendants as to their constitutional rights.

134. Lydon v. Commonwealth, 80 Mass. Adv. Sh. 1915, 1919-20, 409 N.E.2d 745, 752 (1980).

135. *Id., citing* Burks v. United States, 437 U.S. at 18.

136. Lydon v. Commonwealth, 80 Mass. Adv. Sh. at 1919, 409 N.E.2d at 752.

137. *Id.* Assuming, *arguendo,* that *Burks* does require an appellate determination of the sufficiency of the evidence at the initial proceeding, and accepting the majority's assertion that no court in the two-tiered system would make this determination, this does not preclude the possibility that another court could fulfill the precondition of appellate review. Massachusetts General Laws ch. 211, § 3, provides, in part, that the Supreme Judicial Court has "general superintendence of all courts of inferior jurisdiction to correct and prevent errors and abuses therein if no other remedy is expressly provided." The court has stated that this power should be used sparingly "to avoid an error which 'might be irremediable, and possibly not curable even by a new trial since the defendants could not thereafter be placed in status quo.' " Whitmarsh v. Commonwealth, 366 Mass. 212, 215, 316 N.E.2d 610, 612 (1974) (citation omitted). It has further stated that "a criminal defendant who presents a double jeopardy claim of substantial merit is entitled to review of that claim before the second trial 'under our general superintendence power.' " Fadden v. Commonwealth, 78 Mass. Adv. Sh. 2830, 2832, 382 N.E.2d 1054, 1056 (1978) (citation omitted). The *Lydon* majority rejected the option that this statute presented utilizing a "Catch-22" argument. They stated that the remedy available to the defendants was a motion to dismiss, brought before the judge at the de novo trial. However, they also stated that the defendants did not have a valid claim since the sufficiency of the evidence had not been reviewed. Lydon v. Commonwealth, 80 Mass. Adv. Sh. at 1926, 409 N.E.2d at 752. Thus, "the procedure before the jury-trial judge

ing has some validity. However, by lifting the *Burks* holding out of context, the majority gives a rigid construction to the double jeopardy clause; a construction which the Supreme Court has admonished,[138] and which disregards the substantive mandate of *Burks*.

In *Burks*, the government had not satisfied its burden of proof in regard to an essential element of its case.[139] The essence of the Court's decision was that to afford the prosecution a second opportunity to supply the necessary evidence would offend the double jeopardy clause's central purpose of prohibiting successive trials.[140] "The only *'just'* remedy available for [the] court is the direction of a judgment of acquittal."[141] A contrary decision would create "a purely arbitrary distinction between a defendant erroneously convicted, and one who had enjoyed the benefit of a proper decision by the trial court."[142] As a result of the *Lydon* decision, Massachusetts permits exactly the kind of arbitrary distinction condemned by the Supreme Court in *Burks*.[143]

Athough *Burks* did involve an appellate determination of the sufficiency of the evidence at trial, the absence of such a determination does not lead to a conclusion that the double jeopardy principles involved are inapplicable.[144] This was clearly discerned by the dissent:

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can only be a charade in which the defendants' motion to dismiss inevitably will be denied." *Id.* at 1930, 409 N.E.2d at 754 (Liacos & Abrams, JJ., concurring in part and dissenting in part). What is interesting to note is that in the companion case of Gibson v. Commonwealth, 80 Mass. Adv. Sh. 1933, 409 N.E.2d 741 (1980), counsel for Massachusetts stated that this was the proper procedure for resolving double jeopardy claims prior to de novo trials. Brief for Respondent at 9, Gibson v. Commonwealth, 80 Mass. Adv. Sh. 1933, 409 N.E.2d 741 (1980).

138. Illinois v. Somerville, 410 U.S. 458, 467 (1977).

139. Burks v. United States, 437 U.S. at 3. The government failed in its burden of proving the defendant's sanity beyond a reasonable doubt.

140. *Id.* at 11.

141. *Id.* at 18.

142. *Id.* at 11.

143. *See generally* Mayes & Yarborough, *Bis Vixari: New Trials and Successive Prosecutions*, 74 HARV. L. REV. 1, 13 (1960). This raises the issue of whether, as a result of the *Lydon* decision, the Massachusetts de novo system violates the equal protection clause. The Supreme Court has held "that channels of appellate review, once established, 'must be kept free of *unreasoned distinctions* that can only impede open and equal access to the courts.' " Mann v. Commonwealth, 359 Mass. 661, 664, 271 N.E.2d 331, 333 (1971), *quoting* Griffin v. Illinois, 351 U.S. 12 (1956). A defendant who chooses a bench trial in the first instance is in no different position than one who elects a jury trial. Yet in the latter case, a defendant convicted on insufficient evidence has the opportunity to have his case dismissed upon appellate review, while no such opportunity is available in the former situation. Also, while Massachusetts might have a legitimate interest in providing bench trials in the first instance (in that they can resolve a large number of less serious offenses expeditiously), this interest does not extend to the de novo trial, since the state must then commit extra resources to cases that should have already been dismissed.

144. In Crist v. Bretz, 437 U.S. 28 (1978), the Supreme Court stated that the time when jeopardy attaches in a trial "serves as the lynchpin for all double jeopardy jurisprudence." *Id.* at 38, *quoting* Bretz v. Crist, 546 F.2d 1336, 1343 (9th Cir. 1976). Under the majority's rationale, jeopardy does not attach until an appellate court has determined that there was insufficient evidence. This is not the case. In non-jury trials jeopardy attaches when the court begins to hear evidence. Serfass v. United States, 420 U.S. 377, 388 (1975).

> [T]he majority disregards the substantive mandate of *Burks* and fixes upon a formal nicety wholly unrelated to the purposes of the double jeopardy clause. If a defendant is convicted on insufficient evidence, he cannot be retried, and it should matter not at all whether an appellate court has confirmed the insufficiency.[145]

In fact, the majority did address the issue indirectly. In responding to the defendants' assertion that the Commonwealth had no legitimate interest in retrying them, the majority claimed that the Commonwealth was not required to set forth any interests since it was the defendants who were seeking a new trial.[146] However, where a conviction at the bench trial is based upon legally insufficient evidence, both logic and justice would dictate that a defendant resort to the one recourse open to him — a trial de novo. Under these circumstances it can hardly be said that the defendants "sought," or agreed to, a retrial.[147] Therefore, the state must set forth some interest in requiring a trial de novo.

Arguments advanced for allowing reprosecution following a mistrial revolve around two principles: (1) the sound administration of justice,

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145. Lydon v. Commonwealth, 80 Mass. Adv. Sh. at 1928, 409 N.E.2d at 753 (Liacos & Abrams, JJ., concurring in part and dissenting in part).

146. *Id.* at 1921, 409 N.E.2d at 749. In fact the majority went on to state that "[t]he Commonwealth was content with [the] disposition [of the bench trial]." *Id.* This statement indicates an insensitivity for the defendant's plight. For, as the Supreme Court of California has stated, a state has absolutely "no interest in preserving erroneous judgments." People v. Henderson, 60 Cal.2d 482, 497, 386 P.2d 677, 686 (1963).

147. This was the position of the Court in *Burks*. *See* note 111 and accompanying text *supra*. In United States v. Wilkins, 348 F.2d 844 (2nd Cir. 1965), the defendant had been charged with first degree murder, and was convicted of second degree murder. He successfully appealed the conviction, and the case was remanded for a new trial, where he was convicted of first degree murder. The defendant then took a writ of habeas corpus to the United States District Court, which affirmed the conviction. On appeal, the Court of Appeals reversed. One of the arguments rejected by the court was that the defendant had agreed to subject himself to a reprosecution on the greater offense since he successfully appealed his conviction. The court stated that:

> [i]t is difficult to understand how the fundamental unfairness inherent in allowing a prosecutor to "do better a second time" . . . is mitigated by conditioning this second chance on a successful appeal by the accused. To suggest that the accused, by appealing the conviction, somehow 'agreed' to subject himself to the reprosecution on the greater charge if the conviction for the lesser charge is reversed, thereby rendering such a reprosecution fair . . . is to ignore the psychological realities of the situation.

See Kepner v. United States, 195 U.S. 100, 135 (1909) (Holmes, J., dissenting). 348 F.2d at 858. The "elementary psychological realities" referred to, as described by Mr. Justice Holmes, are that (in capital cases, at least) "usually no such waiver is espoused or thought of. Moreover, it cannot be imagined that the law would deny to a prisoner the correction of a fatal error unless he should waive other rights so important as to be saved by an express clause in the Constitution of the United States." Kepner v. United States, 195 U.S. 100, 135 (1909). In *Ludwig*, the Supreme Court likened a defendant who invoked his right to a trial de novo to a defendant who successfully appealed his conviction and had his case remanded. Ludwig v. Massachusetts, 427 U.S. 618, 631-32 (1975). The assertion by the court in *Wilkins*, therefore, would also apply to a defendant who invokes his right to a trial de novo after an erroneous decision at the bench trial. That is, to state that the defendant was seeking to be retried ignores the "elementary psychological realities" of the situation. Put another way, the defendant's choice in *Lydon* was "free in law but not free in fact." Van Alstyne, *In Gideon's Wake: Harsher Penalties and the "Successful" Criminal Appellant*, 74 YALE L. J. 606, 615 (1965).

and (2) fairness to the defendant.[148] Assuming that there was insufficient evidence at the bench trial to warrant a finding of guilt, requiring the defendants to submit to a trial de novo conflicts with both of these concerns.

If the sound administration of justice is a goal, it is difficult to perceive how requiring a defendant, who has elected a bench trial in the first instance, to undergo a completely new trial promotes this goal. In fact, in the report that originally proposed that the Massachusetts de novo system be restructured,[149] the authors found that "the overlapping jurisdiction of the superior court, on the one hand, and . . . the district courts . . . with decisions of the latter always subject to trial de novo in the former, produce duplication and delay."[150]

It is also difficult to perceive how allowing a trial de novo in a situation where a conviction is secured based upon legally insufficient evidence results in fairness to the defendant. The state has already been given its one full opportunity to gain a conviction. It is in this instance where the prohibitions of the double jeopardy clause are given substance. In *Green v. United States,*[151] the Supreme Court stated that:

> the underlying idea [of the double jeopardy clause] is one that is deeply engrained in at least the Anglo-American system of jurisprudence, is that the state with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense.[152]

It is also this opportunity that distinguishes the de novo system from cases involving mistrials or appellate reversals for trial error. Under these circumstances, the determination to retry has "little or no relation to the issue of guilt or innocence."[153] In *Wade v. Hunter,*[154] a case involving a mistrial, the Supreme Court stated that "[i]n such event the purpose of the law to protect society from those guilty of crimes fre-

148. In United States v. Tateo, 377 U.S. 463 (1963), the Supreme Court discussed the principles behind the rule in United States v. Ball, 163 U.S. 602 (1892) (permitting retrials after appellate reversals). It stated that: "[o]f greater importance than the conceptual abstractions employed to explain the *Ball* rule, are the implications of the principle for the sound administration of justice. Corresponding to the right of the accused to be given a fair trial is the societal interest in punishing those whose guilt is clear after he has obtained such a trial." 377 U.S. at 466. *See also* Burks v. United States, 437 U.S. 1, 15 (1978); United States v. Wilson, 420 U.S. 332, 343, n.11 (1975); North Carolina v. Pearce, 395 U.S. 711, 721 n.18 (1969); United States v. Ewell, 383 U.S. 116, 121 (1966); Wade v. Hunter, 336 U.S. 684 (1949). *See generally* Thompson, *Reversals for Insufficient Evidence: The Emerging Doctrine of Appellate Acquittal,* 8 IND. L. REV. 497 (1974).

149. A. COX, THE REPORT OF THE GOVERNOR'S SELECT COMMITTEE ON JUDICIAL NEEDS (1976).

150. *Id.* at 11.

151. 355 U.S. 184 (1957).

152. *Id.* at 187. *See generally* Schulhoffer, *Jeopardy and Mistrials,* 125 U. PA. L. REV. 449 (1977).

153. Note, *Double Jeopardy: A New Trial after Appellate Reversal for Insufficient Evidence,* 31 CHI. L. REV. 365, 372 (1964). *See also* Burks v. United States, 437 U.S. 1, 15 (1978).

154. 336 U.S. 684 (1949).

quently would be frustrated by denying retrials."[155] Therefore, in the mistrial or reversal for error situation, balancing the concerns of society with those of the defendant justify a retrial. In cases where an appellate court reverses due to insufficient evidence, the concerns of society would not be as great. Unlike cases involving appellate reversals for trial error, where there might be a presumption that the burden of proof has been met, in appellate reversals for insufficient evidence the reviewing court is specifically ruling that the burden has not been met.[156] Society should have no more fear of releasing the wrongly convicted defendant than one who has been acquitted.[157]

While the state interest in proceeding with a trial de novo is low, a defendant has a strong interest in avoiding such a trial, notwithstanding the majority's proclamation concerning the "distinct advantages of having a bench trial followed by a jury trial."[158] The majority cited three advantages to this procedure: (1) the defendant may use it as a means of discovery, (2) it is less time-consuming and expensive, and (3) it provides a second chance at an acquittal for a defendant.[159] A defendant convicted on insufficient evidence, however, is not concerned with the benefits of discovery or in having a second chance at an acquittal since he should have been acquitted at the bench trial, and only a miscarriage of justice is requiring him to go through a trial de novo. Also, because of this miscarriage, his attempt at obtaining justice is both more expensive and time-consuming.

What is at stake in this procedure of trying criminal defendants goes beyond the mere fact that the defendant is not "enjoying" the advantages of the system. The majority stated that "allowing a defendant to have a trial de novo, like requiring 'a criminal defendant to stand trial after he has invoked a statutory right of appeal to upset his first convic-

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155. *Id.* at 689.

156. Burks v. United States, 437 U.S. 1, 15-16 (1978). The way the de novo system operates, however, this principle can work in reverse. Where a defendant is acquitted at the bench trial, even though the acquittal is palpably erroneous, he is protected from retrial. A defendant erroneously convicted, on the other hand, must undergo a new trial. "Thus, the present structure of the law in the context of individual cases is calculated to shield the guilty and persecute the innocent." Thompson, *Reversals for Insufficient Evidence: The Emerging Doctrine of Appellate Review*, 8 IND. L. REV. 497, 515 (1974). Although professor Thompson was not referring to a de novo system, his comment is still pertinent.

157. *See generally* Note, note 153 *supra*, at 370-72. In Sumpter v. DeGroote, 552 F.2d 1206 (7th Cir. 1977), the court stated:

> In a case such as this (appellate reversal for insufficient evidence), however, we believe the considerations motivating the balance of interest struck by application of the *Ball* rule . . . have less force. Cases involving reversals grounded upon the insufficiency of the evidence of fact presented at trial, rather than reversals occasioned by procedural errors of law . . . bring into play an additional element that tips the scales of justice in the defendant's favor — his innocence as a matter of law.

Id. at 1211.

158. Lydon v. Commonwealth, 80 Mass. Adv. Sh. at 1924, 409 N.E.2d at 751.

159. *Id.*

tion, is not an act of governmental oppression of the sort against which the Double Jeopardy Clause was intended to protect.' "[160] The court cited *United States v. Scott*[161] for this position. However, the defendant's case in *Scott* had been dismissed due to preindictment delay, rather than insufficient evidence and, as such, had little relation to the issue of guilt or innocence. The significance of this distinction was not lost on the court in *Scott:*

> We think that in a case such as this the defendant, by deliberately choosing to seek termination of the proceedings against him on a basis wholly unrelated to factual guilt or innocence of the offense of which he is accused, suffers no injury cognizable under the Double Jeopardy Clause.[162]

In order to determine whether the situation in *Lydon* is the type that the double jeopardy clause was designed to prevent, it is necessary to return to a passage previously quoted in this article:

> The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent, he may be found guilty.[163]

This is exactly the situation that a defendant may have to face as a result of the decision in *Lydon*. To avoid the result of an erroneous decision in the district court bench trial, a defendant has to go through the expense and ordeal of a new trial, while living with any adverse legal consequences resulting from his erroneous conviction.[164] Furthermore, the trial de novo enhances the "possibility that even though innocent, he may be found guilty." This is due to many factors. First, since the bench trial judgment is vacated, and a completely new trial imposed, the state is not limited to presenting the evidence from the original proceeding.[165] In effect, the first trial acts as a dress rehearsal for the state

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160. *Id.*
161. 437 U.S. 82, 91 (1978).
162. *Id.* at 18.
163. Green v. United States, 335 U.S. 184, 187-88 (1957).
164. *See* note 98 *supra.*
165. Mann v. Commonwealth, 359 Mass. 661, 271 N.E.2d 331 (1971). Contrast this situation with the procedure at issue in Swisher v. Brady, 438 U.S. 204 (1978). There, a number of juveniles brought a class action suit alleging that the Maryland procedure for trying juveniles violated the double jeopardy clause. That procedure, which is still in effect today, *id.* at 210, provides that a juvenile appear before a master who makes proposed findings, conclusions, recommendations, or orders. *Id.* These are forwarded to a Juvenile Court judge who has the power to accept, reject, remand, or modify the master's proposals, and to supplement the record on his own review with additional evidence only if the parties do not object. *Id.* at 210-11. The juveniles' contended that

and its witnesses, with the state having the opportunity to refine its case in the de novo trial.[166] Also, it is a recognized fact that witnesses' testimony becomes hardened in subsequent trials.[167] Lastly, the presumption of innocence that is so basic to our system of criminal justice may be undermined in the de novo trial since both judge and jury may know that the defendant has already been convicted in the initial

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since they were given a favorable report by the master, it would be a violation of their double jeopardy rights for the judge to find them delinquent based upon his own review.

The United States Supreme Court rejected this claim, holding that "Maryland has created a system . . . in which an accused juvenile is subjected to a single proceeding which begins with a master's hearing and culminates with an adjudication by a judge." *Id.* at 215. The Court substantiated its holding on three grounds. First, it noted that the record was closed after the master's hearing, and could only be supplemented with the consent of the juvenile. In light of this, it stated that "a central purpose of the prohibition against successive trials is to bar the prosecution [from] another opportunity to supply evidence which it failed to master in the first proceeding. *Id.* at 215-16, *citing* Burks v. United States, 437 U.S. 1, 11 (1978).

166. Ludwig v. Massachusetts, 427 U.S. 618, 635 (1976) (Stevens, J., dissenting). *See also* Hasler, *De Novo Juries, Misdemeanor Counsel and Other Problems: Changes Ahead for the Maine District Courts?,* 26 ME. L. REV. 63 (1971); Note, *The De Novo Procedure — Assessment of its Constitutionality Under the Sixth Amendment Right to Trial by Jury and the Due Process Clause of the Fourteenth Amendment,* 55 B.U. L. REV., 40-41 (1975). A prime example of the type of refining that can occur was set forth in Ashe v. Swenson, 397 U.S. 436 (1976). *Ashe* dealt with the issue of collateral estoppel, rather than double jeopardy. It is cited merely to demonstrate the effect of a prior trial on a prosecution's presentation. In *Ashe,* the defendant was charged with robbing a man at a poker game and found not guilty. Six weeks later the state again brought him to trial for robbing another player at the poker game and was convicted. Although essentially the same witnesses appeared, their testimony was substantially stronger on the issue of the defendant's identity. For example, two witnesses who at the first trial had been wholly unable to identify the defendant, testified that his features, size, and mannerisms matched those of one of their assailants. "The State further refined its case at the second trial by declining to call one of the participants in the poker game whose identification testimony at the first trial had been conspicuously negative." *Id.* at 440. In commenting upon these facts the Court stated that the prosecutor,

> treated the first trial as no more than a dry run for the second prosecution. No doubt the prosecutor felt the state had a provable case on the first charge and, when he lost, he did what every good attorney would do — he refined his presentation in light of the turn of events at the first trial. But this is precisely what the constitutional guarantee forbids.

Id. at 447.

If this type of refining occurs during the trial de novo, not only will the chances of the defendants' being found guilty be enhanced, but there will be no way to challenge it since the bench trial judgment will have been vacated. This situation, then, is even more repugnant to the double jeopardy clause than that found in *Ashe,* yet the majority was satisfied in relying upon a "procedural formality."

167. *See* Note, note 123 *supra* at 41, *citing* Ashe v. Swenson, 397 U.S. 436 (1976). *See also* Carsey v. United States, 392 F.2d 810, 813-14 (D.C. Cir. 1967), where Judge Leventhal outlined the subtle changes in witnesses' testimony during a subsequent prosecution.

> [T]he Government witnesses came to drop from their testimony impressions favorable to defendant. Thus a key prosecution witness, the last person to see appellant and the deceased together, who began by testifying that they had acted that evening like newlyweds on a honeymoon, without an unfriendly word spoken, ended up by saying for the first time in four trials that the words between them had been "firm," and possibly harsh and "cross."
>
> We also note that the police officer who readily acquiesced in the two "hung jury" trials that appellant was "hysterical," later withheld that charaterization. This shift, though less dramatic, was by no means inconsequential in view of the significance of appellant's condition at the time he made a statement inconsistent with what he later told another officer.

proceeding.[168] Therefore, the Massachusetts procedure for dealing with defendants convicted on insufficient evidence places an undue burden upon the defendant in direct contravention to the decision in *Green v. United States.*[169]

C. *Prior Constitutional Challenges to the De Novo System*

The final rationale set forth by the majority to support their position involved a three-step process. First, they stated that the de novo system had already been upheld by the Supreme Court, citing *Ludwig* and *Colten.*[170] Second, it is utilized in some form in approximately half of the states.[171] Therefore, it was unlikely that the Supreme Court in *Burks* meant to hold, by implication, that all de novo systems were unconstitutional.[172] This reasoning, however, does not withstand close scrutiny.

In *Colten v. Kentucky,*[173] the Supreme Court was dealing with the limited issue of the constitutionality of enhanced penalties at the second tier trial.[174] Because of this distinction, the Court's conclusion that "in reality [a defendant's] choices are to accept the decision of . . . the inferior court or to reject what in effect is no more than an offer in settlement of his case and seek . . . judgment . . . in the superior court,"[175] is inapplicable when applied to the situation in *Lydon.* This is due to the fact that to allow "an offer of settlement" when the state has failed to carry its burden of proving a defendant's guilt beyond a reasonable doubt would completely undermine his presumption of innocence.[176] Moreover, in *Walker v. Dillard,*[177] the United States District Court stated that "the Supreme Court [in *Colten*] held that the two-tired [sic] system does not violate the Due Process Clause, as it imposes no penalty on those who seek a trial de novo after being convicted in the inferior court."[178] As a result of the holding in *Lydon*, the same thing cannot be said for the Massachusetts two-tiered system, since a defendant convicted on insufficient evidence at the bench trial has to forego his rights under the double jeopardy clause in order to gain an acquittal.

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168. *See* Hasler, note 127 *supra* at 92; Note, note 123 *supra*, at 41; Soto, North v. Russel *and* Ludwig v. Massachusetts: *Unhappy Solutions to the Problems of Two-Tier Court System,* 9 COLUM. HUMAN RIGHTS L. REV. 285, 302-03 (1977).

169. 335 U.S. 184 (1957).

170. Lydon v. Commonwealth, 80 Mass. Adv. Sh. 1915, 1922, 409 N.E.2d 745, 750 (1980).

171. *See* note 15 *supra.*

172. 80 Mass Adv. Sh. at 1922-23, 409 N.E.2d at 750.

173. 407 U.S. 104 (1972).

174. *See* notes 64 and 71 *supra.*

175. 407 U.S. at 119.

176. The importance of this presumption was stressed in Sumpter v. DeGroote, 552 F.2d 1206 (7th Cir. 1977), where the court stated that it was "the very essence of the due process of criminal law required by our common law and constitutional traditions." *Id.* at 1211 n.17. *See* note 123 *supra.*

177. 363 F. Supp. 921 (W.D. Va. 1973).

178. *Id.* at 924.

In *Ludwig v. Massachusetts,*[179] the Supreme Court was faced with a general claim of double jeopardy.[180] The Court upheld the de novo system stating that:

> [a] defendant who elects to be tried de novo in Massachusetts is in no different position than is a convicted defendant who successfully appeals on the basis of the trial record and gains a reversal of his case for a new trial. Under these circumstances it has long been clear that the state may reprosecute.[181]

After *Burks* it can no longer be said that a defendant who elects to be tried de novo is in the same position as a defendant who gains a reversal based upon insufficient evidence. In the latter case the defendant is a free man, while a defendant in the Massachusetts de novo system must risk a second prosecution.[182]

The second rationale which the Court in *Ludwig* relied upon in rejecting the defendant's double jeopardy claim was that it was the defendant's decision to secure a new trial.[183] This argument was also raised by the majority in *Lydon.*[184] However, the notion of "choice" implies that there are alternatives from which to choose. Where a conviction at the initial proceeding is based upon legally insufficient evidence, the option of accepting that decision is not a viable alternative.[185] Finally, the Court found that the system was just in that it allowed a defendant a second chance to gain an acquittal.[186] This argument was also set forth by the majority in *Lydon* and, as previously discussed,[187] it is no longer valid where a defendant claims that he was convicted on insufficient evidence.

The fact that the de novo system has been previously upheld, then, is unpersuasive in light of the *Burks* decision. Additionally, although the de novo system does enjoy pervasive use, this does not provide a substantive basis upon which to deprive a defendant of his constitutional rights. Finally, the Supreme Court clearly did not intend to hold, by implication, that its decision in *Burks* rendered all de novo systems uncon-

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179. 427 U.S. 618 (1976).

180. Lydon v. Massachusetts, 80 Mass. Adv. Sh. 1915, 1927 n.1, 409 N.E.2d 745, 753 n.1 (1980) (Liacos & Abrams, JJ., concurring in part and dissenting in part).

181. Ludwig v. Massachusetts, 427 U.S. at 631-33.

182. *See* note 93 *supra.* In People v. Brown, 99 Ill. App.2d 281, 293 n.2, 241 N.E.2d 653, 659 n.2 (1968), the court stated that it could "see no essential difference — except one of unfairness — between a defendant who is acquitted at trial and one who has to appeal to obtain a reversal on the ground of insufficient evidence. Surely, it would compound the unfairness to require that the latter also submit to a retrial."

183. Ludwig v. Massachusetts, 427 U.S. at 632.

184. Lydon v. Commonwealth, 80 Mass. Adv. Sh. 1915, 1921, 409 N.E.2d 745, 749 (1980). *See* note 14 *supra.*

185. *See* note 147 and accompanying text *supra.*

186. Ludwig v. Massachusetts, 427 U.S. at 632.

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

stitutional. For one, some states provide defendants with the option of appellate review or a trial de novo.[188] This would avoid the problem faced by the Court in *Lydon*. The holding in *Burks*, however, is not the relevant issue upon which to focus. The inquiry to be made is whether the principles enunciated in *Burks*, together with the historical purposes of the double jeopardy clause, casts a constitutional shadow over the Massachusetts de novo system. It is the contention of this article that it does.

CONCLUSION

The principle underlying the double jeopardy clause is that "the state with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense."[189] Traditionally, the de novo system was free from constitutional infirmity because an acquitted defendant could not be retried, while a convicted defendant, who invoked his right to a trial de novo was in the same position as a defendant whose conviction was reversed by an appellate court.[190] As a result of the holdings in *Burks* and *Lydon*, however, the de novo system now contravenes double jeopardy principles since the state is given a second opportunity to gain a valid conviction of a defendant convicted on insufficient evidence in the first instance bench trial. In reaching their decision, the *Lydon* majority inadequately probed the issue of the defendant's waiver, and avoided altogether the conflict created by *Burks* by affixing the precondition of an appellate determination of the sufficiency of the evidence before jeopardy attaches. Consequently, "the enforceability of the *Burks* right will depend largely upon the sufferance of the Legislature. If the Legislature chooses to provide a criminal defendant with no avenue of relief other than a second trial, the defendant's constitutional right must languish among shadows."[191]

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188. *See* note 15 *supra*.

189. Green v. United States, 335 U.S. 184, 187-88 (1957). *See* note 163 and accompanying text *supra*.

190. *See* note 93 and accompanying text *supra*.

191. Lydon v. Commonwealth, 80 Mass. Adv. Sh. at 1929, 409 N.E.2d at 753-54 (Liacos & Abrams, JJ., concurring in part and dissenting in part).

Bezio v. Patenaude: The "Coming Out" Custody Controversy of Lesbian Mothers in Court

The controversy concerning the weight to be afforded a parent's sexual preference in child custody cases has currently become an issue in the courts.[1] Specifically, lesbian mothers have begun to assert their rights in custody proceedings.[2] While perhaps done at the risk of re-

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1. One reason why custody for lesbian mothers has never become a recognized issue is partially the result of the minimal documentation of custody cases. This absence of reported case law has inhibited subsequent lesbian litigants and their attorneys from being provided with some precedential authority to bolster their chances for success. The rationale for minimal documentation of the lesbian mother custody suits has been twofold: First, there is an interest in protecting the privacy of the parents and the children involved. In O'Harra v. O'Harra, No. 73-384E (Or. Cir. Ct. 13th Jud. Dist., June 18, 1974), *aff'd*, 530 P.2d 877 (Or. App. 1977), *reported in* 2 WOMEN'S RIGHTS L. REP. 24 (1974), custody was awarded to the father over the lesbian mother. In the appellate court's decision, it was stated without discussion: "We have examined the record in this case and are satisfied that the trial court made the right decision. Because there is a potential for harm to persons involved, we conclude that no useful purpose would be served in publishing a detailed opinion." 530 P.2d at 877, 2 WOMEN'S RIGHTS L. REP. at 24. One Michigan judge who has had the opportunity to hear two cases involving lesbian mothers further recommends that trial court records be sealed. *See* Campbell, *Child Custody: When One Parent is Homosexual*, 17 JUDGE'S J. 52 (1978).

Second, the appellate standard of review in custody cases is whether there has been an abuse of discretion. This standard gives the trial judge such great latitude in making custody decisions that appellate courts will rarely reverse or even review a custody case. As a result, the cases are left unreported because they fail to move past the lower court stage. *See* MASS. R. DOM. REL. 52a.

In order to acquire many unreported lesbian mother custody opinions, organizations formed to give legal and emotional aid to lesbian mothers involved in custody battles may be contacted. Two of the better known organizations are:

(1) Lesbian Mothers National Defense Fund
2445 Lorentz Place North
Seattle, Washington 98109

(2) The Lesbian Rights Project
1370 Mission St., 4th Floor
San Francisco, California 94103

2. This "coming out" process of lesbian mothers seeking custody has been attributed to the growth of both the women's and gay right's movements. *See generally* Hunter & Polikoff, *Custody Rights of Lesbian Mothers: Legal Theory and Litigation Strategy*, 25 BUFFALO L. REV. 691, 692 (1976).

praisal, these mothers contend that neither their lesbian status nor their homosexual lifestyle should preclude them from gaining custody.[3]

The courts have addressed the lesbian mother custody issue from two perspectives. A minority continue to view a mother's homosexuality as a disqualifying factor in her bid for child custody.[4] However, a current judicial trend holds that a mother's homosexuality has no initial presumptive effect. In these jurisdictions, the lesbianism of the mother would only be a factor if the evidence sustained a showing that it had an adverse impact on her child.[5]

A case of first impression in Massachusetts, *Bezio v. Patenaude,*[6] illustrates this current trend. In *Bezio,* the Supreme Judicial Court held that the mother's lesbianism would not be a ban to custody unless it was

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3. Lesbian mothers exist because they had once been part of a conventional heterosexual marital relationship. *See* P. LYON & D. MARTIN, LESBIAN WOMAN 141 (1972). Lesbians had children because they "were unaware of their lesbian tendencies until after they were married and had children. Or they are women who suppressed their lesbian feelings, convinced as most heterosexuals are, that these feelings merely represented a natural phase in their lives and would disappear after they experienced marriage and motherhood. There are some women, too, who consciously rejected the gay life in favor of the more societally accepted and respected heterosexual relationship." *Id.*

This Comment does not directly discuss the custody rights of homosexual fathers, although the same principles would apply. There has been one case to date where an avowed homosexual father retained custody. *See* A. v. A., 514 P.2d 358 (Or. 1973), where a gay father was allowed to keep his two sons but his freedom of action was circumscribed. In order to provide the children with a safe environment, all other men were prohibited from residing in the family home. *Id.* at 359. Homosexual fathers' rights have been considered almost exclusively within the custody realm involving visitation. *See, e.g.,* Commonwealth v. Bradley, 171 Pa. Super. 587, 91 A.2d 379 (1952); *In re* J. S. and C., 129 N.J. Super. 486, 324 A.2d 90 (Ch. Div. 1974), *aff'd,* 142 N.J. Super. 499, 362 A.2d 54 (App. Div. 1976). One commentator attributes the lack of custody cases involving homosexual fathers to the traditional notion of the mother as being the preferred custodian. As courts begin to view the mother and father on an equal footing, more homosexual father custody cases may arise in the future. Hunter & Polikoff, *Custody Rights of Lesbian Mothers: Legal Theory and Litigation Strategy,* 25 BUFFALO L. REV. 691, 702 n.58 (1976).

4. *See* Newsome v. Newsome, 256 S.E.2d 849 (N.C. 1979). The Appeals Court affirmed the lower court's decision that custody be removed from the mother on grounds that a lesbian household would not be conducive to child raising. *Id.* at 855; Russell v. Russell, Unpublished Opinion (Tenn. Ct. App. Oct. 16, 1979) (the court held that *common sense* dictated that living in a lesbian environment was not in the best interests of the children).

5. *See* Whitehead v. Black, Nos. CV-76-422 & CV-76-426 (Me. Super. Ct. June 14, 1976), *reported in part in* [1976] 2 FAM. L. REV. (BNA) 2593. In *Whitehead,* the court allowed the lesbian mother to retain custody, stating that sexual activity "becomes a relevant consideration, not for the purpose of censuring or criticizing the manner in which the parent lives, but for the purpose of determining the impact of the parent's lifestyle upon the minor child." Nos. CV-76-422 & CV-76-426, at 8; M.P. v. S.P., 404 A.2d 1256 (N.J. Super. Ct. App. Div. 1979) (wherein the court held that the lesbianism of the mother should be a factor only if it is having adverse effects upon the child). *See also* Kallas v. Kallas, 614 P.2d 641 (Utah 1980). The court held that although one's sexuality was not a sufficient basis to deny the lesbian mother's right to overnight visitation, "manifestation of one's sexuality and resulting behavior patterns are relevant to custody and to the nature and scope of visitation rights." *Id.* at 645.

6. 80 Mass. Adv. Sh. 2133, 410 N.E.2d 1207 (1980).

apparent from the evidence that a nexus existed between the mother's homosexuality and her fitness as a parent.[7] Under the nexus requirement established in *Bezio,* the court effectively negated a per se rule which, in effect, would have made a person's sexual preference an irrebutable presumption of parental unfitness.[8] In addition the court established guidelines which would reduce the possibility of judicial bias against lesbian mothers in the future.[9]

This Comment will examine the *Bezio* decision in light of present trends involving lesbian mothers in their bid for child custody. The facts and holding of the *Bezio* decision are presented in Section I. Section II addresses the standards to be applied in child custody disputes, and focuses on the role of the trial judge in resolving the lesbian issue. Section III addresses the emerging judicial trends in these disputes, examining the impact of expert testimony and the establishment of a nexus requirement. Finally, this Comment analyzes the impact of the *Bezio* decision on child custody law in Massachusetts. It will be concluded that although the *Bezio* ruling is applicable to a narrowly defined fact pattern, the decision can be broadly construed to expand the ambit of protection for lesbian mothers.

I. *BEZIO V. PATENAUDE*

A. Facts

In *Bezio v. Patenaude,*[10] the lesbian mother, Brenda King, placed her two children in the care of a close friend, Magdalena Patenaude, from time to time over a four year period.[11] The mother consistently remained in contact with her children during the time they were with Magdalena.[12] The reason given for the mother's absences included marital problems, emotional instability, and serious medical complications which required hospitalization.[13]

While in Magdalena's care, one of the children experienced medical difficulties.[14] Magdalena could not secure medical care because she was not the legal guardian. This prompted the mother to consent to a peti-

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7. *See* notes 147-52 and accompanying text *infra.*
8. *See* notes 173-75 and accompanying text *infra.*
9. *See* notes 176-78 and accompanying text *infra.*
10. 80 Mass. Adv. Sh. 2133, 410 N.E.2d 1207 (1980).
11. *Id.* at 2134-35, 410 N.E.2d at 1208-09.
12. *Id.*
13. *Id.* at 2134-36, 410 N.E.2d at 1208-09.
14. *Id.* at 2135, 410 N.E.2d at 1209.

tion for guardianship.[15] Legal guardianship was vested in Magdalena with reasonable visitation rights reserved in the mother.[16]

When problems arose concerning Brenda's visitation rights, she sought to revoke her consent to legal guardianship and attempted to regain custody.[17] The trial court refused to vacate Magdalena's guardianship.[18] The trial judge, in declining to return custody to the mother, essentially based his decision on two grounds. First, the mother was living in a homosexual relationship with another young woman.[19] The second factor concerned the mother's "unwillingness or inability in the past to assume the responsibility of their care."[20] In a separate motion for visitation rights, the trial judge ordered that Brenda only be allowed to visit her children every other Saturday for three hours.[21] From October, 1976 until June, 1978, Brenda regularly visited her children.[22] On one regularly scheduled visit in July, 1978, Brenda failed to return the children. For approximately four months Brenda lived contentedly with the children in Vermont.[23] She was finally brought back to Massachusetts on kidnapping charges which were filed by Magdalena.[24] Upon

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15. *Id.* at 2135-36, 410 N.E.2d at 1209. The applicable statute under which Magdalena petitioned for guardianship was MASS. GEN. LAWS ANN. ch. 201, § 5 (West Supp. 1979), which provides in pertinent part:

> The guardian of a minor shall have custody of his person and the care of his education, except that the parents of the minor, jointly, or the surviving parent shall have such custody and said care unless the court otherwise orders. The probate court may, upon the written consent of the parents or surviving parent, order that the guardian shall have such custody; and may so order if, upon a hearing and after such notice to the parents or surviving parent as it may order, it finds such parents, jointly, or the surviving parent, unfit to have such custody. . . .

There was no need for the court to make a finding of parental fitness before granting permanent guardianship to Magdalena because of Brenda's consent. 80 Mass. Adv. Sh. at 2136, 410 N.E.2d at 1209.

16. 80 Mass. Adv. Sh. at 2136, 410 N.E.2d at 1209. The trial judge stated that Brenda could visit the children at Magdalena's "at all reasonable times and occasions." *Id.*

17. *Id.*

18. The petition to vacate the guardianship was filed in 1977 by Brenda and her then husband James L. Bezio. The actual judgment denying the mother custody was not heard until 1979 due to the illness of the probation officer and the petitioner's inability to pay attorney's fees. *Id.* at 2137, 410 N.E.2d at 1210.

19. *Id.* at 2139, 410 N.E.2d at 1211.

20. *Id.*

21. *Id.* at 2136, 410 N.E.2d at 1209.

22. *Id.* at 2137, 410 N.E.2d at 1210.

23. *Id.*

24. *Id.* The kidnapping charges were subsequently dismissed when the children were returned to Magdalena. Upon Brenda's return to Massachusetts, she alleged that Magdalena had sexually abused her children and filed a complaint under the care and protection statute, MASS. GEN. LAWS ANN. ch. 119, § 24 (West Supp. 1979), which states in pertinent part:

> 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

their return from Vermont, the children were placed in a neutral foster home, and then subsequently returned to Magdalena's care.[25] During this time, Brenda entered a rehabilitation home in an effort to cope with the separation from her children.[26] Having been denied custody, Brenda King sought and was granted direct appellate review by the Supreme Judicial Court.[27]

The Supreme Judicial Court in *Bezio* was faced with the question of whether the trial judge had abused his discretion when he refused to return the children to their natural mother. Within this context, the more specific issue involved the weight to be accorded a parent's sexual preference in a custody proceeding.[28] The Supreme Judicial Court, upon review of the trial judge's decision, found that the record was inadequate.[29] This finding was based on several grounds: First, the court concluded it was plainly erroneous for the trial judge to take judicial notice that the mother's homosexuality in and of itself would have an adverse effect on the children.[30] Second, the trial judge failed to

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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. 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. If, after a recitation under oath by the petitioner of the facts of the condition of the child who is the subject of the petition, the court is satisfied that there is reasonable cause to believe that the child is suffering from serious abuse or neglect, or is in immediate danger of serious abuse or neglect, and that immediate removal of the child is necessary to protect the child from serious abuse or neglect, the court may issue an emergency order transferring custody of a child under this section to the department or to a licensed child care agency or individual described in clause (2) of section twenty-six.

25. 80 Mass. Adv. Sh. at 2137, 410 N.E.2d at 1210. The Supreme Judicial Court noted the degree of comfort and care given to the children during the four months Brenda had them in Vermont. From testimony, it was discovered that Brenda's relationship with the children was "relaxed" and "controlled," and the living conditions were described as " 'very clean, very neat, and very comfortable.' " *Id.*

26. *Id.* at 2138, 410 N.E.2d at 1210.

27. *Id.* at 2134, 410 N.E.2d at 1208.

28. *Id.* at 2148, 410 N.E.2d at 1216.

29. *Id.*

30. *Id.* at 2149, 410 N.E.2d at 1216. The *Bezio* court, quoting Nantucket v. Beinecke, 79 Mass. Adv. Sh. 2623, 2630, 398 N.E.2d 458, 462 (1979) stated: "[M]atters are judicially noticed only when they are indisputably true. . . . Judicial notice is not to be extended to personal observations of the judge. . . ." 80 Mass. Adv. Sh. at 2149, 410 N.E.2d at 1216. That a parent's homosexuality would have an adverse effect upon children is not a matter that can be settled beyond argument by reference to common knowledge. The trial judge in *Bezio* took judicial notice even though the expert testimony presented from both sides indicated that parental homosexuality was an irrelevant factor in successful child rearing. *Id.* at 2148, 410 N.E.2d at 1216. Matters which can be judicially noticed consist of matters of common knowledge within the community, subjects of generalized knowledge which are readily ascertainable from authoritative sources, and matters

make a ruling on "parental fitness" before determining whether or not custody should remain with the guardian.[31] Third, the trial judge misapplied the standards recognized in child custody cases involving third parties.[32] This misapplication was in complete derogation of the strong presumption that children normally belong with their natural parents.[33]

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within the special competence of a judge. *See* Commonwealth v. Kingsbury, 79 Mass. Adv. Sh. 2149, 2153-54, 393 N.E.2d 391, 393 (1979); Boswick v. Hurstel, 344 Mass. 282, 293-94 n.3, 304 N.E.2d 186, 192-93 n.3 (1973); W. LEACH & P. LIACOS, HANDBOOK OF MASSACHUSETTS EVIDENCE 27 (4th ed. 1967). *See, e.g., In re* Duarte, 331 Mass. 747, 749, 122 N.E.2d 890, 892 (1954), where the Supreme Judicial Court held that it was improper for a probate judge to take judicial notice of pending Catholic placement applications in denying a Seventh Day Adventist's petition for adoption. There was no evidence in the record of any pending Catholic placement applications, and the trial judge's personal knowledge was insufficient. For a general discussion of when a judge may take judicial notice, *see* G. LILLY, AN INTRODUCTION TO THE LAW OF EVIDENCE § 7 (1978).

31. 80 Mass. Adv. Sh. 2133, 2134, 410 N.E.2d at 1208 (1980).

32. *Id.* at 2147, 410 N.E.2d at 1215.

33. *See, e.g.,* MASS. GEN. LAWS ANN. ch. 119, § 1 (West Supp. 1979), which provides:

> 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.
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> 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.

In a series of guardianship cases, the Supreme Judicial Court has consistently applied a presumption in favor of the natural parent, even though the natural parent may have been separated from the child for an extended period of time. *See* Richards v. Forrest, 278 Mass. 547, 180 N.E. 508 (1932), where it was held that even though the six year old child had been with its guardian almost since birth, custody was returned to the natural parents. The court stated:

> [T]he child is not a stranger to the parents, and there is no indication of natural or inherent incompatibility between them. She is young enough so that in these circumstances she will in the ordinary course of events readily become adjusted to happy relations with her own nearest blood relatives, if she returns to her own father and mother and their parental care. Other things being equal, that care is doubtless the best.

Id. at 556, 180 N.E. at 512; Gordon v. Gordon, 317 Mass. 471, 59 N.E.2d 5 (1945). In *Gordon,* the natural parents regained custody of their child after the child had spent four years with a guardian. The Supreme Judicial Court acknowledged the importance of the biological family environment and stated that "the welfare of the child is not so affected as to justify depriving her parents of their natural rights to her custody. . . ." *Id.* at 477, 59 N.E.2d at 8; Stinson v. Meegan, 318 Mass. 459, 62 N.E.2d 113 (1945). In *Stinson,* after the natural mother died in childbirth, the father placed the child in the care of relatives for five and one half years. The father's petition to regain custody was initially dismissed, but the court of appeals reversed on the basis that it was more important that the child be raised by a natural parent. *Id.* at 465, 62 N.E.2d at 116; *In re* Kauch, 358 Mass. 327, 264 N.E.2d 371 (1970). Here, the natural mother had custody pursuant to a divorce action. The father kept in touch with the children during the three years prior to the mother's death. When the mother died, both the aunt and father petitioned for guardianship. Although the children preferred to live with the aunt and the trial court had determined that custody with her would be in their "best interests," the Supreme Judicial Court held that "[t]he settled law, founded on express legislative policy and uniformly adhered to by this court, is that a parent is not to be deprived of the custody of his child in the absence of a finding that he is unfit." *Id.* at 330, 264 N.E.2d at 373; Duclos v. Edwards, 344 Mass. 544, 183 N.E.2d 708 (1962), where the children had

The bases which the trial judge relied upon in continuing custody in the guardian were blatantly unsupported by the record. In order to prevent such an arbitrary ruling, the Supreme Judicial Court attempted to clarify the standards to be used in custody cases.

II. THE LESBIAN FACTOR

A. Custody — The Threshold Issue

The traditional "parental fitness"[34] and "best interests of the child"[35] tests are the two standards used in custody proceedings. These

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spent nine years in the guardian's home and the court still held that custody should be returned to the father. *But see* Wilkins v. Wilkins, 324 Mass. 261, 85 N.E.2d 768 (1949). The evidence in *Wilkins* revealed an extremely disturbed relationship with the natural parents. Custody was retained in the guardian even though the parents were not otherwise unfit. Here, the presumption that the natural parent would be the best custodian was adequately rebutted. For a discussion of how to rebut the presumption in favor of a natural parent, *see* note 157 *infra*. In *Bezio*, Brenda's children were not emotionally distressed by her presence. In fact, the trial judge had found that "[t]he children love their natural mother and desire to visit with her. . . ." 80 Mass. Adv. Sh. 2133, 2145, 410 N.E.2d 1207, 1214 (1980).

34. "Parental fitness" within the custody context has been described as a test which evaluates a parent's ability to meet the developmental needs of a child. *See* Levy, *Child Custody Determination — A Proposed Psychiatric Methodology and its Resultant Case Typology*, 6 J. PSYCH. & L. 189 (1978). This test has been difficult to define although the focus is on parental rights rather than the child's welfare. In Massachusetts, characteristics of the "parental fitness" test have been described as exhibiting traits of "moral delinquency . . ., indifference or . . . vacillation of feeling toward the child, or inability or indisposition to control are unparental traits of character or conduct. . . ." Richards v. Forrest, 278 Mass. 547, 553, 180 N.E. 508, 514 (1932). The word "unfit" in general means "unsuitable, incompetent, or not adapted for a particular use or service." *Id.* at 552, 180 N.E. at 510. For a discussion of this nebulous standard, *see also* Comment, *King Solomon's Court: Reconciling the Interests of Parent, Child and State Under Mass. Gen. Laws ch. 119*, 15 NEW ENGLAND L. REV. 853, 862-64 (1980); Note, *The Right to Family Integrity: A Substantive Due Process Approach to State Removal and Termination Proceedings*, 68 GEO. L.J. 213, 231-40 (1979).

35. The "best interests" test, which places emphasis on the child's personal needs is presently the dominant standard used in child custody cases. *See generally* J. GOLDSTEIN, A. FREUD & A. SOLNIT, BEYOND THE BEST INTERESTS OF THE CHILD (1973). The Michigan Child Custody Act of 1970 statutorily delineates those criteria operative in determining the "best interests" of the child. Factors to be evaluated by the court include:

(a) The love, affection and other emotional ties existing between the competing parties and the child.
(b) The capacity and disposition of competing parties to give the child love, affection and guidance and continuation of the educating and raising of the child in its religion or creed, if any.
(c) The capacity and disposition of competing parties to provide the child with food, clothing, medical care or other remedial care recognized and permitted under the laws of this state in lieu of medical care, and other material needs.
(d) The length of time the child has lived in a stable, satisfactory environment and desirability of maintaining continuity.
(e) The permanence as a family unit, of the existing or proposed custodial home.
(f) The moral fitness of the competing parties.
(g) The mental and physical health of the competing parties.
(h) The home, school and community record of the child.

two tests are used with varying emphasis, depending upon whether the custody dispute is between two natural parents,[36] a natural parent and third party,[37] or a natural parent and the state.[38] In custody disputes between two natural parents, the "best interests of the child" analysis predominates.[39] In proceedings between a natural parent and a third party, the inquiry is whether or not the parents are "fit" to promote the welfare of the child.[40] Finally, in state initiated proceedings, the "parental fitness" test is also applied. However, in this area, the standard is broadly construed so that removal from the parents is justified only when the child has been physically abused or denied the basic necessities of life.[41]

The lesbianism of an individual has been used as a factor in determining custody. Presently, only a few states have been confronted with the lesbian issue. This lesbian factor in custody proceedings is generally

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(i) The reasonable preference of the child, if the court deems the child to be of sufficient age to express preference.
(j) Any other factor considered by the court to be relevant to a particular child custody dispute.

MICH. STAT. ANN. § 25.312(3) (1980). In Massachusetts, the "best interests" test has been articulated in case law in which the first and paramount consideration is the welfare of the child. *See* Bezio v. Patenaude, 80 Mass. Adv. Sh. 2133, 2144, 410 N.E.2d 1207, 1214 (1980); Purington v. Jamrock, 195 Mass. 187, 199, 80 N.E. 802, 805 (1907).

36. *See* note 39 *infra.*

37. *See* note 40 *infra.*

38. *See* note 41 *infra.*

39. *See* H. CLARK, THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES 582, 584 (1968). *See* Hersey v. Hersey, 271 Mass. 545, 171 N.E. 815 (1930), where the Supreme Judicial Court enunciated the basic rule applicable in a custody dispute between two natural parents: "The governing principle by which the court must be guided in deciding the issues raised is the welfare of the child. This is so both as [sic] matter of law and as [sic] matter of humanity. Every public and private consideration establishes this as the dominanting rule." *Id.* at 555, 171 N.E. at 820; Jenkins v. Jenkins, 304 Mass. 248, 23 N.E.2d 405 (1939), where in addition to adherence to a "best interests" standard, the court stated that, "[in] providing for the custody of a minor child, while the feelings and the wishes of the parents should not be disregarded, the happiness and the welfare of the child should be the controlling consideration." *Id.* at 250, 23 N.E.2d at 406. *See also* Vilakazi v. Maxie, 371 Mass. 406, 357 N.E.2d 763 (1976); Smith v. Smith, 361 Mass. 855, 279 N.E.2d 693 (1972); Pur-Shahriari v. Pur-Shahriari, 355 Mass. 632, 246 N.E.2d 677 (1969); Clifford v. Clifford, 354 Mass. 545, 238 N.E.2d 522 (1968); Jones v. Jones, 349 Mass. 259, 207 N.E.2d 922 (1965). For a discussion of cases in which lesbianism is a factor in custody disputes between the two natural parents, *see* notes 42-44 and accompanying text *infra.*

40. *See* Bezio v. Patenaude, 80 Mass. Adv. Sh. 2133, 410 N.E.2d 1207 (1980). In *Bezio*, the Massachusetts Supreme Judicial Court held that a finding of "parental fitness" must be evidenced before custody can be denied a natural parent. *Id.* at 2147, 410 N.E.2d at 1216.

41. *See In re* The New England Home for Little Wanderers, 367 Mass. 631, 328 N.E.2d 854 (1975), where it was held that a state must, when attempting to cut-off parental rights, show that the parents suffer from "grievous short comings or handicaps, that would put the child's welfare in the family milieu much at hazard." *Id.* at 646, 328 N.E.2d at 863. The critical question which must be asked when the state seeks to intervene is: "[F]rom what shortcomings or handicaps does the parent suffer that would endanger the well-being of the child if exposed, and has the necessity of permanently removing the child from its parent persuasively been shown?" Custody of a Minor, 79 Mass. Adv. Sh. 2099, 2112, 393 N.E.2d 379, 385 (1979). *See generally* Note, *State Intrusion into Family Affairs: Justifications and Limitations,* 26 STAN. L. REV. 1383 (1974).

evaluated within the "best interests" standard. This is because most lesbian mother custody suits arise in the divorce context where natural parents are competing for custodial rights.[42] Normally, the mother obtains custody after divorce and the lesbian factor emerges when the father later petitions for a custody modification. The basis for modification of the initial custody agreement is "substantial change in circumstances."[43] The contention of the father is that the mother's pursuance of a homosexual lifestyle is adversely affecting the child.[44] Less fre-

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42. *See* Whitehead v. Black, Nos. CV-76-422 & CV-76-426 (Me. Super. Ct. June 14, 1976), *reported in part in* [1976] 2 FAM. L. REP. (BNA) 2593; Newsome v. Newsome, 42 N.C. App. 416, 256 S.E.2d 849 (1979); M.P. v. S.P., 404 A.2d 1256 (N.J. Super. Ct. App. Div. 1979); *In re* Jane B. 85 Misc.2d 515, 380 N.Y.S.2d 848 (Sup. Ct. 1976); Schuster v. Schuster, 90 Wash.2d 626, 585 P.2d 130 (1978). *See generally* Hitchens, *Social Attitudes, Legal Standards and Personal Trauma in Child Custody Cases,* in KNUTSON, HOMOSEXUALITY AND THE LAW 89, 91 (1980).

43. In a custody proceeding where one party seeks to regain custody after an initial award, it must be shown by the complaining party that there are new circumstances present which were not known at the time of the initial award. A custody change is requested in order to promote the "best interests" of the child. The change in circumstances must be "significant" in that "change must be of sufficient magnitude to satisfy the governing principle by which the court must be guided in these cases, namely, whether the transfer of custody will be conducive to the welfare of the children." Fuller v. Fuller, 2 Mass. App. 372, 376, 312 N.E.2d 581, 584 (1974) (citations omitted). In *Fuller,* a mother sought to regain custody based on the changed circumstance of the father's second marriage. The court held that although the mother would be satisfactory as a custodian, there are no changed circumstances present which have in any way been detrimental to the children. The father's remarriage was an insufficient changed circumstance where no evidence was presented that a transfer would be in the child's "best interests." *Id. See* Palmer v. Palmer, 357 Mass. 764, 256 N.E.2d 446 (1970); Hoas v. Puchalski, 402 N.E.2d 1088 (Mass. App. 1980).

It is the contention of fathers that lesbianism per se or a mother's live-in homosexual relationship is a substantial change in circumstances to warrant a custody modification. *See* Belmont v. Belmont, No. M-16937-74 (N.J. Super. Ct. July 22, 1980), *reported in part in* [1980] 6 FAM. L. REP. (BNA) 2785. In *Belmont,* the father contended that the mother's lesbianism and her live-in homosexual relationship were sufficient changed circumstances to effect a custody modification. No. M-16937-74 at 2. The court concluded that the mother's lesbianism was not a changed circumstance because the father had previously acknowledged the mother's lesbianism in the divorce proceedings. Further, although the mother's overt lesbian relationship was a changed circumstance, it was not deemed substantial enough to modify the initial custody award. *Id.* Expert testimony was the basis upon which the court in *Belmont* ruled that the mother's lesbian relationship was not inhibitive to the children's welfare. *Id.* at 3. For a discussion of how expert testimony has been used in lesbian mother custody cases, *see* notes 95-121 and accompanying text *infra.*

44. For cases in which courts have returned custody to the father because of a finding that the mother's lesbianism was adversely affecting the child, *see In re* Jane B., 85 Misc.2d 515, 380 N.Y.S.2d 848 (Sup. Ct. 1976). Here, although the court did not rule that a lesbian mother is per se unfit, it did, however, rule that "the home environment with her homosexual partner in residence [was] not a proper atmosphere in which to bring up this child or in the best interest of the child." *Id.* at 527, 380 N.Y.S.2d at 858. The court justified its modification order returning custody to the father because of psychiatric expert testimony which evidenced that the child was emotionally disturbed and that a change in environment was needed. Although the cause of the child's emotional problems may have been due to the divorce itself, the psychiatrist "suspected the child was living in an abnormal atmosphere. . . ." *Id.* at 521, 380 N.Y.S.2d at 852. Further the *Jane B.* court limited the mother's right to visit her child by imposing the following conditions:

1. That the child, Jane B., will not remain overnight at respondents residence nor is she to be taken there to visit while Lucy Q. or other homosexuals are present;
2. That the child will not be taken to any other place where known homosexuals are present;

quently the situation arises where a third party seeks to obtain legal custody using the lesbianism of the mother as an issue in the dispute.[45] In custody cases involving third parties, the presumption that the natural mother is better able to promote the welfare of the child is accorded great weight.[46] The rarest situation where the lesbian factor is

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3. That the mother will not involve this child in any homosexual activities or publicity.

Id. at 528, 380 N.Y.S.2d at 861; Newsome v. Newsome, 256 S.E.2d 849 (N.C. 1979). The husband in *Newsome* was granted a motion for modification of the initial custody award even though it was found by the trial court that the lesbian mother had sufficiently cared for the child's well-being. The court found that "the environment in which the minor child is now being raised is not conducive or beneficial to the raising of a minor child of such tender years." *Id.* at 853.

There have been a number of attempts by fathers to modify custody awards on the grounds of sufficient change in circumstances. These attempts, which are based on the mother's lesbian lifestyle, have been largely unsuccessful. *See* Schuster v. Schuster, 585 P.2d 130 (Wash. 1978). The court in *Schuster* refused to modify a custody order which granted the children to two lesbian women. The court held that the fact that the mothers were allegedly living together in violation of certain previous decrees was not a sufficient change of circumstances. *Id.* at 133; M.P. v. S.P., 404 A.2d 1256 (N.J. Super. Ct. App. Div. 1979). In *M.P.*, the father sued a lesbian mother in an attempt to secure custody. The custody modification was denied. The basis was that neither the mother's lesbianism nor the fact that her sexual preferences might cause her children social embarassment was a sufficient change of circumstances. *Id.* at 1262. The *M.P.* court countered the father's social embarassment argument with a dissertation on the virtue of tolerance for unpopular sentiments:

> Taking the children from defendant can be done only at the cost of sacrificing those qualities they will find most sustaining in meeting the challenges inevitably ahead. Instead of forbearance and feelings of protectiveness, it will foster in them a sense of shame for their mother. Instead of courage and the precept that people of integrity do not shrink from bigots, it counsels the easy option of shirking difficult problems and following the course of expedience. Lastly, it diminishes their regard for the rule of human behavior, everywhere accepted, that we do not forsake those to whom we are indebted for love and nurture merely because they are held in low esteem by others.

Id. at 1263.

45. *See* Chaffin v. Frye, 45 Cal. App. 3d 39, 119 Cal. Rptr. 22 (1975). In *Chaffin,* custody was awarded to the lesbian mother. Although the mother could have been denied custody on a variety of grounds (*e.g.*, arrest record, economical instability), the court elevated lesbianism to the status of being the major issue and justified using lesbianism as a factor because homosexuality is penalized by the criminal law. The court stated:

> [T]his factor is not merely fortuitous or casual, but rather it *dominates* and forms the basis for the household into which the children would be brought if custody were awarded to appellant. . . . The trial court was not required to believe appellant's self-serving statements about the present nature of her homosexual relationship, nor was it required to disregard the potential psychological influence that appellant's homosexual relationship might have upon her daughters.

Id. at 47, 119 Cal. Rptr. at 25-26 (emphasis added). *See also* Bezio v. Patenaude, 80 Mass. Adv. Sh. 2133, 410 N.E.2d 1207 (1980). The trial court in *Bezio* took judicial notice of the mother's lesbianism, thereby eliminating it as a controversial issue in the case. It is questionable whether the third party, Magdalena, would have wanted to have the lesbian issue raised against the natural parent, Brenda, where "[t]he [trial] judge also indicated in his findings that the early association between Magdalena and Brenda 'may have been on a homosexual basis.' " *Id.* at 2139, 410 N.E.2d at 1211.

46. The presumption in favor of natural parents may be rebutted by a finding that the parent is unfit. Within this realm, the focus is placed upon parental rights, and the "best interests" of the child, although considered, is placed in the subordinate position. *See generally* McGough & Shindell, *Coming of Age: The Best Interest of the Child Standard in Parent-Third Party Custody Disputes,* 27 EMORY L. J. 209 (1978). One state which utilizes the "best interests" standard to the exclusion of the "parental fitness" standard (even in parent-third party custody disputes) is Col-

used to deny the mother custody occurs in state initiated neglect proceedings.[47] For example, in only one state initiated neglect proceeding has the lesbianism of the mother been a significant factor in denial of custody.[48]

The Massachusetts case of *Bezio v. Patenaude*[49] was a custody dispute involving a lesbian mother and a non-relative third party.[50] The Supreme Judicial Court in *Bezio* held that a "dual standard" was to be effectuated in child custody cases.[51] The court stated that the "best interests" and "parental fitness" tests are not "separate and distinct," but "cognate and connected."[52]

In *Bezio*, the trial judge examined the lesbian factor exclusively

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orado. Here, there is no statutory preference accorded a blood relative or the "psychological parent" of the child. *In re* Hatzopoulos, [1977] 4 FAM. L. REP. (BNA) 2075 (Colo. Juv. Ct. July 8, 1977). In *Hatzopoulos*, the court awarded custody to the former lesbian partner of the lesbian mother as opposed to the child's natural aunt. *Id.* at 2076. The basis for the court's decision included the lesbian woman's ability to effectively deal with any impact her sexual preference would have on the child. Conversely, the blood relatives were persons who idealized family life and tended to reject anything that was less than ideal. *Id.*

47. *See* People v. Brown, 212 N.W.2d 55 (Mich. 1973). In *Brown*, the trial court removed the children from the care of two lesbian mothers. The mothers were living together in violation of a previous order made pursuant to the court's jurisdiction under MICH. STAT. ANN. § 27.3178(598.2)(b)(2) (1962), which provided that a probate judge shall have jurisdiction over a child "whose home or environment by reason of neglect, cruelty, drunkeness, criminality, or depravity on the part of the parent, guardian or other custodian, is an unfit place for such a child to live in." The Michigan Court of Appeals reversed and remanded, stating that while "[t]here was sufficient evidence to support the conclusion that the women were engaged in a lesbian relationship . . ., there [was] very little to support the conclusion that this relationship rendered the home an unfit place for the children to reside." 212 N.W.2d at 59. In *In re* Tammy F., 1 Civ. No. 32648 (Cal. App. Aug. 21, 1973), *cited in* 2 WOMEN'S RIGHTS L. REP. 21, 22 (1974), custody was initially removed from the mother after she was convicted for possession of marijuana. Thereafter, her children were returned but then subsequently removed after her lesbianism became known to the court. The court's removal was based, in part, upon the conclusion that: "The continuous existence of a homosexual relationship in the home where the minor is exposed to it involves the necessary likelihood of serious maladjustment problems." *Id.* at 21.

48. *In re* Tammy F., 1 Civ. No. 32648 (Cal. App. Aug. 21, 1973), *cited in* 2 WOMEN'S RIGHTS L. REP. 21, 22 (1974).

49. 80 Mass. Adv. Sh. 2133, 410 N.E.2d 1207 (1980).

50. Magdalena was merely a friend of the natural mother. Brenda was introduced to Magdalena through a pastor at a local church. *Id.* at 2134, 410 N.E.2d at 1208.

51. *Id.* at 2147, 410 N.E.2d at 1215. *See In re* The New England Home for Little Wanderers, 367 Mass. 631, 328 N.E.2d 854 (1975), wherein the Supreme Judicial Court first articulated the "dual standard." The court stated: "We think that the relationship [between 'parental fitness' and 'best interests'] is more subtle, that elements of '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." *Id.* at 636-37, 328 N.E.2d at 858 (emphasis added).

The dissent in *Little Wanderers* indicates how the "dual standard" operates depending upon whether the focus is on "parental fitness" or "best interests." Under a "best interests" test, the rights of a parent are most always subordinated to those of a child. Alternatively, under a "parental fitness" test, the focus is on the conduct and character of the parent as it affects the child. Regardless of the approach, both tests overlap to a certain degree. *Id.* at 648, 328 N.E.2d at 864 (Hennessey, J., dissenting).

52. 80 Mass. Adv. Sh. 2133, 2147, 410 N.E.2d 1207, 1215 (1980).

within the "best interests" standard;[53] judicial notice was taken that lesbianism would have an adverse impact on the children.[54] There was no determination of "parental fitness" ever made.[55] Under the "dual standard" enunciated by the Supreme Judicial Court, the appropriate analysis should have been whether the natural parent was "fit" to further the "best interests" of the child.[56] By taking judicial notice of the mother's lesbianism, thus not thoroughly examining the question of "parental fitness," the trial court misapplied the law. This misapplication was clearly wrong, warranting a reversal by the Supreme Judicial Court.[57]

The clearly erroneous standard is used by appellate courts to review child custody proceedings. This standard provides trial judges with great flexibility in making custody awards.[58] This flexibility exists because child custody cases involve a multitude of emotionally charged impressions not easily captured in a written record. Therefore, because an appellate court is not in a position to view firsthand all of the relevant factors, it is reluctant to upset a trial judge's decision.[59]

A trial judge's wide discretionary power has led, as in *Bezio*, to arbitrary decisionmaking based on mere conjecture.[60] For instance, the

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53. *Id.* at 2139, 410 N.E.2d at 1211. The trial court, in allowing Magdalena to retain custody of her children, based its decision on the fact that she had provided a stable and loving home. To remove them from such surroundings would be traumatic. *Id.*

54. *Id.*

55. The Supreme Judicial Court remanded *Bezio* to allow the trial judge to make a ruling on the mother's "parental fitness." *Id.* at 2147-49, 410 N.E.2d at 1215-16. For a discussion of the appropriate standards which a trial judge should use in making a custody determination, *see* notes 161-70 and accompanying text *infra*.

56. *Id.* at 2149, 410 N.E.2d at 1216.

57. In *Bezio*, the Supreme Judicial Court found that the trial judge's ruling that the mother's lesbianism would adversely affect her children had no support in the record. *Id.* The standard of review for appellate courts is delineated in MASS. R. DOM. REL. P. 52(a): "[f]indings of fact shall not be set aside unless clearly erroneous."

58. The subject of a child's welfare regarding his/her present or future well-being lends itself to judicial discretion. Jenkins v. Jenkins, 304 Mass. 248, 250, 23 N.E.2d 405, 406 (1939). The trial court's failure in *Bezio* to consider relevant evidence relating to parental fitness was not within the judge's discretion. "Discretion [in consideration of the 'best interests' standard] does not of course mean arbitrary or capricious decision; it calls for a decision based on *all* of the relevant facts. . . . Troublesome facts, pointing to a conclusion contrary to that reached by the [welfare] department or the judge, are to be faced rather than ignored. . . . Only then is the judge's conclusion entitled to the great respect traditionally given to discretionary decisions." Adoption of a Minor, 367 Mass. 684, 688-89, 327 N.E.2d 875, 879 (1975) (emphasis in original).

59. *See, e.g.*, Breton v. Breton, 332 Mass. 317, 125 N.E.2d 121 (1955); Hersey v. Hersey, 271 Mass. 543, 171 N.E. 815 (1930). For a discussion of judicial discretion in child custody cases, *see generally* Comment, *Child Custody: Best Interests of the Child vs. Constitutional Rights of Parents*, 81 DICK. L. REV. 733, 734-37 (1976-77). For reasons why judicial discretion should be limited because of the potential for abuse, *see* Schoenfeld, *Discretion and the Law: A Psycholegal Overview*, 5 J. PSYCH. & L. 101 (1977); Comment, *The Custody of Children*, 2 IND. L. J. 325 (1926).

60. *See* Brief for Appellant at 33, Bezio v. Patenaude, 80 Mass. Adv. Sh. 2133, 410 N.E.2d 1207 (1980), where it was submitted that the lower court decision denying Brenda custody was based on the court's aversion to homosexuality.

trial judge in *Bezio* took judicial notice that the mother's lesbianism would have an adverse affect on her children's development.[61] There were no evidentiary findings in the record that the children would become maladjusted if raised in a lesbian household.[62] The trial judge's analysis in *Bezio* lends support to the contention of commentators that judges myopically view a person's sexual preference. This fear, known as judicial homophobia,[63] has resulted in irrational decision-making in child custody disputes.[64] Other cases involving lesbian mothers in custody proceedings confirm that judicial homophobia has inherently prejudiced the mother.[65] To illustrate, in one custody case it was held that the custodial father was the more fit of the two natural parents.[66] It was concluded that the father's home, in which the children experienced behavioral problems and substandard living conditions, was preferable to a life in a lesbian household where sexual identities may be confused.[67]

Homophobic fears of trial courts distort the application of the appropriate standards that should be utilized in custody suits. Neither the

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61. 80 Mass. Adv. Sh. 2133, 2149, 410 N.E.2d 1207, 1216 (1980). For a discussion of when a judge can take judicial notice, *see* note 30 *supra*.

62. 80 Mass. Adv. Sh. 2133, 2149, 410 N.E.2d 1207, 1216 (1980).

63. *See* Dressler, *Judicial Homophobia: Gay Rights Biggest Roadblock*, 5 CIV. LIB. REV. 19 (1978-79), in which the commentator contends that judges have a fear of homosexuality which affects their decisionmaking. "Although individual exceptions clearly exist, the judiciary as a whole has failed in this mission by displaying the subjective, emotional, and often irrational sort of judgments endemic to homophobia in cases involving gay rights." *Id.* at 20. Fear of homosexuality pervades society as a whole as well. *See* Note, *Lesbian Mothers I*, in 2 WOMEN'S RIGHTS L. REP. 3, 5 (1974); Note, *The Avowed Lesbian Mother and Her Right To Child Custody: A Constitutional Challenge That Can No Longer Be Denied*, 12 SAN DIEGO L. REV. 799, 800-15 (1975).

64. An example of irrational judicial decisionmaking is illuminated by the reflections of a southern black judge in, J. NOBLE & W. NOBLE, THE CUSTODY TRAP (1975) wherein he states:

> Sure I'm black and have been the object of prejudicial abuse. But now I'm middle aged. . . . I find I have as many prejudices as the next man. . . . This is why divorce and custody should be decided by people much closer to the social scene than we are. Who do we turn to for clinical evidence? And where would we get the time to steep ourselves in all this knowledge that's coming out? Just the other week I awarded custody to a father, and I suppose he was a good father and would take care of his children. But my reason for awarding custody was because the mother was a lesbian and flaunted it. She walked down the street with her girlfriend holding hands. I suppose if she kept the whole relationship hidden in the back room somewhere, I'd have let the kids stay with her. So maybe I awarded them to the father for the wrong reasons. Maybe two years from now I would become more tolerant of an openly lesbian mother.

Id. at 138-39.

65. *See, e.g.*, Chaffin v. Frye, 45 Cal. App. 3d 39, 119 Cal. Rptr. 22 (1975), where custody was awarded to the maternal grandparents over a lesbian mother. The court acknowledged that the criminal law penalizing homosexuality demonstrated society's abhorrence of a child growing up in a homosexual environment. *Id.* at 47, 119 Cal. Rptr. at 26. *See also* Brief for Appellant at 30, Bezio v. Patenaude, 80 Mass. Adv. Sh. 2133, 410 N.E.2d 1207 (1980) (trial court's limitation on natural mother's visitation rights was deemed a penalization because of her sexual preference).

66. Werneburg v. Werneburg, [1980] 6 FAM. L. REP. (BNA) 2280 (N.Y. Fam. Ct. Jan. 29, 1980).

67. *Id.* at 2281.

"best interests" test nor the "parental fitness" test can be equitably applied where no evidence is heard on a parent's character and competence. Indeed, this is what the Supreme Judicial Court imparted when they overruled the trial court in *Bezio*.

In order to minimize the prejudicial effects surrounding judicial homophobic attitudes, there should be a requirement that all findings of fact be recorded in detail in the record.[68] This requirement would operate as a safeguard against judicial carelessness in custody suits involving lesbian mothers. Massachusetts presently requires that detailed findings be made in custody controversies where the state is a party.[69] It is submitted that the same procedure be followed in all custody disputes so as to protect those who may be subject to judicial bias. Protection is essential because the trial judge retains continuing jurisdiction to modify his prior custody decision.[70]

B. Continuing Jurisdiction

After an initial custody award, a trial judge continues to have jurisdiction to remove a child from the original custodian.[71] A trial judge's

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68. The requirement that a judge specify his findings in the written record limits the possibility of abuse in making custody awards. Custody of a Minor, 79 Mass. Adv. Sh. 1117, 389 N.E.2d 68 (1979).

> [A]s every judge knows, to set down in precise words the facts as he finds them is the best way to avoid carelessness in the discharge of [one's] duty. Often a strong impression that, on the basis of the evidence, the facts are thus-and-so gives way when it comes to expressing that impression on paper.

Id. at 1130, 389 N.E.2d at 75 (citations omitted). *Compare* Stamper v. Stamper, No. 75-054-055-DM (Mich. Cir. Ct. June 15, 1977), where the trial judge maintained a thorough record in a lesbian custody suit, *with* Bezio v. Patenaude, 80 Mass. Adv. Sh. 2133, 410 N.E.2d 1207 (1980), where the only reference in the record as to the mother's lesbianism was the fact that it had hindered her care for her children in the past.

69. Custody of a Minor, 79 Mass. Adv. Sh. 1117, 389 N.E.2d 68 (1979). The court noted that "[w]hile much of what we say here applies to custody disputes involving husbands and wives or other relatives of the child, we wish to make clear that the requirement of detailed findings is directed only to custody controversies between the parent and the state." *Id.* at 1131 n.10, 389 N.E.2d at 75 n.10. *See* J.W. SMITH & H.B. ZOBEL, RULES PRACTICE 241 (1977), where it is explained that under procedure rules, submission of written findings of fact is optional at the discretion of the trial judge. In *Bezio,* the lesbian mother may in fact still be unable to care for her children. However, without detailed findings showing the rationale of the judge's conclusion, it becomes more likely that he subsumed the personal rights of the parents to his own personal aversion to homosexuality. Thus the requirement of detailed findings protects the lesbian mother in that the written record must reflect the basis of the custody award. The judge is also protected in that there will be less chance that allegations claiming subjective aversion to homosexuality by lesbian mothers as the sole basis for the custody decision will be made.

70. *See* notes 71-88 and accompanying text *infra.*

71. MASS. GEN. LAWS ANN. ch. 208, § 28 (West Supp. 1980), which provides in pertinent part:

> Upon a judgment for divorce, or an action of either parent, or of a next friend in behalf of the children, after notice to both parents, after such judgment, the court may make such judgment as it considers expedient relative to the care, custody and maintainance of the minor children of the parties, and may determine with which of the parents the children or any of them shall remain, or may award their custody to some third person if

exercise of this removal power usually emanates from a petition submitted by one parent contending that there has been a sufficient change of circumstances to warrant a custody modification.[72] Removal of custody may be premised upon factors such as alteration of physical environment,[73] inability to manage the child,[74] or changes in moral and mental fitness.[75] Lesbianism has also been used as a basis for custody modifications. The contention is that a lesbian household fosters an immoral and unhealthy atmosphere for a child.[76]

It is within this context of continuing jurisdiction that the lesbian mother is subject to the greatest critical scrutiny. Although a lesbian mother may be free to acknowledge her sexual preference, lesbian practice could be the basis for a custody modification.[77] For example, les-

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it seems expedient or for the benefit of the children; *and afterward may from time to time, upon the action of either parent, or of a next friend, revise and alter such judgment or make a new judgment, as the circumstances of the parents and the benefit of the children may require.*

Id. (emphasis added).

See Dawson v. Rogers, 79 Mass. Adv. Sh. 633, 387 N.E.2d 1162 (1979); Hersey v. Hersey, 271 Mass. 545, 171 N.E. 815 (1930); Masters v. Craddock, 4 Mass. App. 426, 351 N.E.2d 217 (1976).

72. *See* MASS. GEN. LAWS ANN. ch. 208, § 28 (West Supp. 1980). *See, e.g.*, Palmer v. Palmer, 357 Mass. 764, 256 N.E.2d 446 (1970) (judge has power to remove custody from one parent and give custody to the other parent based on the notion that custody proceeding is a matter peculiarly within the province of the judge, who has the chance to observe witnesses); Jenkins v. Jenkins, 304 Mass. 248, 23 N.E.2d 405 (1939) (judge has discretion to modify divorce decree in respect to custody of a minor child). *See also* note 43 and accompanying text *supra*.

73. *See* Rosenburg v. Rosenburg, 365 So.2d 185 (Fla. App. 1979) (custody removed from mother and awarded to father where change in circumstances had occurred due to unstable physical environment offered by the mother); Stevens v. Stevens, 337 Mass. 625, 151 N.E.2d 166 (1958) (father initially awarded custody but later custody award modified, based upon changed circumstance that mother offered a more stable environment).

74. *See* Hinds v. Hinds, 329 Mass. 190, 107 N.E.2d 319 (1952) (father, who initially had been granted custody, put the children in an inadequate foster home, warranting a change in custody to the mother).

75. *See* Jarrett v. Jarrett, 400 N.E.2d 42 (Ill. 1979) (change in custody effected from mother to father where mother's cohabitation with a man to whom she was not married evidenced an immoral climate); Sloane v. Sloane, 349 Mass. 318, 208 N.E.2d 211 (1965) (mother's emotional instability warranted removal of custody to father).

76. *See* Newsome v. Newsome, 256 S.E.2d 849 (N.C. 1979). The motion made by the father in *Newsome* reads, in pertinent part:

> The defendant is informed and believes, and upon such information and belief alleges, that the plaintiff has engaged in an illicit homosexual relationship with said Virginia Gooding; and has conducted said homosexual relationship in the presence and on the premises occupied by the minor child. The defendant further alleges on information and belief that the homosexual activities of the plaintiff are *detrimental to the health, safety, welfare and general well being of the minor child;* and that it would be in the best interest of said minor child that she be removed from the presence of, or association with such activities, and placed in the custody of the defendant.

Id. at 890 (emphasis added). *See generally* Hitchens, *Social Attitudes, Legal Standards and Personal Trauma in Child Custody Cases,* in KNUTSON, HOMOSEXUALITY AND THE LAW 89 (1980).

77. Courts have concluded that parental rights may not be circumscribed on the basis of homosexuality per se. *See* Bezio v. Patenaude, 80 Mass. Adv. Sh. 2133, 410 N.E.2d 1207 (1980); Smith v. Smith, [1979] 5 FAM. L. REP. (BNA) 2450 (Mich. Cir. Ct. Mar. 12, 1979); M.P. v. S.P., 404 A.2d 1256 (N.J. Super. Ct. App. Div. 1979); Armanini v. Armanini, [1979] 5 FAM. L. REP. (BNA) 2501 (N.Y. Sup. Ct. Feb. 16, 1979). Custody decisions allowing lesbian mothers to retain

bian mothers who have originally secured custody may be susceptible to losing it because of political activism in the gay movement.[78] Judges have justified this view by rationalizing that a lesbian mother who flaunts her homosexual lifestyle would never be able to adequately serve the needs of her children.[79] Even in cases where custody was allowed to remain with the mother, numerous restrictions have been imposed on the mother's freedom of action.[80] These restrictions have been justified

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custody of their children have often been based on the mother's low profile in pursuing her lifestyle. *See* M.P. v. S.P., 404 A.2d 1256 (N.J. Super. Ct. App. Div. 1979). In *M.P.*, the mother, although an admitted lesbian, was granted custody instead of the heterosexual father. The court noted in deciding in favor of the mother that "[r]egrettably, the decision as to where custody shall lie must be made in terms of available alternatives, and in this case, neither holds out the promise of a completely unguent environment." *Id.* at 1262. The *M.P.* court was persuaded to grant the lesbian mother custody because her lesbianism was not flamboyant: "[T]he evidence is affirmatively to the effect that she never displayed any sexual behavior in the presence of her children, and that she refrains from any demonstration of affection toward other women when the girls are present. Moreover, she is not a member of any homosexual organization." *Id.* at 1259; Townend v. Townend, [1975] 1 FAM. L. REP. (BNA) 2830 (Ohio Ct. C.P. Mar. 14, 1975). In *Townend,* the mother's flagrant lesbianism was grounds used to remove the children from the mother pursuant to a divorce proceeding. The court stated:

> I don't say that a mother cannot be fit to rear her children even if she is a lesbian, but I wonder if she is fit when she *boldly* and *brazenly* sets up a home where the children are to be reared, the lesbian practices which have been current there, clearly to the neglect of [sic] supervision of the children.

Id. at 2831 (emphasis added). For more discussion of the status/practice dichotomy in lesbian mother custody cases, *see* Hunter & Polikoff, *supra* note 2, at 705.

78. *See* Schuster v. Schuster, [1974] 1 FAM. L. REP. (BNA) 2004 (Wash. Super. Ct. Sept. 3, 1974), *aff'd in part,* 90 Wash.2d 626, 585 P.2d 130 (1978). Although in *Schuster* a custody modification was not effectuated based on the mothers' public advancement of the cause for homosexuality through lectures and moviemaking, the court warned the mothers that "if in the future they put the children on exhibition for the cause of homosexuality or if they spent too much time on that cause to the neglect of their children, these circumstances would jeopardize future custody." 1 FAM. L. REP. at 2004. One Michigan judge elucidates the dangers present where a child's best interests may be subordinated to the advancement of the cause for homosexuality. Campbell, *Child Custody: When One Parent is a Homosexual,* 17 JUDGE'S J. 38 n.51 (1978).

79. *See* Townend v. Townend, [1975] 1 FAM. L. REP. (BNA) 2830, 2831 (Ohio Ct. C.P. Mar. 14, 1975).

80. *See* Mitchell v. Mitchell, No. 240665 (Cal. Super. Ct. June 8, 1972), *cited in* 30 HASTINGS L. J. 892 (1979) (the *Mitchell* court awarded custody to the lesbian mother on condition that she not live with her lesbian partner and that lesbian association take place only when the children were in school and visiting with the father); Schuster v. Schuster, [1974] 1 FAM. L. REP. (BNA) 2004 (Wash. Super. Ct. Sept. 3, 1974), *aff'd in part,* 90 Wash.2d 626, 585 P.2d 130 (1978) (after an initial custody award to the two sets of lesbian mothers without any restrictions placed on their lifestyle, the appeals court reinstated the restriction that the mothers not live together); Hulett v. Hulett, No. 79-D-563 (Kan. Dist. Ct. May 19, 1980). The *Hulett* court made custody contingent upon certain requirements:

> The first requirement of this Custody Order is that the mother not cohabit with any other adult female. This limitation shall not apply to the defendant residing with parents and siblings. However this Order shall be contingent upon the defendant not allowing another female to reside with her on a regular basis.

Id. at 3. The second requirement concerned babysitting arrangements. The *Hulett* court dispelled the lesbian mother's meritorious constitutional right of association argument by reinforcing the analogy that the father's rights to freely associate were also circumscribed by loss of custody. *Id.* For a discussion of the right of association argument involving homosexuals, *see generally* Wilson & Shannon, *Homosexual Organizations and the Right of Association,* 30 HASTINGS L.J. 1029

as safeguards against possible future maladjustments in a child's development.[81] In effect, the mother must agree to a compromise with the court in order to retain custody. Such a compromise would seem to be harsh where, in the absence of proof of adverse effects, a lesbian mother is circumscribed from advocating her cause in the gay rights movement or engaging in the lifestyle most comfortable to her.[82]

In *Bezio v. Patenaude,*[83] the trial judge, through his power of continuing jurisdiction, denied Brenda King's petition for a custody modification.[84] While not directly stated, it can be inferred that Brenda's active lesbian relationship was the overriding factor in the denial of her petition.[85] Moreover, Brenda was not even afforded the option of a compromise in which she could have accepted restrictions on her lifestyle.[86]

Because of the trial court's power of continuing jurisdiction the lesbian mother must become the theoretical gay person. Thus, a mother may admit that she is a lesbian without recrimination, but overt lesbian practice sounds the warning signal for "unfitness."[87] Consequently, there is a necessity for a standard which requires that parental behavior

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(1979); Ashling v. Ashling, 599 P.2d 475 (Or. App. 1979). In *Ashling,* the trial court modified the original order granting custody to the mother on the changed circumstance that she was engaging in an overt lesbian relationship. The trial court further restricted the lesbian mother's visitation privileges. Visitation was conditioned upon the absence of any lesbians in her home or around the children. On appeal, the court stated that the restrictions imposed on visitation privileges were too stringent absent any evidence of indiscretion. *Id.* at 476; *In re* Jane B., 85 Misc.2d 515, 380 N.Y.S.2d 848 (Sup. Ct. 1976). In *Jane B.,* custody was removed from the mother and visitation rights were contingent upon there being no homosexuals present within the house, that the child would not be taken to places where known homosexuals were present, and that the mother would not inculcate the child with any homosexual publicity. *Id.* at 528, 380 N.Y.S.2d at 861. For cases in which custody and visitation rights of homosexual fathers were conditioned on maintenance of a low profile, *see* A. v. A., 514 P.2d 358 (Or. 1973); *In re* J. S. & C., 129 N.J. Super. 486, 324 A.2d 90 (Ch. Div. 1974), *aff'd,* 142 N.J. Super. 499, 362 A.2d 54 (App. Div. 1976).

81. Hulett v. Hulett, No. 79-D-563 (Kan. Dist. Ct. May 19, 1980). The court stated:

> By setting the limitations discussed herein, the Court is expressing serious reservations about the impact on children of the ages of the children born of this marriage, being raised in a setting of two females living in a marital relationship. Moreover, even if the Court were satisfied that this living arrangement would not directly adversely affect the children, there would remain the problem of community acceptance of such a relationship, and the impact of the community's reaction to this relationship on the children.

Id. at 3.

82. A salient point raised by one commentator is that the imposition of restraints on the lesbian mother's lifestyle deprives her of emotional support. This emotional deprivation could have an adverse impact upon the child. *See* Goodman, *Homosexuality of a Parent: A New Issue In Custody Disputes,* 5 MONASH L. REV. 305, 308 (1979). For a discussion of cases in which a nexus requirement is effectuated in lesbian mother custody suits, *see* notes 122-53 and accompanying text *infra.*

83. 80 Mass. Adv. Sh. 2133, 410 N.E.2d 1207 (1980).

84. *Id.* at 2136, 410 N.E.2d at 1209.

85. 80 Mass. Adv. Sh. 2133, 2148, 410 N.E.2d 1207, 1216 (1980).

86. Brief for Appellant at 33-34 n.3, Bezio v. Patenaude, 80 Mass. Adv. Sh. 2133, 410 N.E.2d 1207 (1980).

87. *See* Section III.B. *infra.*

should not be considered which does not adversely affect the child.[88] The lesbian mother should not have to be placed in a custody trap where being theoretically gay merely becomes form without substance.

III. LESBIANISM AND THE FACTUAL MATRIX

An emerging trend in custody cases indicates that the lesbian factor is diminishing in importance.[89] This trend has been the result of the judiciary basing its decisions on more objective standards. Specifically, two objective criteria have been used to minimize the subjective disqualifying effect lesbianism has traditionally had in child custody disputes. First, there has been substantial reliance on expert testimony.[90] Such testimony is offered to rebut the proposition that the mother's lesbianism will have either patent or latent adverse effects on the child.[91] Second, many courts have adopted a nexus requirement in which the lesbian factor has no presumptive effect unless concrete evidence can substantiate that it has a negative impact.[92] Judicial reliance on expert

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88. UNIFORM MARRIAGE AND DIVORCE ACT § 402, which states that a trial court "shall not consider conduct of a proposed custodian that does not affect his relationship to the child." In effect, this is a nexus test which shifts the burden onto the complaining party to show that a mother's lesbianism is having an adverse effect on the child. Colorado has adopted the language of the UNIFORM MARRIAGE AND DIVORCE ACT. COLO. REV. STAT. ANN. § 14-10-124 (1973). A Colorado case in which the opposing party could not show that the proposed custodian's lesbianism would adversely affect the child, caused custody to be transferred from a blood relative to a non-related lesbian. *In re* Hatzopoulos, [1977] 4 FAM. L. REP. (BNA) 2075 (Colo. Juv. Ct. July 8, 1977). In *Hatzopoulos,* the court concluded:

> Donna's sexual preference has *not affected* the child in the past and is not related to her ability to parent the child. Her strengths as a parent to the child are her sensitivity, her ability to empathize with the child, her warmth and her dependability. When sexual preference would become significant to the child, Donna has the ability to deal with it intelligently, openly, and honestly.

Id. (emphasis added). The imposition of a nexus requirement affords the proposed lesbian custodian more protection from judicial decisions based upon subjectivity. *See* notes 125-53 and accompanying text *infra.*

89. Belmont v. Belmont, No. M-16937-74 (N.J. Super. Ct. July 22, 1980), *reported in part in* [1980] 6 FAM. L. REP. (BNA) 2785. Where lesbianism and the maintenance of a lesbian relationship within the home were *only two* of the *many* factors in determining the child's "best interests." Smith v. Smith, [1979] 5 FAM. L. REP. (BNA) 2450 (Mich. Cir. Ct., Mar. 12, 1979), wherein a lesbian mother was granted custody based on a finding that lesbianism is only *one* of the several factors to be considered. *Cf.* Chaffin v. Frye, 49 Cal. App. 3d 39, 46-47, 119 Cal. Rptr. 22, 25-26 (1975) (in which a lesbian mother lost custody to her own parents; although custody may have been denied on another basis — perhaps, the mother's arrest record — the court elevated the *lesbian factor* as dominant).

90. *See* notes 95-121 and accompanying text *infra.*

91. For an enlightened discussion of testimonial strategy which should be used to rebut prejudicial attitudes concerning homosexuality, *see generally* Hitchins & Price, *Trial Strategy in Lesbian Mother Custody Cases: The Use of Expert Testimony,* 9 GOLDEN GATE L. REV. 451 (1979-80).

92. *See* notes 122-53 and accompanying text *infra.*

testimony and adherence to a nexus requirement has favored lesbian mothers. These mothers have been able to retain custody of their children without having to compromise their lesbian lifestyles.[93] The courts' use of these two objective criteria evidences a shift in judicial focus. Courts are now approaching the lesbian issue in terms of the lesbian mother as a parent, rather than the mother as a lesbian.[94]

A. Expert Testimony

Psychiatric experts have become an integral part of the child custody process.[95] When a determination must be made as to which person can better provide for the child's physical and emotional needs, many behavioral variables must be examined.[96] Some examples of these individual variables include: (1) the emotional stability of the parties; (2) the nature of the relationship between the parties; and (3) the relative atmosphere of the competing households.[97] Psychiatrists, because of their expertise, are best qualified to evaluate these behavioral variables. In contrast, the judiciary has only limited expertise;[98] judges are not

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93. In a number of recent cases, the lesbian mother's partner has been able to remain part of the household. Smith v. Smith, [1979] 5 FAM. L. REP. (BNA) 2450 (Mich. Cir. Ct. Mar. 12, 1979); Belmont v. Belmont, No. M-16937-74 (N.J. Super. Ct. July 22, 1980), *reported in part in* [1980] 6 FAM. L. REP. (BNA) 2785; Armanini v. Armanini, [1979] 5 FAM. L. REP. (BNA) 2501 (N.Y. Sup. Ct. Feb. 16, 1979); Barron v. Becker, No. 79-12869 & 79-12431 (Pa. Ct. C.P. Feb. 15, 1980).

94. Inevitably, there will be both bad and good homosexual parents. If custody determinations are based on the individual capabilities of the parent as a parent, two positive results will be achieved. A good homosexual parent who has provided a stable home will not be sanctioned because of her sexual preference, and the "best interests" of the child will not be subordinated because of the homosexuality issue. The Colorado court in *In re* Hatzopoulos, [1977] 4 FAM. L. REP. (BNA) 2075 (Colo. Juv. Ct. July 8, 1977), looked at the lesbianism of the proposed custody within the ambit of "best interersts." The proposed lesbian custodian's relationship with the child was so close that removal of custody would have been detrimental to the child's mental health. In balancing the factors, it was found that the prospective lesbian custodian offered the stability necessary to provide for the child's "best interests." Conversely, the child's blood relatives tended to have an unrealistic attitude towards family life, which could possibly be psychologically detrimental to the child's social adjustment. In light of the court's balancing process in *Hatzopoulos,* the focus on "best interests," as opposed to sexual preference, in effect, relegated the proposed custodian's lesbianism to an irrelevant status. *Id.* at 2076.

95. Halleck, *A Troubled View of Current Trends in Forensic Psychiatry,* 2 J. PSYCH. & L. 134 (1974).

96. For a checklist of variables examined in a child custody dispute, *see* R. WOODY, GETTING CUSTODY 90-110 (1978).

97. *See In re* Hatzopoulos, [1977] 4 FAM. L. REP. (BNA) 2075 (Colo. Juv. Ct. July 8, 1977). In *Hatzopoulos,* the emotional stability of the lesbian mother was very strong. The court acknowledged that Donna Levy was a sensitive woman who would have the ability to effectively deal with any problems resulting from her sexual preference. Moreover, the maintenance of the relationship with the proposed lesbian custodian was endemic to the child's welfare. *Id.*

98. *See* Halleck, *supra* note 95, at 136-37, where the commentator states:

> The biases, the limited expertise, even the mistakes, of the judicial agency are not easily hidden. Faced with new responsibilities and new stresses, attorneys and judges have understandably looked for new sources of expert assistance. The expert not only provides information and opinions that may enhance the probability of a just resolution

specifically trained to deal with all of the psychological factors operative in a child custody case. This lack of expertise makes it more likely that judicial custody determinations are prone to decisionmaking based on instinct, rather than on empirical data.[99] The psychiatrist's role has been to assist the judge in making more objective decisions. Although the judge is not bound by psychiatric testimony,[100] it has been increasingly used as a major factor in deciding the outcome of lesbian mother custody suits.[101]

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of the problem, but also will share some of the responsibility for the ultimate legal decision, since much of our litigation involves behavior that is viewed as strange, deviant, or illegal, and since psychiatrists, justifiably or not, hold the highest status as experts in the understanding of a typical human behavior [in this instance lesbianism], they find themselves increasingly welcome in the courtroom.

99. Solow & Adams, *Custody by Agreement: Child Psychiatrist as Child Advocate,* 5 J. PSYCH. & L. 77 (1977). "Courts tend to uphold traditional values in deciding child custody. The decision is difficult if one parent accuses the divorced spouse of being involved in drugs, alcohol, radical politics, *homosexuality* or almost any form of illegal or nontraditional behavior." *Id.* at 81 (emphasis added). In Russell v. Russell, Unpublished Opinion (Tenn. Ct. App. Oct. 6, 1979), the appeals court acknowledged that previous lesbian mother custody cases have held that a homosexual environment would not adversely affect a child. The court also noted the expert testimony of a clinical psychologist who stated that children exposed to an ongoing lesbian relationship within the home would not be adversely affected. Still, the court dispelled the cited cases and expert testimony stating: "Common sense dictates that living in a lesbian environment is not in the best interest of the children. Such [sic] environment can make little or no contribution to their spiritual or intellectual growth and development." Unpub. Op. at 5.

The court's attitude in *Russell* illustrates the danger in viewing the lesbian factor in a vacuum without relating it to the child. Where the focus is on lesbianism alone, without relationship to the child, it becomes more probable that a custody determination will not be decided in the child's "best interests." "Each child embodies his own unique combination of physical, psychological, and social components; no child has quite the same strengths or weaknesses as another or exactly the same relationship with his family. The parental figure which damages one child might leave another quite untouched." Gill, *The Legal Nature of Neglect,* 6 NAT'L PROBATION AND PAROLE ASS'N J. 1, 5 (1960), *quoted in* Guardianship of a Minor, 1 Mass. App. Ct. 392, 396 (1973). For a discussion of how judicial homophobia has affected the child custody process, *see* notes 63-70 and accompanying text *supra.*

100. Expert testimony may be used as probative evidence in any case, but ultimate determination of the weight to be given the expert testimony is reserved for the trier of fact. Whether or not the proffered expert testimony is relevant in a lesbian mother custody context depends on its tendency to establish a material proposition (*e.g.,* lesbianism is irrelevant or lesbianism is adversely affecting the child) which is beyond the ordinary understanding of the lay person. It must be remembered that expert testimony is considered opinion evidence. *See generally* G. LILLY, AN INTRODUCTION TO THE LAW OF EVIDENCE § 104 (1978).

101. There have been a number of cases in which the court has justified its decision favoring the lesbian mother on the basis of the expert testimony presented. *See* Belmont v. Belmont, No. M-16937-74 (N.J. Super. Ct. July 22, 1980), *reported in part in* [1980] 6 FAM. L. REP. (BNA) 2785. *Belmont* involved an attempt by a father to regain custody of his two children, Eddie and Tika, aged nine and eleven respectively. The court recognized that the father was fully capable of taking responsibility for the children. Despite the court's favorable assessment of the father's capabilties, custody was retained by the mother. No. M-16937-74 at 5. The judge in *Belmont,* in allowing custody to be retained in the mother, relied on expert testimony to evaluate the issue of whether the mother's homosexuality would act adversely upon the child's normal development. Dr. Greene, a psychiatrist specializing in human sexuality, and with particular experience in areas concerning the psycho-sexual development of children, testified that Eddie and Tika showed no signs of sex role conflict or confusion, and both exhibited comparatively normal sexual identities. *Id.* at

There has been a shift in recent years concerning how trial judges use expert testimony to reach decisions in lesbian mother custody suits. Rather than focus on the deviancy aspect of the lesbian personality, there has been more judicial reliance placed on expert testimony which evaluates the specific lesbian - child relationship.[102] In effect, the lesbianism of the mother is not looked at in a vacuum. The mother's relationship with the child is the major consideration. Therefore, psychiatric testimony made on behalf of the lesbian mother has been given greater weight.[103] To the contrary, pro-heterosexual testimony has

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3. The trial judge concluded on the basis of expert testimony proffered by Dr. Greene that the children had suffered no sexual identity conflict, and that it would be unreasonable to uproot the present family stability merely because of an unconventional lifestyle. The trial judge stated:

> *It was Dr. Greene's opinion, and I so find,* that Eddie showed genuine male identity and no signs of any gross psycho-sexual conflicts, and that Tika had a self-concept of being female, that her behavior was conventional female behavior and that she had no signs of any sexual identity conflict or any impairment of her psycho-sexual development.

Id. (emphasis added). The Michigan case of Smith v. Smith, [1979] 5 FAM. L. REP. (BNA) 2450 (Mich. Cir. Ct. Mar. 12, 1979), is another example of a court's reliance upon expert testimony to dismantle the preconceived notions that a child in the custody of a lesbian mother would be adversely affected in contravention of the child's "best interests." *Smith* involved a lesbian mother's bid for modification of the divorce decree which had vested custody in the father. The father had never exercised his custodial rights, and actual custody was held by the paternal grandmother for approximately two years. *Id.* at 2451. The *Smith* court when balancing the factors involved, conceded that the father, although fit to have custody, did not by a preponderance of the evidence afford a better home for the child than the mother. The court, in negating the issue raised by the father that the mother's lesbianism would create maladjustment problems for the child, deferred to the expert medical testimony of Dr. James Lundy on the subject of female sexuality. The trial judge repeated the testimony of Dr. Lundy, and, in effect, based his decision on the doctor's perception.

> The court was most fortunate in being able to hear the expert testimony of Dr. James Lundy on the subject of female sexuality. We stress the word "female" since the witness Lundy testified that there are significant differences between a male and female homosexual behavior patterns. The witness Lundy explained that female sexuality is not a disorder or disease, but rather a variation. He said that a child's gender identity is essentially determined at the age of eighteen months to three years. . . . [H]e then said that while no one really knows the effect of homosexuality by the custodial parent or parents on a young child, it is a commonly accepted view that sex is not a significant variable in the care of a child. It is, rather, the kind of care, the quality of care, the love, security, and consistency of discipline that are important. Thus, if two female homosexuals can give that kind of care, it matters not that they are lesbians, nor does it matter if the child is male or female. Lesbianism, he testified, is a choice not an abnormality.

Id.

This dissertation by the court is a clear example of a judge incorporating the testimony of another as a justification for its own decision. Judicial reliance on expert testimony was also evidenced in Whitehead v. Black, Nos. CV-76-422 & CV- 76-426 (Me. Super. Ct. June 14, 1976), *reported in part in* [1976] 2 FAM. L. REP. (BNA) 2593. The court in *Whitehead* returned custody to the lesbian mother. Although the mother's homosexual lifestyle was a factor to be considered, the expert testimony proffered by Dr. Heath bore on the trial judge's favorable decision. The expert testimony, quoted in part by the court, revealed that although the effects of the mother's lesbianism on the children could not be conclusively predicted, the interviews with the mother showed her acumen in dealing with the unconventional situation. Nos. CV-76-422 & CV-76-426 at 10. *Contra,* Russell v. Russell, Unpublished Opinion (Tenn. Ct. App. Oct. 6, 1979) (where the expert testimony of a psychiatrist concluded that the mother's lesbian environment would not be in a child's "best interests").

102. *See* note 93 *supra.*

103. *See* note 100 *supra.*

lacked the substantive data to empirically substantiate the theory that a child raised in a homosexual home will suffer serious maladjustments.[104] There has been no conclusive proof offered by pro-heterosexual experts that children raised in a homosexual household are more likely to become homosexual themselves,[105] develop an irreversible social stigma,[106] or that a homosexual parent has a greater propensity to sexually molest his/her children.[107] Since these professional opinions can not be backed up with sound data, pro-heterosexual testimony has begun to lose its efficacy.[108] Conversely, pro-homosexual psychiatric experts have been able to effectively dispel any homophobic myths by focusing on the lesbian mother's relationship with her child.

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104. Goodman, *Homosexuality of A Parent, A New Issue In Custody Disputes,* 5 MONASH L. REV. 305 (1979). The author states:

> It is a fact that there is no specific evidence to support or refute the claim that children generally are likely to be adversely affected by being members of homosexual households. It is a fallacy to believe that science in general and the behavioral sciences in particular can assist the court by providing clear-cut answers to this controversial question. Psychological evidence, no less than the moral predeliction of the judiciary, is influenced by the subjective bias of the observer. Given the complexity of human behavior, it may well be that precise, quantitative, experimentally verified data will never be available to guide the court in custody adjudication involving a homosexual parent, or for that matter any other form of custody adjudication.

Id. at 313. *See also* S. RAMOS, THE COMPLETE BOOK OF CHILD CUSTODY 159-71 (1978); Hunter & Polikoff, *Custody Rights of Lesbian Mothers: Legal Theory and Litigation Strategy,* 25 BUFFALO L. REV. 720, 732 (1976); Rivera, *Our Straight-Laced Judges: The Legal Position of Homosexual Persons in the United States,* 30 HASTINGS L. J. 799, 903-04 (1979). In fact, the experts disagree on the causes of homosexuality, and on whether it is a mental illness, a deep-seated sexual orientation, or merely a variant lifestyle. It logically follows, therefore, that there is debate as to the effect of one's sexual orientation on children.

105. *See* Campbell, *Child Custody: When One Parent is a Homosexual,* 17 JUDGE'S J. 38, 39 (1978).

106. *See* Hall, *Lesbian Families: Cultural and Clinical Issue,* 25 SOCIAL WORK 385 (1978). In response to the argument that children will develop an irreversible social stigma because of a parent's homosexuality, the author used the analogy of interracial stigmatization. The point to be made is that it is not the task of the judiciary to resolve every conflict to which a child may be exposed in the real world. The New Jersey appeals court comported with this view in M.P. v. S.P., 404 A.2d 1256 (N.J. Super. Ct. App. Div. 1979). The court stated:

> If defendant [lesbian mother] retains custody, it may be that because the community is intolerant of her differences these girls may have to bear themselves with greater than ordinary fortitude. But this does not necessarily portend that their moral welfare or safety will be jeopardized. It is just as reasonable to expect that they will emerge better equipped to search out their own standards of right and wrong, better able to perceive that the majority is not always correct in its moral judgments, and better able to understand the importance of conforming to the requirements of reason and tested knowledge, not the constraints of current popular sentiment or prejudice.

Id. at 1263.

107. There have been no cases to date involving incidents between lesbian mothers and female children. *See* Hall, *supra* note 106. For examples of the judicial fear that lesbians will molest their children, *see* Hitchens & Price, *Trial Strategy in Lesbian Mother Custody Cases: The Use of Expert Testimony,* 9 GOLDEN GATE L. REV. 451, 454 (1979).

108. The demise of the effectiveness of pro-heterosexual testimony may in part be due to the successful litigation strategy used by lesbian mothers involved in a custody dispute. Strategic guidelines on the most effective ways to rebut the general misconceptions surrounding lesbian mothers may be found in, Hitchens & Price *supra* note 107 at 454. *See generally* Hunter & Polikoff, *supra* note 2.

Many courts have concluded, based on this expert testimony, that placement with a lesbian mother would be in the "best interests" of the child.[109] In *Bezio v. Patenaude,*[110] the expert testimony offered by both parties concluded that the mother's sexual preference would not impair her parental skills.[111] Notwithstanding, the trial court accorded little weight to this expert testimony.[112]

The trial court decision in *Bezio* is the antithesis of recent cases which have allowed custody to remain with the lesbian mother. These decisions have allowed custody where pro-heterosexual testimony has failed to show that a mother's sexual preference has adversely effected the child. In particular, New Jersey has established a solid precedent in using expert testimony as substantive evidence to justify the custodial decisions in favor of homosexual parents.[113] In fact, a recent New

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109. *In re* Hatzopoulos, [1977] 4 FAM. L. REP. (BNA) 2075 (Colo. Juv. Ct. July 8, 1977); Whitehead v. Black, Nos. CV-76-422 & CV-76-426 (Me. Super. Ct. June 14, 1976), *reported in part in* [1976] 2 FAM. L. REP. (BNA) 2593; Smith v. Smith, [1979] 5 FAM. L. REP. (BNA) 2450 (Mich. Cir. Ct. March 12, 1979); Stamper v. Stamper, No. 75-054-550-DM (Mich. Cir. Ct. July 15, 1977); Belmont v. Belmont, No. M-16937-74 (N.J. Super. Ct. July 22, 1980), *reported in part in* [1980] 6 FAM. L. REP. (BNA) 2785; M.P. v. S.P., 404 A.2d 1256 (N.J. Super. Ct. App. Div. 1979); Armanini v. Armanini, [1979] 5 FAM L. REP. (BNA) 2501 (N.Y. Sup. Ct. Feb. 16, 1979); Becker v. Becker, Nos. 79-12869 & 79-12431 (Pa. Ct. C.P. Feb. 15, 1980); Schuster v. Schuster, [1974] 1 FAM. L. REP. (BNA) 2004 (Wash. Super. Ct. Sept. 3, 1974). Although these courts have concluded that the children's "best interests" would be better served by retaining custody with the lesbian mother, there is a position taken by the judiciary that "best interests" really is equal to lack of an available, alternative placement. For example, in *M.P. v. S.P.*, the court, in finding that custody should remain with the lesbian mother, stated:

> Regrettably, the decision as to where custody shall lie must be made in terms of *available alternatives,* and in this case neither holds out the promise of a completely unguent environment. While one is troubled by the possible problems that may arise from defendant's homosexual bent, the evidence also features a disturbed and abrasive personal relationship between Joy and plaintiff's father's present wife which has resulted in the administration of unduly harsh discipline to this child.

404 A.2d at 1261. The least detrimental alternative placement theory is discussed in J. GOLDSTEIN, A. FREUD & A. SOLNIT, BEYOND THE BEST INTEREST OF CHILD (1973).

110. 80 Mass. Adv. Sh. 2133, 410 N.E.2d 1207 (1980).

111. *Id.* at 2148, 410 N.E.2d at 1215-16.

112. *Id.* at 2149, 410 N.E.2d at 1216.

113. The 1974 case of *In re* J.S. & C., 129 N.J. Super. 486, 324 A.2d 90 (1974), initially carved the path by pronouncing a rule that a homosexual's visitation rights could not be circumscribed absent a positive showing through expert testimony that the parent's homosexual activities would impair the mental or physical health of the child. *Id.* at 489, 324 A.2d at 92. The rule was expanded in M.P. v. S.P., 404 A.2d 1256 (N.J. Super. Ct. App. Div. 1979), where it was held that the court improperly ignored expert testimony which revealed that a custodial change would harm the children involved. On the lesbian issue, the court went so far as to emphasize with the plight of the mother by stating that the sexual cruelty experienced at the hands of the father "could well have stifled forever the mother's initial efforts to enjoy heterosexual love in a conventional relationship." *Id.* at 1263. The effect of *M.P.* has been to shift judicial focus from looking at homosexuality itself to a consideration of homosexuality as it directly relates to the child's welfare. The shift has caused judges to give evidentiary value to that psychiatric testimony which evaluates the parents' individual parenting abilities, rather than rely upon assumptions or theories postulating the adverse possibilities of homosexual parenting, without clinical evidence to support it. The *M.P.* focus of analysis in cases involving lesbian mothers has since been tested at the trial level. In Belmont v. Belmont, No. M-16937-74 (N.J. Super. Ct. July 22, 1980), *reported in part in* [1980] 6

Jersey decision has gone as far as to give a lesbian mother custody while not restricting her live-in lesbian relationship.[114] This was held even though it was noted that the father would have been a capable parent.[115] Before custody can be denied, New Jersey requires a positive showing through expert testimony that a parent's homosexual activities would impair the mental or physical health of the child.[116] Massachusetts subscribes to a similar position. The Supreme Judicial Court has taken the approach that all of the available evidence, including expert testimony, must be evaluated by the trial judge.[117] In *Bezio*, the trial judge never considered the expert testimony.[118] As a result, the Supreme Judicial Court, upon review, remanded the case so that the expert testimony would be given its appropriate weight.[119] However, how much weight was to be given the expert testimony was never delineated.[120] Perhaps Massachusetts, like New Jersey, should clarify its guidelines regarding the degree of consideration expert testimony is to receive.[121]

B. The Nexus Requirement

In addition to the substantial consideration given to expert testimony, adherence to a nexus requirement will encourage more equitable resolutions of lesbian mother custody suits.[122] The establishment of a nexus requires that the sexual preference of the mother be viewed in conjunc-

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FAM. L. REP. (BNA) 2785, the lesbian mother was allowed to retain custody of her children even though the court concluded the father would have been a capable parent. Expert testimony proffered by the pro-homosexual expert became the basis for the trial judge's decision. The trial judge fount that there were "no signs of any gross psycho-sexual conflicts . . .," merely because of an unconventional lifestyle. No. M-16937-74 at 3. The expert testimony given evidentary value was that which focused on the mother's relationship with the children. The lesbian factor in *Belmont* was largely irrelevant in that the testimony failed to produce any concrete evidence confirming a nexus between the homosexual relationship and a resulting adverse impact upon the child. For a discussion of the nexus requirement, *see* notes 122-52 and accompanying text *infra*.

114. Belmont v. Belmont, No. M-16937-74 (N.J. Super. Ct. July 22, 1980), *reported in part in* [1980] 6 FAM. L. REP. (BNA) 2785.

115. *Id.*

116. *See* cases cited in note 113 *supra*.

117. 80 Mass. Adv. Sh. 2133, 410 N.E.2d 1207 (1980).

118. *Id.*

119. *Id.*

120. The Supreme Judicial Court in *Bezio*, although acknowledging that the expert testimony was evidence to be considered, did not afford the trial court with a clear standard. In fact, the Supreme Judicial Court used weak language, stated in the negative, when referring to the evidentiary burden trial courts were to adhere to. "In the *total absence* of evidence *suggesting* a correlation between the mother's homosexuality and her fitness as a parent, we believe the judge's finding that a lesbian household would adversely affect the children to be without basis in the record." *Id.* at 2149, 410 N.E.2d at 1216 (emphasis added).

121. *See* M.P. v. S.P., 404 A.2d 1256 (N.J. Super. Ct. App. Div. 1979). The *M.P.* court noted that expert testimony was desirable in achieving answers to difficult questions involving child custody and is properly relied on by courts. *Id.* at 1261.

122. For cases in which the nexus requirement was used in lesbian mother custody cases, *see* notes 123-53 and accompanying text *infra*.

tion with the child's welfare.[123] Under this parameter, the mother's lesbianism cannot be used as a basis to deny custody unless there is proof that it is causing injury to the child.[124] There are presently two operative versions of the nexus requirement. The first version imposes a nexus in cases where emphasis is placed on "parental fitness."[125] The critical inquiry here is whether the manifestation of lesbian behavior has so affected the parenting abilities of the mother to constitute neglect.[126] The second version shifts emphasis to the "best interests" of the child.[127] Here, the inquiry is whether there is sufficient evidence to support a finding that the lesbian mother's behavior is adversely affecting the child.[128] Both types of nexus requirements shift the focus from lesbianism to parental behavior. The difference between the two versions is a matter of degree: Under a "parental fitness" test lesbianism alone can be the *sole factor* which precludes a mother from maintaining custody,[129] while under a "best interests" standard lesbianism may be just *one of many factors* in determining custody.[130]

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123. *See* UNIFORM MARRIAGE AND DIVORCE ACT § 402, *supra* note 88.

124. *Cf. In re* Hatzopoulos, [1977] 4 FAM. L. REP. (BNA) 2075 (Colo. Juv. Ct. July 8, 1977). The custody controversy in *Hatzopoulos* did not involve a lesbian mother, but rather the mother's former lesbian partner. This former lesbian partner was granted custody instead of the child's blood relatives. One reason for this atypical custodial arrangement was that there was no evidence presented that a lesbian relationship would cause *harm* to the child. Conversely, the evidence showed that the child being with Donna Levy, the mother's former lesbian partner, was important for her emotional well-being. *Id.* at 2077.

125. Parental fitness is usually emphasized in state initiated neglect proceedings and custody disputes between natural parents and third parties. There is the initial presumption that a natural parent is fit to further the child's best interests and the opposing party has the burden of proof to show that the parent is "unfit." *See* notes 34-52 and accompanying text *supra.*

126. *See* notes 136-39 and accompanying text *infra.*

127. The best interests standard is normally used in divorce proceedings where two natural parents are competing for custodial rights. *See* notes 34-52 and accompanying text *supra.*

128. *See* Whitehead v. Black, Nos. CV-76-422 & CV-76-426 (Me. Super. Ct. June 14, 1976), *reported in part in* [1976] 2 FAM. L. REP. (BNA) 2593. The *Whitehead* court focused on parental behavior which adversely affects the child. The court stated that "the inquiry would be the same whether the parent is living in an adulterous heterosexual relationship or a homosexual relationship; what is the effect on the child exposed to this relationship." Nos. CV-76-422 & CV-76-426 at 4. *See also,* Kallas v. Kallas, 614 P.2d 641 (Utah 1980).

129. *See, e.g.,* People v. Brown, 49 Mich. App. 358, 212 N.W.2d 55 (1973), where the trial court relegated the children to foster homes as their own homes were "unfit because the mothers were living in a state of lesbianism which created an immoral atmosphere." *Id.* at 360, 212 N.W.2d at 57. The appellate court reversed and remanded, stating that there was very little evidence to support the conclusion that their lesbian relationship rendered the home an unfit place for children to reside. *Id.* at 362, 212 N.W.2d at 59.

130. Smith v. Smith, [1979] 5 FAM. L. REP. 2450 (Mich. Cir. Ct. March 12, 1979). The *Smith* court held that "lesbianism is only one of several factors to be considered, and that in and of itself, female homosexuality is no bar to the granting of custody of a child or children under the Child Custody Act of 1970." *Id.* at 2451. For pertinent provisions of the Michigan Child Custody Act, *see* note 35 *supra;* Belmont v. Belmont, No. M-16937-74 (N.J. Super. Ct. July 22, 1980), *reported in part in* [1980] 6 FAM. L. REP. (BNA) 2785. The lesbianism of the mother and her live-in lesbian relationship were only two of the many factors to be considered in a custody proceeding between divorced parents. No. M-16937-74 at 3.

When suits are initiated by the state and third persons,[131] the "parental fitness" standard is normally utilized.[132] Under this standard, the nexus mandates that lesbianism can never be the equivalent of child neglect.[133] Rather, lesbianism plus overindulgent lesbian activity would be necessary to prove neglect.[134] To illustrate, a lesbian mother who engages in a lesbian relationship is not an unfit mother unless that relationship causes her to impair the child's physical or emotional health.[135] Those courts which have imposed a nexus requirement where the fitness of the parent is at issue have foreclosed judicial application of the conclusive presumption that lesbianism, standing by itself, indicates unfitness.[136] For example, in *People v. Brown,*[137] the Michigan Court of

131. *See* notes 44-48 and accompanying text *supra.*

132. *See generally* notes 34-70 and accompanying text *supra.*

133. Townend v. Townend, [1975] 1 FAM. L. REP. (BNA) 2830 (Ohio Ct. C.P. March 14, 1975). The court agreed that a lesbian may be "fit" to raise her children, but may not be fit if she indulges in the lesbian practices to the neglect of the children. *Id.* at 2831. However, in *Townend* it is unclear whether the finding of unfitness was based on substantive proof in the record that the mother's lesbian activities were causing her to neglect her child, or on a mere assumption by the trial judge. The only evidence proffered was a writing in the lesbian mother's journal that "she loved her [lesbian partner] to a degree where if it became a choice she would give up the children before she would give up Vicky Dickinson." The trial judge responded that: "I don't think it is all right in the eyes of society, and I don't think that that frame of mind and that attitude are conducive to the rearing of these children in this home, coupled with the consequent neglect of them ensuing as shown by the evidence." *Id.* at 2831. Thus, although the *Townend* court stated that lesbianism was not the equivalent of neglect, the nexus employed was tenuous in that it was not based on concrete evidence but on assumptions made by the trial judge. For examples of judicial homophobia prevalent in lesbian mother custody cases, *see* notes 63-67 and accompanying text *supra.*

134. *See In re* J.S. & C., 129 N.J. Super. 486, 324 A.2d 90 (1974), where a homosexual father sought broad visitation rights. The mother's expert testimony that the father's gay rights activities had become "*an obsessive preoccupation*" which could detrimentally influence their children's sexual development. The *J.S. & C.* court applied a nexus standard and determined that visitation should be allowed, but severely restricted. The court agreed with the constitutional claim advanced by the homosexual father:

> Fundamental rights of parents may not be denied on the basis of sexual orientation, *per se.* The right of a parent, including a homosexual parent, to the companionship and care of his or her child, insofar as it is for the best interest of the child is a fundamental right protected by the First, Ninth, and Fourteenth Amendments to the United States Constitution. That right may not be restricted without a showing that the *parent's activities* may tend to impair the emotional or physical health of the child. *Id.* at 489, 324 A.2d at 92 (emphasis added).

Although analysis in *J.S. & C.* was framed in terms of a nexus standard, there was no delineated formulation for the test. Instead of requiring concrete proof that one's homosexual manifestations are in fact having detrimental impact, the court was satisfied with evidence couched in future as opposed to present terms. Thus although the homosexual father may have overindulged in gay rights activities, a true nexus would have focused on specific present harm than on possible future harm.

135. *See* notes 137-39 and accompanying text *infra.*

136. Chaffin v. Frye, 45 Cal. App. 3d 39, 119 Cal. Rptr. 22 (1975); People v. Brown, 49 Mich. App. 358, 212 N.W.2d 55 (1973); Bezio v. Patenaude, 80 Mass. Adv. Sh. 2133, 410 N.E.2d 1207 (1980); Townend v. Townend, [1975] 1 FAM. L. REP. (BNA) 2830 (Ohio Ct. C.P. March 14, 1975).

137. 49 Mich. App. 358, 212 N.W.2d 55 (1973).

Appeals concluded that in a neglect proceeding the state may not presume that lesbianism alone is the cause of the child's neglect.[138] The court held that it must be affirmatively shown that the mother's lesbianism caused her to neglect the child.[139]

The implementation of a nexus requirement under the "parental fitness" test merely raises the homosexuality of the parent to the same standard as that of a heterosexual parent. Just as a heterosexual political activist is not unfit unless the activism causes the parent to manifest neglectful behavior, a lesbian activist in the gay rights movement is not unfit unless that participation diminshes her ability to care for the child.

The imposition of a nexus requirement in custody proceedings, where the "best interests" of the child standard predominates, can effectively narrow the broad discretionary powers of the judge in dealing with lesbian mothers.[140] In the "best interests" context, numerous factors are balanced to determine which party will gain custody. Lesbianism may be one of these factors if the evidence indicates that a nexus exists between the mother's lesbianism and the child's welfare.[141] As a result, the nexus under the "best interests" test prevents one factor (*e.g.*, lesbianism) from being given more weight than any of the other factors involved (*e.g.*, stability, guidance, and compatibility).[142] Thus, in cases where a lesbian mother has offered a stable environment, been attentive to the child's needs, and has been the psychological parent of the child, a nexus prevents the lesbian factor from being accorded undue weight.[143] In contrast, before courts implemented a nexus requirement,

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138. *Id.* at 365, 212 N.W.2d at 59.

139. *Id.*

140. Imposition of a nexus requirement only narrows a judge's discretionary powers if it is factually concrete and specific. Some courts which have required a nexus have not specifically delineated how specific the evidence must be to link one's sexual preference with a resulting adverse impact upon the child. Therefore, a trial judge may still be free to make assumptions which can only suggest possibilties of *future* harm. *See, e.g.*, Townend v. Townend, [1975] 1 FAM. L. REP. (BNA) 2830 (Ohio Ct. C.P. March 14, 1975). In *Townend*, the court established that lesbianism was not tantamount to a finding of unfitness. While there must be present some nexus relating the mother's lesbianism with a resulting detrimental effect on the child, the court concluded that the children were neglected. This was based on the judge's personal attitude that overt lesbian practice would cause harm. *Id.* at 2831. *See also* note 142 *infra*.

141. In Smith v. Smith, [1979] 5 FAM. L. REP. (BNA) 2450 (Mich. Cir. Ct. March 12, 1979), the lesbian relationship of the mother was only one of the many factors to be considered in determining the "best interests" of the child. Since there was no nexus linking the mother's lesbian relationship with any adverse impact upon the child, the lesbian factor was largely irrelevant in the custody determination. Custody was granted to the mother even though the father would have been a responsible parent. *Id.* at 2451.

142. *See* Chaffin v. Frye, 45 Cal. App. 3d 39, 119 Cal. Rptr. 22 (1975), where the lesbian factor was elevated to a status above any other factor. Although the lesbian mother was financially and socially unstable, and physically disabled, the court chose to conclude that homosexuality was the paramount factor which it must consider. *Id.* at 46, 119 Cal. Rptr. at 25.

143. In most cases, the lesbian factor arises in a divorce context where the father is attempting to effectuate a custody modification. From the time of the divorce until the petition for modification, the mother has been the sole provider for the children. It would seem unduly harsh

lesbianism could be considered a factor even though there was no evidence showing an adverse effect. This gave trial judges almost unlimited discretion to use a mother's lesbianism as determinative in denial of custody.[144]

Most custody disputes arise between natural parents.[145] Since the "best interests" test is usually employed in this situation, the advent of a nexus requirement significantly benefits lesbian mothers. However, within this test, few courts have applied the more protective version of the nexus requirement.[146] In those courts which have, lesbian mothers have been allowed to keep their children.[147] In *Bezio,* the Supreme Judicial Court negated the assumption made by the trial judge and imposed a nexus requirement in relation to the "parental fitness" test.[148]

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to a lesbian mother and her children to uproot them from an environment in which they have lived merely because the mother pursues an unconventional lifestyle. The court in Belmont v. Belmont, No. M-16937-74 (N.J. Super. Ct. July 22, 1980) *reported in part in* [1980] 6 FAM. L. REP. (BNA) 2785, advocated this view. In *Belmont,* the mother had all of the children since the divorce. The family, although unconventional was considered a loving one by the court. In contrast, the father only offered change. The court concluded that since there was very little evidence that the children were being adversely affected by the mother's sexual preference, the father "woefully" failed to carry his burden of proof. No. M-16937-74 at 4.

144. *See* Newsome v. Newsome, 256 S.E.2d 849 (N.C. App. 1979). Although the lesbian mother in *Newsome* was good to the minor child, it was the court's *opinion* that the child's "best interests" would best be served by granting custody to the father. While no nexus existed between the mother's sexual preference and any adverse impact upon the child, the court was concerned with possible "future" embarrassment which the child might have to face. *Id.* at 855. *See also* Ashling v. Ashling, 599 P.2d 475 (Or. App. 1979).

145. *See* notes 42-44 and accompanying text *supra.*

146. *See* M.P. v. S.P., 404 A.2d 1256 (N.J. Super. Ct. App. Div. 1979). In *M.P.,* the trial court had concluded that the mother's sexual and identity problems and her ongoing lesbian relationship were adversely affecting the children. On this basis, custody was removed from the mother even though the judge had never articulated just how the lesbian factor related to the welfare of the children. On appeal, the court exemplified the nexus requirement and how sexual preference must affirmatively relate to resultant adverse impact:

> [T]here is nothing in the record to show any *nexus* between defendant's sexual companionship and the older girl's reaction. Nowhere do we find *documented* in the record any *specific* instances of sexual misconduct by defendant or evidence that she tried in any way to inculcate the girls with her sexual attitudes. To the contrary, the evidence is affirmatively to the effect that she never displayed any sexual behavior in the presence of her children. . . .

Id. at 1259. (emphasis added). The *M.P.* court has been the first to delineate with a degree of specificity this more protective version of the nexus test. Commentators have advocated in the past that in order to protect the parental rights of a lesbian mother, a specific nexus should be required. *See* Campbell, *supra* note 1, at 41; Hunter 17 JUDGE'S J. 39, 41 (1978); Hunter & Polikoff, *Custody Rights of Lesbian Mothers: Legal Theory and Litigation Strategy,* 25 BUFFALO L. REV. 691, 705 (1976). For more examples of courts that have applied a nexus requirement where the focus is on "best interests," *see* Whitehead v. Black, Nos. CV-76-422 & CV-76-426 (Me. Super. Ct. June 14, 1976), *reported in part in* [1976] 2 FAM. L. REP. (BNA) 2593. Smith v. Smith, [1979] 5 FAM. L. REP. (BNA) 2450 (Mich. Cir. Ct. March 12, 1979); *In re* Hatzopoulos, [1977] 4 FAM. L. REP. (BNA) 2076 (Colo. Juv. Ct. July 8, 1977); Belmont v. Belmont, No. M-16937-74 (N.J. Super. Ct. July 22, 1980), *reported in part in* [1980] 6 FAM. L. REP. (BNA) 2785; Armanini v. Armanini, [1979] 5 FAM. L. REP. (BNA) 2501 (N.Y. Sup. Ct. Feb. 16, 1979).

147. *See* cases cited in note 146 *supra.*

148. 80 Mass. Adv. Sh. 2133, 2149, 410 N.E.2d 1207, 1218 (1980).

In order to find that a mother's sexual preference constituted unfitness, it was held that there must be a correlation between the mother's sexual behavior and a resulting adverse effect upon the child.[149] Absent this correlation, the lesbian factor may not be used as a basis to deny custody. After applying the "parental fitness" nexus, the Supreme Judicial Court attempted to clarify the guidelines to be followed under it. First, it was stated that there must be deference paid to the natural bond existing between parents and their children.[150] Second, *current* parental fitness is the determinative consideration in a natural parent versus third party custody proceeding.[151] Third, the "parental fitness" and the "best interests" tests should operate together to form a "dual standard" for lesbian mother custody suits.[152] Finally, while the Supreme Judicial Court did not directly adopt the "best interests" version of the nexus requirement, its decision in *Bezio* may be read to imply it.[153]

IV. THE EFFECT OF *BEZIO V. PATENAUDE*

A. "Dual Standard" in Lesbian Mother Custody Suits

In *Bezio v. Patenaude,*[154] the Supreme Judicial Court established the use of a "dual standard" in resolution of lesbian mother custody disputes. This "dual standard" requires that the "parental fitness" and "best interests" tests operate simultaneously in order to achieve a desirable balance between a parent's rights and a child's welfare.[155] The court's articulation of a "dual standard" is misleading, however. The "dual standard" is actually a single standard which encapsules two components. In essence, the "parental fitness" test and "best interests" test are these two components. They are applied together with varying degrees of emphasis, depending upon the facts and circumstances of a given case.[156] Thus, the two components mesh together to achieve the desired result. This so-called "dual standard" is what the court applied in *Bezio*. The "dual standard" in *Bezio* was assessed within two analytical frameworks. First, the Supreme Judicial Court had to consider how the "dual standard" interrelates when a natural

149. *Id.*
150. *Id.* at 2145-46, 410 N.E.2d at 1214.
151. *Id.* at 2147, 410 N.E.2d at 1215.
152. *Id.* at 2146-47, 410 N.E.2d at 1215.
153. For a discussion of the "best interests" version of the nexus test, *see* notes 122 and 146 *supra.*
154. 80 Mass. Adv. Sh. 2133, 410 N.E.2d 1207 (1980).
155. *Id.* at 2147, 410 N.E.2d at 1215. *See also* note 51 *supra.*
156. *See* note 51 *supra.*

parent attempts to regain custody from a third party.[157] Second, the court had to determine how to apply the "dual standard" where lesbianism was a factor.[158]

Within the first framework, Brenda, the natural parent, under Massachusetts case law, had a prima facie right to custody over a third party.[159] This rule recognizes the state's policy favoring retention of custody by natural parents. Thus, when a dispute is between a parent and a third party, the evidentiary scale is tipped hard to the parent's side.[160]

In *Bezio*, there is no convincing reason why Brenda's prima facie right to custody should have been forfeited. Although Brenda voluntarily consented to legal guardianship, it cannot be presumed that she intended this to be a permanent situation. In fact, shortly after guardianship was vested, Brenda continually sought to regain custody.[161] Further, Brenda's letter stating that she believed Magdalena to be "the only fully qualified person to raise my children in a manner which I myself would do if I could," suggests appropriate reasons for giving up the children at that time.[162]

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157. 80 Mass. Adv. Sh. 2133, 2141, 410 N.E.2d 1207, 1212 (1980). Parental fitness may be considered the primary factor within the greater ambit of "best interests." In cases where the custody dispute is between a natural parent and a third party, the strong presumption that a parent is fit to raise his/her children may be rebutted by the party challenging the custody by showing either: (1) the parent is unfit (*e.g.*, incapable of providing for the child's basic needs); (2) the child has a severely disturbed relationship who is otherwise "fit"; or (3) that there has been such a long separation from the natural parent that the child would be hurt if returned to his/her natural parents. See Brief for Appellant at 58, Bezio v. Patenaude, 80 Mass. Adv. Sh. 2133, 410 N.E.2d 1207 (1980). As one commentator has stated:

> [I]n disputes between parents and third parties, the child's best interest is usually interpreted to mean custody by a natural parent. The parental — right and best — interest doctrines are, in effect, opposite sides of the same coin. The fusion of the doctrines results from the generally justifiable view that custody by a natural parent . . . is in the best interest of the child.

Slovenko, *Child Custody,* PSYCH. & L. 361 (1973).

158. 80 Mass. Adv. Sh. 2133, 2148, 410 N.E.2d 1207, 1216 (1980).

159. To determine the appropriate analysis to be given where a natural parent seeks to regain custody from a legally appointed guardian (*i.e.* third party), the Supreme Judicial Court relied on its previous decisions in Duclos v. Edwards, 344 Mass. 544, 183 N.E.2d 708 (1962), and Wilkins v. Wilkins, 324 Mass. 261, 85 N.E.2d 768 (1949). The facts in *Duclos* and *Wilkins* were substantially the same. Both involved a natural parent's attempt to regain custody from a guardian. These attempts were made years after the guardian had been granted custody. In both cases, the Supreme Judicial Court interfaced the "best interests" test and the parental "fitness" test. In *Duclos,* the court held that the natural parent was "fit" to further the "best interests" of the child. As a result, custody was returned. 344 Mass. at 546, 183 N.E.2d at 709. In *Wilkins,* however, although the parent was "fit" in a vacuum without relation to the child, he was unfit when considered within the context of "best interests." This was due to an affirmative showing that it would be emotionally detrimental to return the child to the natural parent. 324 Mass. at 264, 85 N.E.2d at 769.

160. *See* note 33 *supra.*

161. 80 Mass. Adv Sh. at 2136, 410 N.E.2d at 1209.

162. *Id.* The *Bezio* court noted that the "mere failure to exercise custodial rights in the past, particularly where a parent has voluntarily relinquished custody for 'apropriate reasons' [*i.e.*

Additionally, Brenda's present fitness was at issue. Although the trial judge found that Brenda had been unfit in the past to assume the responsibility of her children's care, the critical inquiry should have been her *current* parental fitness.[163] Concerning current fitness, there is evidence to show that Brenda can offer a stable environment for the children. For instance, while in Vermont, the record indicates that Brenda ably cared for her children.[164] Moreover, Brenda kept in constant contact with her children the entire time custody was vested in Magdalena.[165] This lends support to Brenda's current "parental fitness" to provide for the "best interests" of her children. In light of the lack of evidence indicating any unfitness, the "dual standard" appears satisfied under the natural parent versus third party framework. Thus, under Massachusetts case law, Brenda's prima facie right to custody over the third party (guardian) should stand.

Finally, when the Supreme Judicial Court analyzed the mother's lesbianism within the "dual standard," it found that the trial judge had no basis to forfeit Brenda's rights. This was based on the complete dearth of evidence suggesting that sexual preference would produce any resulting harm to the children.[166] In fact, both of the competing parties introduced evidence that sexual preference is irrelevant to parenting skills.[167] This evidence was provided by two experts in the field of psychology. The pro-homosexual expert stated: "[m]ost children raised in a homosexual situation become heterosexual as adults. . . . There is no evidence that children who are raised with a loving couple of the same sex are any more disturbed, healthy, maladjusted, than children raised with a loving couple of mixed sex."[168]

Accordingly, there was no clear basis for the trial judge to forfeit Brenda's parental rights. In view of the strong presumption in favor of the natural parent, it would seem that this presumption could not be rebutted when no evidence was submited to show whether or not Brenda's lesbianism would have an adverse impact on her children.

In summary, within both frameworks it can be concluded that under the "dual standard" Brenda is "fit" to further the "best interests" of her children. The only possible consideration which could lend credence to the trial court's denial of custody was that the instabilities which plagued Brenda in the past were possibly still present.[169] On this basis,

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financial instability and medical problems], does not support a conclusion that such parent is unfit to further the welfare of the child." *Id.* at 2147, 410 N.E.2d at 1215 (citations omitted).

163. *Id.* at 2147, 410 N.E.2d at 1215.

164. *Id.* at 2137, 410 N.E.2d at 1210.

165. *See* notes 10-26 and accompanying text *supra*.

166. 80 Mass. Adv. Sh. at 2147, 410 N.E.2d at 1215.

167. *Id.* at 2148, 410 N.E.2d at 1215.

168. *Id.*

169. *Id.* at 2149, 410 N.E.2d at 1216.

the Supreme Judicial Court remanded the case rather than immediately return custody to the mother.[170]

B. *Where* Bezio *Stands*

The Supreme Judicial Court's delineation of the operation of a "dual standard" suggests that the nexus requirement will apply in lesbian mother custody suits between natural parents. Under the "dual standard" the "parental fitness" and "best interests" tests operate concurrently. Since one test may not be imposed to the exclusion of the other, the nexus requirement in *Bezio v. Patenuade*[171] can be read to extend beyond the facts of the case and include custody cases between natural parents. Thus, even in suits where the "best interests" test is emphasized, the "parental fitness" test must also be applied. The effect of this "dual standard" will make lesbianism an irrelevant consideration where proof of adverse impact on a child is absent. While the complete application of the "dual standard" necessitates some clarification by the court, its present use appears to comport with the more protective nexus requirement utilized by the New Jersey courts.[172]

At the very least, the nexus requirement in *Bezio* mandates that "a finding that a parent is *unfit* to further the welfare of the child must be predicated on parental behavior which adversely affects the child."[173] When confined to the limited facts of *Bezio*, this nexus, under the "parental fitness" test alone, would foreclose an application of the conclusive presumption that lesbianism itself signifies unfitness, while simultaneously shifting the burden of proof to the party opposing the lesbian mother to rebut the presumption of fitness.[174] The effect would

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170. *Id.*

171. 80 Mass. Adv. Sh. 2133, 410 N.E.2d at 1207.

172. The *Bezio* court cited M.P. v. S.P., 404 A.2d 1256 (N.J. Super. Ct. App. Div. 1979), for support in lending credence to its conclusion that a nexus must exist between parental behavior and a resultant adverse impact before custody can be denied. Unlike *Bezio*, the situation in *M.P.* involved two natural parents. However, the *Bezio* court's acknowledgment of the *M.P.* position may be read to infer that the Supreme Judicial Court will advocate the same position when it is afforded the opportunity to hear a case involving natural parents (one a homosexual) in the future. 80 Mass. Adv. Sh. at 2149, 410 N.E.2d at 1216.

173. 80 Mass. Adv. Sh. at 2149, 410 N.E.2d at 1216.

174. In *Bezio*, since judicial notice was taken by the trial judge that lesbianism would have an adverse impact upon the child, a conclusive presumption existed. From one fact (lesbianism), the trial judge inferred another fact (adverse impact). Where a conclusive presumption is present, evidence contrary to the inferred fact may not be admitted to negate it. This has the effect of making lesbianism the equivalent of parental unfitness. The imposition of a nexus test where parental fitness is the issue mandates that all relevant evidence must be considered. Thus, lesbianism *per se* may never be the equivalent of unfitness. *See, e.g.*, Stanley v. Illinois, 405 U.S. 645 (1972). In *Stanley*, the Supreme Court struck down an Illinois law which required the children of an unwed father become wards of the state upon the mother's death. This law was instituted without any proof that the natural father was unfit. The Supreme Court found the Illinois law to be a violation of due process in relation to the fundamental right of a natural parent to raise his/her own child. The constitutional due process, right of privacy, freedom of association, and

be to allow lesbian mothers to retain custody in suits where a natural parent is given preferred status (*i.e.*, suits between natural parents and third parties). However, where no preference is accorded either party, it may be that the lesbian factor will still be determinative in a decision to deny custody.[175]

In addition, the *Bezio* decision also indicated the necessity for fully documenting all evidence in the record.[176] A trial judge must maintain a certain level of evidence. It is not enough for a trial judge to base his decision on a vague statement that the mother's lesbianism is adversely affecting the child.[177] Proof through the use of expert testimony and empirical data should be shown; taking judicial notice of the possible adverse effects of lesbianism is inadequate.[178] Therefore, a trial judge's broad discretionary powers in lesbian mother custody suits should be somewhat circumscribed.

As the field of psychology moves away from the labelling of homosexuality as a type of mental disease[179] and toward defining it as an al-

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equal protection arguments relative to homosexuals are beyond the purview of this comment; however, they have important ramifications. *See generally* Symposium: *Sexual Preference and Gender Indentity*, 30 HASTING L.J. 799 (1979); Note, *The Avowed Lesbian Mother And Her Right to Custody: A Constitutional Challenge That Can No Longer Be Denied*, 12 SAN DIEGO L. REV. 799 (1975).

175. *See* Chaffin v. Frye, 45 Cal. App.3d 39, 119 Cal. Rptr. 22 (1975). In *Chaffin*, although the mother may have justifiably been denied custody because of her previous arrest record, homosexuality was the determinative factor. The court concluded that a lesbian environment would not be conducive to child raising. There was no nexus present within the context of "best interests" affirmatively showing that the lesbian lifestyle would detrimentally influence the children. In *In re* Jane B., 85 Misc.2d 515, 380 N.Y.S.2d 848 (1976), it was within the discretion of the court to conclude that a lesbian environment was detrimental to the welfare of the child. Although the court purported to apply a nexus test in which testimony evidenced that the child would be adversely affected (*i.e.* the child would emulate the lesbian mother's conduct) by living in a lesbian household, there was no conclusive proof shown. Rather, the court chose to accept the psychiatric opinion of the pro-hetereosexual expert that a change in environment was indicated. The court never discussed or balanced the important factor that the mother had had custody for all the years since the divorce. While the mother's lesbian relationship may in fact have been adversely affecting the child, the *Jane B.* court did not go through an adequate balancing process. *Id.* Balancing factors may have dispelled any notion that the decision was based, in part, on adversion to homosexuality, rather, than the "best interests" of the child.

176. 80 Mass. Adv. Sh. at 2149, 410 N.E.2d at 1216.

177. In *Bezio*, the trial judge's only statement concerning lesbianism in the record was that "[t]he environment in which the mother proposes to raise the children, namely, a lesbian household creates an element of instability that would adversely effect the welfare of the children." *Id.* at 2148, 410 N.E.2d at 1211. *Cf.* Stamper v. Stamper, No. 75-054-550-DM (Mich. Cir. Ct. June 15, 1977), where the court discussed every factor embodied within the Michigan Child Custody Act of 1970 in an attempt to achieve an appropriate balance of what was in the child's "best interests." *Id.* at 4-8. In *Stamper*, although neither parent offered an ideal environment, in terms of alternatives the lesbian mother was given custody. *Id.* at 12. The *Stamper* decision was well analyzed, and it was evident from the documented record that the court achieved the only possible result. This fully documented record leaves the judge less open to criticism for being subjectively biased.

178. 80 Mass. Adv. Sh. at 2149, 410 N.E.2d at 1216.

179. In 1973, the Board of Trustees of the American Psychiatric Association (A.P.A.) removed homosexuality from the list of mental diseases. N.Y. Times, Dec. 16, 1973, § 1, at 1, col. 1.

ternative lifestyle,[180] courts have become more objective in dealing with homosexuals who become involved in the judicial process. The traditional view that homosexuals are immoral people who would undermine the best interests of their children has been tempered by evaluative data and expert testimony that has sometimes served to enlighten the bench. Studies have researched the effects of a parent's homosexuality and have found that most children retain their normal gender identity.[181] The fear that children will develop a social stigma because their parent is a homosexual has been largely unfounded. One commentator has even taken the view that homosexual individuals offer children favorable role models in that children are taught to be more tolerant and mentally expansive.[182]

Furthermore, the Supreme Judicial Court observed that "[t]he state may not deprive parents of custody of their children simply because their households fail to meet the ideals approved by the community . . . or simply because the parents embrace ideologies or pursue lifestyles at odds with the average."[183] In *Bezio*, the court discussed homosexuality in the context of "alternative lifestyle," evidencing a liberal position. The significance of framing the lesbian custody issue in terms of lifestyle as opposed to morality allows evaluation of the lesbian factor within a particular set of circumstances, rather than in the abstract.[184] Continuance of such an approach will result in fair and impartial decisionmaking for lesbian mothers.

CONCLUSION

Traditionally, lesbian mothers have not been favored by the law. Trial judges' subjective aversions to homosexuality have resulted in arbitrary decisionmaking against lesbian mothers. The current trend is to

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The Board's action was ratified by a general vote of the A.P.A. membership in April, 1974. N.Y. Times, April 9, 1974, § 2, at 12, col. 4.

180. Some courts have adopted the psychological trend that homosexuality is to be categorized as an alternative lifestyle. *See* Stamper v. Stamper, No. 75-054-550-DM (Mich. Cir. Ct. June 15, 1977); Bezio v. Patenaude, 80 Mass. Adv. Sh. 2133, 2149, 410 N.E.2d 1207, 1216 (1980).

181. *See* Green, *Sexual Indentity of 37 Children Raised by Homosexual or Transsexual Parents,* 135 AMER. J. PSYCH. 692 (1978); Hall, *Lesbian Families: Cultural and Clinical Issue,* 23 SOCIAL WORK 385, No. 5 (1978); 6 CHILD PSYCH. AND HUMAN DEV. No. 1 (1975).

182. Riddle, *Relating to Children: Gays As Role Models,* J. SOC. ISSUES n.3 (1978). The rationale espoused by Riddle is that gay men and lesbian women, rather than act as determinants, serve to neutralize the prevalent sex-role stereotyping within our society.

183. 80 Mass. Adv. Sh. at 2148-49, 410 N.E.2d at 1216.

184. There will be those homosexual parents who are sensitized to the problems which may arise in relation to their sexual preference and effectively be able to deal with them. Conversely, there will be other homosexual parents who will be incapable of providing the kind of care and understanding needed. Since custody decisions remain part of the judicial process, it becomes necessary for judges to take the utmost care in evaluating the characters of the parents; case by case analysis remains the only effective way to deal with the personality variables involved in the

give custody to a lesbian mother where a nexus between sexual preference and resulting adverse effect is absent. Additionally, this nexus must be substantiated through proof such as expert testimony. The imposition of these evidentiary burdens tempers the trial judge's wide discretionary powers to deny custody based on the lesbian factor.

The decision in *Bezio v. Patenaude* comports with this current trend. Although *Bezio* was limited to cases involving natural parents versus third parties, the ambit of protection may be read to extend to disputes between two natural parents. The implication is that the Supreme Judicial Court, by combining the "parental fitness" and "best interests" tests to comprise a "dual standard," necessarily indicates that the nexus operative in *Bezio* will extend to all custody disputes where lesbianism is an issue. Specifically, how the nexus requirement will operate under the "dual standard" remains to be seen. Still open to interpretation is whether or not the absence of a nexus showing adverse effects will make a mother's lesbianism irrelevant, or still one of many factors to be considered in custody awards. It is submitted that a mother's lesbianism should only be relevant when there is a clear showing that it is detrimental to the child. Unless there is such evidence, an otherwise acceptable parent should not be denied custody solely because of sexual preference.*

BARBARA A. SMART

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custody process. Judges must become aware of possible subjective biases on their part and seek to make fully-informed decisions when awarding custody to a lesbian mother. *See* S. RAMOS, THE COMPLETE BOOK OF CHILD CUSTODY, 159-71 (1978).

* At the time of publication, the Franklin County Probate Court issued a decree returning custody to the lesbian mother, Brenda Bezio, commencing on June 27, 1981. Until this time, the present guardian, Magdalena Patenaude, will retain custody; Brenda will receive expanded visitation rights; and a court appointed psychologist will assist the children in making the transition from their guardian back to their natural mother. Bezio v. Patenaude, No. 46557 (Franklin Cty. Probate Ct. Jan. 27, 1981).

BOOK REVIEW

TAKING CARE OF STRANGERS:
THE RULE OF LAW IN DOCTOR-PATIENT RELATIONS
By Robert A. Burt. New York: Free Press 1980.
Pp. vii, 200. $15.95. Clothbound.

Taking Care of Strangers should be an enormously important book. In light of the amount of public attention paid to the plights of Karen Quinlan,[1] Chad Green,[2] and Brother Fox,[3] the concern over the so-called malpractice crisis[4] and the growth of interest in the issues raised at the interaction of law and medicine,[5] a book purporting to describe the impact of law upon doctor-patient relations should have great impact. Unfortunately, *Taking Care of Strangers* does not deliver what the title appears to promise. Professor Burt, a law professor at Yale, has written a highly ideosyncratic book which is both confusing and unconvincing.

Professor Burt describes four situations to illustrate issues in physician-patient relationships: (1) a severely burned man desires to halt treatment; (2) a somewhat confused "shoppingbag lady" faces possible civil commitment; (3) subjects in an experiment obey orders to inflict greater amounts of pain upon persons who pretend to be fellow research subjects but are actually actors ordered to protest the increasing amounts of "pain" they are experiencing; and (4) the courts consider whether to permit withholding of medical treatment from Karen Quinlan and Joseph Saikewicz. Burt's thesis which draws heavily upon psychoanalytic theory refuses to place primary responsibility for decision-making in the situations upon either patient or physician. Without any real discussion, Burt appears to reject the rather well-established notion that competent persons can elect whether or not to be treated. Rather, Burt suggests that the motivations of treating professionals are mixed, growing out of desires to hurt patients as well as to help them.

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1. *In re* Quinlan, 70 N.J. 10, 355 A.2d 647 (1976).
2. Custody of a Minor, 375 Mass. 733, 379 N.E.2d 1053 (1978), *on review and redetermination*, 79 Mass. Adv. Sh. 2124, 393 N.E.2d 836 (1979).
3. Eichner v. Dillon, 73 App. Div.2d 431, 426 N.Y.S.2d 517 (1980).
4. *See* Jones v. State Bd. of Medicine, 97 Idaho 859, 555 P.2d 399 (1976), *cert. denied*, 431 U.S. 914 (1977) (discussion of so-called medical malpractice crisis).
5. *See generally* W. WADLINGTON, J. WALTZ & R. DWORKIN, CASES AND MATERIALS ON LAW AND MEDICINE (1980); D. SHARPE, S. FISCINA & M. HEAD, CASES AND MATERIALS ON LAW AND MEDICINE (1978).

> Whose claim of benevolence toward diseased people is to be believed? . . . Rules governing doctor-patient relations must rest on the premise that anyone's wish to help a desperately pained, apparently helpless person is intertwined with a wish to hurt that person, to obliterate him from sight.[6]

Because of the mixed motivations of the actors, Burt would have doctor-patient relations determined by a negotiation process between professional and patient which he calls "communication." Since neither party is supreme, treatment or commitment decisions are to come out of this negotiation process which apparently will serve to neutralize the mixed motivation of the respective parties.

All of this is interesting, but it has little, if anything, to do with the rule of law in doctor-patient relationships. In Burt's first situation — involving the mentally competent person who no longer wishes to continue painful treatment — there is no reason why the patient's desires should not govern. The physician may well have a responsibility to seek to dissuade a patient from electing to have treatment withheld, but there is no reason why the patient is not able to elect whether or not to continue treatment.[7] The legal and moral duty of the physician should be merely to insure that the withholding of consent is competently made. It is obvious that physicians should not be able to treat seriously ill patients without their consent,[8] and it should also be obvious that the patient's determination as to the value of treatment should govern. The rule of law should be to preserve and defend individual decision-making.

With regard to the shoppingbag lady who does not want to be sent away, the difficult issues raised by the situation again are different than those which Burt chooses to consider. Rather than involving a question of communication between patient and physician, the case raises the difficult question of when the state can intervene through the civil commitment process and involuntarily deprive an individual of freedom to move about freely. Burt does not address such questions as the standard of proof for civil commitment or, indeed, whether civil commitment is an appropriate device for social restraint. Such issues necessarily are part of the analysis of whether the protestations of Mrs. Lake should be taken seriously and are more significant to the question of whether she should be committed than the nature of her communication with the physicians of St. Elizabeth's.

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6. R. BURT, TAKING CARE OF STRANGERS: THE RULE OF LAW IN DOCTOR-PATIENT RELATIONS 137 (1980).

7. Satz v. Perlmutter, 362 So.2d 160 (Fla. App. 1978), *aff'd*, 379 So.2d 359 (Fla. 1980).

8. *Id. See generally* Superintendent of Belchertown State School v. Saikewicz, 373 Mass. 728, 370 N.E.2d 417 (1977).

In his discussion of *Quinlan* and *Saikewicz,* Burt again ignores the most difficult issues — the extent to which the court system should be utilized as the decision-maker[9] — and thereby misses a chance to help shape this rapidly developing body of law concerning treatment of the terminally ill. Since the issue of withholding and refusal of treatment is arising in ever more complex areas,[10] it is unfortunate that Burt again declines to analyze the most difficult legal issues in this area.

Finally, Burt's discussion of the so-called Milgram experiments involving the infliction of pain upon research subjects may substantiate his thesis that helping persons have hurtful instincts, but it really has nothing much to do with the rule of law in doctor-patient relations.

In sum, *Taking Care of Strangers* doesn't deliver what it appeared to offer. The need for someone to write the definitive work on the subject remains.

JONATHAN BRANT*

9. *Compare* Baron, *Assuring Detached but Passionate Investigation and Decision; The Role of Guardians Ad Litem in* Saikewicz-*Type Cases,* 4 AM. J. L. & MED. 111 (1978) *with* Relman, *The* Saikewicz *Decision: A Medical Viewpoint,* 4 AM. J. L. & MED. 233 (1978).

10. *See e.g.,* Rennie v. Klein, 462 F. Supp. 1131 (D. N.J. 1978); Rogers v. Okin, 478 F. Supp. 1342 (D. Mass. 1979), *rev'd and remanded,* No. 79-1648 (1st Cir. Nov. 25, 1980) (right of involuntarily committed mental patients to refuse psychotropic medication).

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BOOKS RECEIVED

THE COURT YEARS: 1939-1975: THE AUTOBIOGRAPHY OF WILLIAM O. DOUGLAS, New York, New York, Random House, 1980. Pp. xi, 434, $16.95. William O. Douglas was appointed to the United States Supreme Court by President Franklin D. Roosevelt in 1939. His 36 year tenure was the longest of any Supreme Court Justice. In this posthumous publication of his memoirs, Douglas traces the major legal issues that reached the Court during his service and recounts the personalties of fellow Justices, six Presidents, and other political figures of his era. Special emphasis is given to the anti-communist movement of the 1950's, the desegregation of public schools, differing theories of the Court's mission, judicial treatment of nonconformists, the Court and big business, and the unsuccessful efforts to impeach Douglas. For legal scholars or historians interested in Douglas, this autobiography provides many insights into his tenure on the Supreme Court as well as his times.

A CONSTITUTIONAL HISTORY OF HABEAS CORPUS. By William F. Duker. Westport, Connecticut: Greenwood Press. 1980. Pp. 349. $29.95. *Habeas Corpus,* the legal process that serves to question the legality of an individual's confinement, is the subject of this book. Duker traces the development of the writ from its origin in English common law to its present day application. The author contends that the purpose underlying the establishment of the *habeas* remedy in the United States Constitution was the founding fathers' fear of the possible instability of the new government. Duker also notes that the courts have expanded the scope of the writ far beyond its original ambit. The author's constitutional analysis of the *habeas* writ is set against the backdrop of the political struggles between the departments of government and the ever-shifting notions of federalism. Eventually, the writ was transformed: Its historical function of restricting Congress from suspending the already existing state writs for federal prisoners evolved to its present form guaranteeing a federal writ and prohibiting state courts from issuing *habeas corpus* to federal prisoners.

Legal Problems of Surrogate Motherhood

*Robert C. Black**

Surrogate motherhood is a burgeoning practice whereby a married couple arranges to have a third-party female bear their child. In this Article, the author scrutinizes the legal ramifications applicable to surrogate motherhood. Examined are statutes pertaining to adultery and illegitimacy as well as laws which proscribe the black-market selling of infants. Also addressed is the constitutional right to privacy which, contends the author, should provide some substantive and procedural protection to the family. Finally, the author illuminates a panoply of practical problems in enforcing surrogate motherhood contracts and concludes that there exists a need for comprehensive legislation in this area.

The development of new reproductive technologies such as artificial insemination poses a variety of legal questions which often cannot be readily resolved in terms of traditional legal doctrines and categories.[1] Those who resort to technically feasible but legally unrecognized solutions to marital or reproductive difficulties must often act without being certain of the legality or the legal consequences of their choices.[2] Such uncertainty cannot be reconciled with the recent recognition of a constitutional right of privacy which protects personal decisions with respect to marriage and reproduction.[3]

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1. *See* Kinney, *Legal Issues of the New Reproductive Technologies,* 52 CAL. S.B.J. 514, 514-16 (1977); Smith, *Through a Test Tube Darkly: Artificial Insemination and the Law,* 67 MICH. L. REV. 127, 149 (1968).

2. *See* Annot., 25 A.L.R.3d 1103, 1106-07 (1969).

3. *See, e.g.,* Roe v. Wade, 410 U.S. 113 (1973) (abortion); Eisenstadt v. Baird, 405 U.S. 438 (1972) (contraception); Griswold v. Connecticut, 381 U.S. 479 (1965) (contraception); Skinner v. Oklahoma, 316 U.S. 535 (1942) (procreation).

This Article is concerned with the legal issues raised by the practice of surrogate motherhood by means of artificial insemination. As used herein, surrogate motherhood refers to an arrangement between a married couple which is unable to have a child because of the wife's sterility and a fertile woman who agrees to conceive the husband's child through artificial insemination, carry it to term, and surrender all parental rights in the child.[4] Usually, though not always, the surrogate mother receives compensation for her services.[5] The final step in the process is typically the father's acknowledgment of paternity and the adoption of his child by the married couple. Through surrogate motherhood, a couple desiring a child need not wait for an indefinite period of years for an adoptable baby, as generally happens in the conventional adoption process.[6] Moreover, the couple obtains a child which is the husband's biological offspring, a child for whose existence both husband and wife can feel responsible. The surrogate mother, in return for undergoing the risks and discomforts of pregnancy and childbirth, ordinarily receives a substantial recompense.[7]

Despite the simplicity of the arrangement and its advantages for all concerned, surrogate motherhood is fraught with legal difficulties. In most, perhaps all, states the contract providing for surrogate motherhood is probably void.[8] In some states, payment to a parent for consenting to the adoption of a child is a crime.[9] The child itself is illegitimate,[10] and some courts have even taken the view that artificial insemination except between husband and wife is adultery.[11] The current applicable law, whether statutory or decisional, was not fashioned with surrogate motherhood in mind.

Yet surrogate motherhood is on the increase, and may become as well established as its counterpart, artificial insemination by a donor (AID), the procedure by which the fertile wives of sterile husbands are ar-

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4. *See* Comment, *Contracts to Bear a Child,* 66 CAL. L. REV. 611, 611 (1978). Although this practice might also be employed by unmarried couples or individuals, the present discussion is limited to the legal position of married couples who opt for surrogate motherhood.

5. *See, e.g.,* Lauerman, *Surrogate-Mother Law: Will It Be Conceived?,* Chicago Tribune, Dec. 4, 1977, at 1, col. 1 (referring to a couple who paid $3,000 in medical and legal fees and $7,000 to the surrogate mother). In one of the most publicized cases, however, the surrogate mother was a close friend of the wife and bore two babies for her gratuitously. Markoutsas, *Parenting by Proxy — A Story of Love and Friendship,* Chicago Tribune, Jan. 14, 1980, § 2, at 1, col. 1.

6. *Adoption and Foster Care 1975, Hearings on Baby Selling Before the Subcomm. on Children and Youth of the Senate Comm. on Labor and Public Welfare,* 94th Cong. 1st Sess. 6 (1975) (estimating the wait at three to seven years)

7. *See* note 5 *supra.*

8. *See* notes 51-53 and accompanying text *infra.*

9. *See* notes 47-49 and accompanying text *infra.*

10. *See* note 26 and accompanying text *infra.*

11. *See* notes 17-23 and accompanying text *infra.*

tificially inseminated, usually by an anonymous donor.[12] Between 6,000 and 10,000 children are born annually in the United States as a result of artificial insemination,[13] and it has been estimated that at least 250,000 living Americans were conceived this way.[14] The circumstances of their births have already occasioned legislative and judicial action, much of it having implications for surrogate motherhood as well as AID. Overall, however, the law is at best awkwardly adapted, and at worst hostile, to the surrogate motherhood arrangement.

I. ADULTERY AND ILLEGITIMACY

One problem posed by the surrogate motherhood arrangement is the possibility that the relationship between the husband/father and the surrogate mother will be considered adultery. Adultery is a crime in some states[15] and in others it furnishes grounds for divorce.[16] An early Canadian decision suggested that the artificial insemination by donor of a married woman constituted adultery,[17] and a New York decision came to the same conclusion.[18] Presumably surrogate motherhood stands on the same footing as AID with respect to adultery, since in both situations there is impregnation of a woman by a man to whom she is not married and one of the biological parents of the resulting offspring is married to someone else. Such a characterization is obviously stigmatizing for all concerned, including the child. In addition to the direct adverse legal consequences of an adjudication of adultery, such adjudication would render any surrogate motherhood contract illegal on the basis that its object was the commission of a crime[19] or that the contract was against public policy.[20]

Even if surrogate motherhood were adultery, insofar as it is relied upon as grounds for divorce it may be defeated, in most jurisdictions,

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12. *See* Kindregan, *State Power Over Human Fertility and Human Individual Liberty,* 23 HASTINGS L.J. 1401, 1408 (1972); Guttmacher, *Artificial Insemination,* 18 DEPAUL L. REV. 566, 566 (1969).

13. Curie-Cohen, Luttrell & Shapiro, *Current Practice of Artificial Insemination by Donor in the United States,* 300 NEW ENGLAND J. MED. 585, 588 (1979).

14. Behrman, *Artificial Insemination and Public Policy,* 300 NEW ENGLAND J. MED. 619, 619 (1979).

15. *See, e.g.,* MICH. COMP. LAWS 750.30 (MICH. STAT. ANN. § 28.219 (Callaghan 1962)).

16. *See, e.g.,* LA. CIV. CODE ANN. art. 139 (West Supp. 1980).

17. Orford v. Orford, 49 Ont. L.R. 15, 23, 58 D.L.R. 251, 259 (1921). This was an action for alimony brought by a woman who claimed to have employed AID without her (then) husband's consent. The court's characterization of AID as adultery must be considered dictum, since the court in denying alimony expressed the opinion that the wife was impregnated through sexual intercourse, not AID. *Id.* at 19, 58 D.L.R. at 255.

18. Gursky v. Gursky, 39 Misc.2d 1083, 1088, 242 N.Y.S.2d 406, 411 (Kings Cty. Sup. Ct. 1963). *Accord,* Doornbos v. Doornbos, No. 54 S. 14981 (Cook Cty., Ill., Super. Ct., Dec. 13, 1956), *appeal dismissed,* 12 Ill. App.2d 473, 139 N.E.2d 844 (1957).

19. *See* notes 51-52 and accompanying text *infra.*

20. *See* note 53 and accompanying text *infra.*

by invoking the defenses of "connivance," whereby a spouse consents to his spouse's adultery,[21] and "condonation," whereby the aggrieved spouse resumes marital relations after discovering the adultery and, in effect, excuses it.[22] A spouse's consent to either AID or surrogate motherhood, then, may be seen as connivance and continued marital relations following artificial insemination — presumably the norm in such situations — should qualify as condonation.

In the AID cases the issue of adultery is closely related to and seemingly confused with the issue of the child's legitimacy. A few decisions hold that the child of a married woman artificially inseminated by a man other than her husband is illegitimate.[23] Traditionally, such a status carried with it a number of legal disabilities, especially with respect to inheritance,[24] although recently constitutional limitations have begun to be placed upon discrimination against the illegitimate.[25] Of course, since the child of a surrogate mother is born out of wedlock, he is definitely illegitimate.[26]

However, recent decisions have held that a child conceived by means of AID is legitimate and is not the product of an adulterous relationship, at least where AID was with the husband's consent. A 1948 New York decision was the first reported case to hold that such a child is legitimate.[27] In 1968, the California Supreme Court held that a husband who has consented to the artificial insemination of his wife by an anonymous donor is deemed the "father" of the resulting child for purposes of the duty of child support.[28] As the court stated, "[c]ategorizing

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21. *See, e.g.*, 23 PA. STAT. ANN. tit. 23, § 52 (Purdon 1955); Benson v. Benson, 102 So.2d 748, 752 (Fla. Dist. Ct. App. 1958).

22. *See, e.g.*, Stribling v. Stribling, 215 So.2d 869, 870 (Miss. 1968); Allgood v. Allgood, 189 Neb. 429, 429, 203 N.W.2d 102, 103 (1972).

23. Gursky v. Gursky, 39 Misc.2d 1083, 1088, 242 N.Y.S.2d 406, 411 (Kings Cty. Sup. Ct. 1963); Doornbos v. Doornbos, No. 54S.14981 (Cook Cty., Ill. Super. Ct., Dec. 13, 1954), *appeal dismissed*, 12 Ill. App.2d 473, 139 N.E.2d 844 (1957).

24. *See* H. H. CLARK, THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES 176-80 (1968).

25. *See, e.g.*, Glona v. American Guarantee & Liability Insurance Co., 391 U.S. 73 (1968); Levy v. Louisiana, 391 U.S. 68 (1968) (invalidating a wrongful death statute barring recovery by a mother for her unacknowledged illegitimate child and vice versa). Although the Supreme Court's decisions regarding illegitimacy classifications are neither clear nor consistent, it appears to be constitutionally significant whether the child is acknowledged or unacknowledged by the biological parent. *Compare* Labine v. Vincent, 401 U.S. 532 (1971) *with* Weber v. Aetna Casualty & Surety Co., 406 U.S. 164 (1972). In any event, the state may not attempt to influence the actions of men and women by imposing sanctions on the children of their illegitimate relationships. Trimble v. Gordon, 430 U.S. 762, 769 (1977).

26. *See* People v. Sorensen, 68 Cal.2d 280, 288-89, 66 Cal. Rptr. 7, 13, 437 P.2d 495, 501 (1968).

27. Strnad v. Strnad, 190 Misc. 786, 787, 78 N.Y.2d 390, 392 (N.Y. Cty. Sup. Ct. 1948) (semble). *Accord*, Hoch v. Hoch, No. 44-C-8307 (Cook Cty., Ill. Super. Ct. 1945), *reported in* Note, *Social and Legal Aspects of Human Artificial Insemination*, 1965 WIS. L. REV. 859, 875.

28. People v. Sorensen, 68 Cal.2d 280, 286, 66 Cal. Rptr. 7, 10-11, 437 P.2d 495, 499-500 (1968).

the child as either legitimate or illegitimate does not resolve the issue of the legal consequences flowing from the defendant's participation in the child's existence."[29] To treat the husband as the father serves the statutory objective of assuring support to all children, and "no valid public purpose is served by stigmatizing an artificially conceived child as illegitimate."[30] Such a child is not the product of an adulterous relationship since there has been no sexual intercourse between a married and unmarried person.[31] The court ridiculed the suggestion that the doctor who administered the artificial insemination process had committed adultery with the wife:

> Since the donor may be a woman, or the husband himself may administer the insemination by a syringe, this is patently absurd; to consider it an act of adultery with the donor, who at the time of insemination may be a thousand miles away or may even be dead, is equally absurd. Nor are we persuaded that the concept of legitimacy demands that the child be the actual offspring of the husband of the mother and if semen of some other male is utilized the resulting child is illegitimate.[32]

A recent New York decision likewise held that a wife does not commit adultery with the sperm donor[33] and that the resulting child is legitimate.[34] A number of states have by now enacted statutes legitimating children conceived through AID with the husband's consent.[35]

The current cases holding that AID is not adultery have corrected contrary conclusions which never had any legal justification. Adultery has been defined as "the voluntary sexual intercourse of a married person with a person other than the offender's husband or wife,"[36] and as "the sexual intercourse of two persons, either of whom is married to a third person."[37] Since AID does not involve sexual intercourse, it cannot be adultery.[38] The prior contrary decisions adopted the view that

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29. *Id.* at 288, 66 Cal. Rptr. at 14, 437 P.2d at 501.

30. *Id.* at 288, 66 Cal. Rptr. at 13, 437 P.2d at 501.

31. *Id.* at 289, 66 Cal. Rptr. at 13, 437 P.2d at 501; *see also* CAL. CIV. CODE § 93 (West 1954) (repealed 1969).

32. People v. Sorensen, 68 Cal.2d 280, 289, 66 Cal. Rptr. 7, 13, 437 P.2d 495, 501 (1968).

33. *In re* Adoption of Anonymous, 74 Misc.2d 99, 104, 345 N.Y. S.2d 430, 433 (Kings Cty. Surrogate's Ct. 1973).

34. *Id.* at 105, 345 N.Y.S.2d at 435-36.

35. *See, e.g.*, CAL. CIV. CODE § 7005 (West Supp. 1980); GA. CODE ANN. § 74-101.1 (1973); KAN. STAT. ANN. § 23-129 (1974); N.Y. DOM. REL. LAW § 73 (McKinney 1977); N.C. GEN. STAT. § 49A-1 (1976); OKLA. STAT. ANN. tit. 10, § 552 (Supp. 1977).

36. CAL. CIV. CODE § 93 (West 1954) (repealed 1969).

37. MICH. COMP. LAWS ANN. § 750.29 (Supp. 1979).

38. People v. Sorensen, 68 Cal.2d 280, 289, 66 Cal. Rptr. 7, 13, 437 P.2d 495, 501 (1968); *In re* Adoption of Anonymous, 74 Misc.2d 99, 105, 345 N.Y. S.2d 430, 434 (Kings Cty. Surrogate's Ct. 1973).

adultery can be considered the voluntary relinquishment of one's reproductive capacities to an illicit partner.[39] This, though, "is quite inconsistent with the usual definition of adultery, and is really theological rather than legal."[40] Adultery does not depend upon the possibility of conception.[41] In other contexts the argument that adultery sanctions exist to exclude "spurious" offspring from the family has been generally rejected.[42] Surrogate motherhood, like AID, involves no sexual intercourse. Where the wife consents to a surrogate motherhood arrangement, as where a husband consents to AID, there is no basis for treating the fertilization technique as an act of adultery.

As for the stigmatization of the child as illegitimate, that is probably unaffected by recent statutory and decisional developments relating to AID. It has been persuasively argued that to distinguish legitimate from illegitimate children for many legal purposes is a denial of equal protection.[43] Many states provide for the legitimation of illegitimate children or confer the same rights as legitimate children enjoy through acknowledgment of paternity by the father,[44] or by acknowledgment coupled with reception of the child into the family.[45] The terms of any surrogate motherhood contract should provide for acknowledgment of paternity by the husband/father and for the adoption of the child by the biological father and his wife.[46] The offspring of a surrogate mother may be born illegitimate but he need not remain that way for long.

II. Statutory and Public Policy Impediments to Compensating the Surrogate Mother

Among the most serious impediments to surrogate motherhood arrangements are statutes which make it a crime to make payments to a (biological) parent in connection with the adoption of his child. Although the evident purpose of these statutes is to prevent the "sale" of infants as if they were property, their language is sufficiently broad — or overbroad — to forbid compensation to a surrogate mother. Thus

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39. *See, e.g.,* Orford v. Orford, 49 Ont. L. R. 15, 22-23, 58 D.L.R. 251, 258 (1921).

40. H. H. Clark, The Law of Domestic Relations in the United States 329 (1968).

41. Comment, *Artificial Insemination: Confusion Compounded,* 3 Wayne L. Rev. 35, 36 (1956).

42. Namely, it has been rejected that an insane wife who commits sexual intercourse with a third party is an adulteress, notwithstanding her incapacity for voluntary sexual intercourse, because she caused extraneous offspring to taint the family line. *See* Annot., 19 A.L.R.2d 174 (1951).

43. *See* Krause, *Equal Protection for the Illegitimate,* 65 Mich. L. Rev. 477 (1968).

44. *E.g.,* Ala. Code § 26-11-2 (1977); Cal. Prob. Code § 255 (West Supp. 1979); Wis. Stat. Ann. § 237.06 (1957).

45. *E.g.,* Idaho Code § 16-1510 (1979); S.D. Cod. Law § 25-6-1 (1977).

46. Attorney Katie Brophy of Louisville, Kentucky, who has represented a number of parties to surrogate motherhood contracts, employs a model contract containing provisions to this effect.

a California statute makes it a misdemeanor to pay or offer to pay a parent in return for the placement of his child for adoption, or his consent to, or cooperation with the child's adoption.[47] A Michigan statute has an equivalent adverse impact on surrogate motherhood contracts.[48]

That statute permits such "charges and fees" as the court may approve, but a Michigan judge with considerable experience in the domestic relations area has expressed his informal opinion that only the direct medical expenses of the surrogate mother (not the value of her services in carrying the child or even her foregone income) could be approved by the court.[49]

While such statutes are rarely enforced, their existence deters surrogate motherhood arrangements.[50] Apart from the possibility of criminal prosecution, such statutes render surrogate motherhood contracts void and unenforceable under the doctrine that contracts requiring the doing of an illegal act are unenforceable by any party.[51] A contract is deemed unenforceable if it contravenes the law or a known public policy.[52] Even without a statute, a court may hold, as did the Georgia Supreme Court, that a contract calling for payment to a mother in return for placing her child for adoption is unenforceable on

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47. CAL. PENAL CODE § 273 (West 1970). Another type of statute which may apply to surrogate mother contracts is that — obviously aimed at slavery, peonage, and similar arrangements — which makes it a crime to contract to deliver someone into the "custody" of another. *See, e.g.*, CAL. PENAL CODE § 181 (West Supp. 1979). Obviously involuntary servitude, not the assignment of custody of a child to one of its biological parents, is the intended target of such a statute.

48. MICH. COMP. LAWS ANN. § 710.54 (Supp. 1979), provides:

> (1) Except for charges and fees approved by the court, a person shall not offer, give, or receive any money or other consideration or thing of value in connection with any of the following:
>
> (a) The placing of a child for adoption.
>
> (b) The registration, recording, or communication of the existence of a child available for adoption or the existence of a person interested in adopting a child.
>
> (c) A release.
>
> (d) A consent.
>
> (e) A petition.
>
> (2) Before the entry of the final order of adoption, the petitioner shall file with the court a sworn statement describing money or other consideration or thing of value paid to or exchanged by any party in the adoption proceeding, including anyone consenting to the adoption or adopting the adoptee, any relative of a party or of the adoptee, any physician, attorney, social worker or member of the clergy, and any other person, corporation, association, or other organization. The court shall approve or disapprove fees and expenses. Acceptance or retention of amounts in excess of those approved by the court constitutes a violation of this section.

A first violation of this statute is a misdemeanor; subsequent violations are felonies. MICH. COMP. LAWS ANN. § 710.69 (Supp. 1979). *See also* Note, *Black-Market Adoptions*, 22 CATH. L. 48, 59 (1976).

49. Letter to Margaret Pfeiffer from Executive Judge James H. Lincoln, Wayne County Juvenile Court, March 2, 1977.

50. Comment, *Contracts to Bear a Child*, 66 CAL. L. REV. 611, 612-13 (1978).

51. International Dairy Queen, Inc. v. Bank of Wadley, 407 F. Supp. 1270, 1271 (M.D. Ala. 1976) (applying Alabama law).

52. Board of Education of School District No. 68 v. Surety Developers, Inc., 24 Ill. App.3d 638, 645, 321 N.E.2d 99, 104 (1974).

public policy grounds.[53] If a surrogate motherhood contract is unenforceable, the married couple would be without recourse if the surrogate mother aborted the husband/father's child or decided to keep it. Concurrently, the surrogate mother would be unable to enforce payment if the married couple failed to pay her.

It seems clear that unless surrogate mothers can be offered meaningful compensation for their services, there will be very few children brought into the world in this way — legally, anyway. Pregnancy and childbirth are hazardous, time-consuming, painful conditions which few women can be expected to experience for the sake of someone else unless they receive substantial compensation. The irony is that the masculine counterpart to surrogate motherhood (the "surrogate fatherhood" of a sperm donor in the AID situation) is apparently lawful in all jurisdictions. Additionally, the AID concept enjoys explicit legislative recognition in some jurisdictions[54] despite the fact that the semen is usually paid for[55] and the sperm donor assumes none of the risks and burdens which an "ovum donor" does.

Statutes like those in Michigan and California serve a legitimate purpose insofar as they forbid the sale of infants as if they were chattels. Children are not the property of their parents[56] and cannot be made the subject of barter.[57] Because of the scarcity of adoptable babies, the baby-black market is flourishing[58] and prohibitory legislation may well be justified although it is often difficult to enforce.[59] In contrast, surrogate motherhood is radically different from baby-buying and presents a situation which was never envisaged by the legislatures which enacted the current penal statutes. As applied in such situations, their impact is harmful and, as discussed below,[60] their constitutionality is questionable. This situation is aggravated by the increased availability of abortion and contraceptives and other circumstances.[61]

Consideration of the policy reasons underlying the antipathy to payment for adoption suggests that they are largely inapplicable to the surrogate situation. The principal reason is a desire to protect and promote

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53. Downs v. Wortman, 228 Ga. 315, 315, 185 S.E.2d 387, 388 (1971).

54. *See* note 35 *supra* (citing representative statutes relating to AID).

55. A recent survey of physicians who administer artificial insemination revealed that virtually all paid donors for their semen, usually paying between $20 and $35 per ejaculate. Curie-Cohen, Luttress & Shapiro, *Current Practice of Artificial Insemination by Donor in the United States,* 300 NEW ENGLAND J. MED. 585, 587 (1979).

56. Hooks v. Bridgewater, 111 Tex. 122, 131, 229 S.W. 1114, 1118 (1921).

57. Parks v. Parks, 209 Ky. 127, 132, 272 S.W. 419, 422 (1928).

58. Note, *Black-Market Adoptions,* 22 CATH. L. 848, 849 (1976).

59. *Id.* at 59.

60. Podulski, *Abolishing Baby Buying: Limiting Independent Adoption Placement,* 9 FAM. L. Q. 547, 547 (1975); Note, *Black-Market Adoptions,* 22 CATH. L. 48, 49 (1976).

61. *See* notes 95-136 and accompanying text *infra.*

the family, which the courts have often identified as the foundation of society.[62] This is apparent from a case like *Willey v. Lawton,*[63] an Illinois decision which held that an agreement between the natural parent and adopting parents of a child, whereby the latter, for payment, agreed to adopt the child, was unenforceable as contrary to public policy.[64] The court declared that to permit the bartering away of children for a property return "tends to the destruction of one of the finest relations of human life," the parent/child relation.[65] In the particular circumstances of the case, there is some merit in the court's contention. The former husband of a woman who had remarried was in arrears in paying child support, and the couple contracted with the delinquent husband to forego the arrearages and pay $5,000 in return for his consent to their adoption of the child born to the divorced parties during their marriage.[66] Thus an established parent/child relationship between the biological and custodial father and his legitimate child would have been disrupted, and the father's motive in consenting to adoption could only have been economic duress overbearing his desire to keep the child.

In the typical baby-buying situation, an involuntarily pregnant unwed mother gives birth to an illegitimate child whose biological father usually takes no interest in it. Even if the mother has some desire to keep the child she is financially unable to do so. An intermediary whose motives are strictly mercenary brings "buyer" and "seller" together on the basis of the buyers' urgent desire for a child and the seller's financial exigency. The "adoptive" parents are both biologically unrelated to the child, which is removed from the single mother who, despite her possibly adverse circumstances, may well represent a rudimentary but real "family" for the child. The "adoptive" parents' fitness is not ascertained by anyone, and the biological mother may well experience guilt and pain over relinquishing her child, especially in these circumstances.[67] In at least some cases, then, a potential parent/child relationship is precluded for reasons unrelated to the well-being of the child or the true desires of its biological mother.

Surrogate motherhood is different. A married couple desiring a child

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62. *See* Zablocki v. Redhail, 434 U.S. 374, 384 (1978); Griswold v. Connecticut, 381 U.S. 479, 486 (1965); Maynard v. Hill, 125 U.S 190, 211 (1888).

63. 8 Ill. App.2d 344, 132 N.E.2d 34 (1956).

64. *Id.* at 346, 132 N.E.2d at 35.

65. *Id.* at 346-47, 132 N.E.2d at 35, *quoting* Hooks v. Bridgewater, 111 Tex. 122, 131, 229 S.W. 1114, 1118 (1921).

66. Willey v. Lawton, 8 Ill. App.2d 344, 345, 132 N.E.2d 34, 34 (1956).

67. Even in the case of the surrender of a newborn child to an adoption agency the situation is fraught with tragedy, inspiring unavoidable feelings of pain and guilt. People *ex rel.* Scarpetta v. Spence-Chapin Adoption Service, 28 N.Y.2d 185, 188-89, 321 N.Y.S.2d 65, 67, 269 N.E.2d 787, 788 (1974).

which the wife is incapable of bearing herself enters into an arrangement, not to "buy" a biologically unrelated baby, but to bring a child which is, as far as is biologically possible, their "own" into existence by conscious prearrangement. Without entering into an adulterous sexual relationship which might impair the marriage, the husband arranges to become the biological father of the child. The surrogate mother, on her part, consciously chooses to bear a child for another couple with the understanding that she will consent to their adoption of it. The decision to give up the child for adoption is not the product of the adverse circumstances of an unplanned pregnancy. When the child is born, there is already a home prepared for it consisting of its biological father and his wife. The possibility of feelings of guilt or loss on the biological mother's part is minimized, though not eliminated.[68]

In any realistic view of the situation, the only true "family" whose future is at stake is the one the child is predestined to enter — that of the childless married couple — not the nominal, intentionally temporary "family" represented by the surrogate mother. Clearly surrogate motherhood, like AID, *strengthens* the family insofar as it offers a solution for couples whose marriage may well be endangered by a desire for children.[69] Whatever the implications of surrogate motherhood for the family viewed as an abstraction, it means joy and fulfillment for certain real, flesh-and-blood families approaching despair over their inability to realize their parental aspirations.[70]

Ringing denunciations of baby-buying and declarations that children are not property may make stirring reading, but it is difficult to specify precisely why the "commercialization" of a surrogate motherhood arrangement is inconsistent with public policy. In a commercial society, "commercialization" is the usual way in which many of the needs of individuals are satisfied. There is no doubt that financial return may be important in motivating the surrogate mother to make her reproductive capacity available to others. Any intermediary who brings the interested parties together could also act from motives of pecuniary gain, though he may also be acting incidental to a role such as attorney or physician, serving his clients' best interests as he sees them.[71] What is important is

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68. *See* Comment, *Contracts to Bear a Child,* 66 CAL. L. REV. 611, 613-14 & n.13 (1978).

69. *See* Comment, *Artificial Insemination: Confusion Compounded,* 3 WAYNE L. REV. 35, 42 (1956).

70. *See* Smith, *A Close Encounter of the First Kind: Artificial Insemination and an Enlightened Judiciary,* 17 J. FAM. L. 41, 47 (1978-79) (referring to AID); Breo, *Special "Gift" From One Friend to Another: A Baby,* AMERICAN MEDICAL NEWS, July 28, 1978, at 11 (surrogate motherhood case).

71. For a discussion raising possible problems of professional ethics where attorneys act as adoption brokers, *see* Podulski, *Abolishing Baby Buying: Limiting Independent Adoption Placement,* 9 FAM. L. Q. 547, 552-53 (1975).

that the adoptive parents are no more acting upon economic considerations than are married couples who elect to have children.[72] The involvement of third parties whose actions are influenced by the profit motive may well justify regulation of surrogate motherhood agreements,[73] but not their prohibition.

The application of the anti-black-market statutes to surrogate motherhood contracts poses a number of problems on the issue of what, if anything, may be paid to the surrogate mother without contravening the statutes. Under the Michigan statute, medical and other "expenses" apparently may be paid,[74] but nothing beyond that. One authority is of the opinion that the surrogate's foregone wages cannot be paid,[75] but this is not clear from the statutory language. If the object of the statute is to prevent anyone from "profiting" from an adoption, it should not be necessary to proscribe payments which merely make up for the surrogate mother's income loss. In a Nevada decision, the issue arose as to whether a newspaper had libelled an attorney by referring to his arrangement of an adoption in which the biological mother was paid for foregone wages as a "black-market" sale of the child.[76] The court stated: "Under any reasonable construction of the term, 'black market sale' contemplates a sale contrary to regulations with a profit calculated either to compensate for the risk of apprehension or to match the buyer demand which has created the market."[77] The jury could properly decide, as it did, that compensation for lost wages did not turn the transaction into a sale.[78]

One difficulty in applying these statutes to surrogate motherhood contracts is that they relate only to the final phase (the adoption) of a

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72. "Economic" reasons for having children include: the use of children as a source of consumable entertainment; as vehicles of conspicuous consumption and vicarious achievement; and as a means of preserving property, even after death, through inheritance. *See* R. COOPERSTEIN, SOME NOTES ON THE REPRODUCTION OF HUMAN CAPITAL (1974). Psychoanalytically oriented authorities contend that parental self-love flowing from self-validation through reproduction is the original source of the parents' love for their child. *See* J. GOLDSTEIN, A. FREUD & A. SOLNIT, BEYOND THE BEST INTERESTS OF THE CHILD 16-17 (1973). It may be a good thing that parental motivation is ordinarily not subject to official scrutiny.

73. For some proposals for regulation, *see* Comment, *Contracts to Bear a Child,* 66 CAL. L. REV. 611, 621-22 (1978).

74. MICH. COMP. LAWS ANN. § 710.54 (Supp. 1979).

75. *See* note 49 and accompanying text *supra.*

76. Las Vegas Sun, Inc. v. Franklin, 74 Nev. 282, 291, 329 P.2d 867, 870 (1958).

77. *Id.* at 291-92, 329 P.2d at 872.

78. The court stated:

> Appellants contend that the compensation paid for loss of wages amounted to a profit and constituted the transaction a sale. In absence of statute the determination of whether such compensation was proper rested in the first instance with the jury. We shall not disturb their determination, implict in their verdict, that such compensation did not constitute the transaction a sale. There is nothing to indicate that the payment permitted the mother to profit from childbirth. To the contrary, it would seem to have been intended simply to prevent her confinement from resulting in pecuniary loss.

Id. at 292, 329 P.2d at 872.

contract which has other important provisions. The surrogate mother is not paid primarily for consenting to the adoption of the child; the services performed which justify substantial compensation consist rather of pregnancy and parturition, together with the risks and limitations which these experiences entail. These statutes do not purport to make it a crime to pay someone for becoming pregnant or having a baby. (This omission, of course, confirms that surrogate motherhood was never the intended target of the anti-black-market statutes.) What the surrogate mother has to offer is what the sterile wife of the biological father unfortunately lacks: the biological capacity to reproduce. The essence of the surrogate motherhood contract is to redress the injustice of nature in conferring this capacity on certain individuals who are able but unwilling to assume parental responsibilities while denying it to others who are willing but unable to do so. Thanks to artificial insemination, the solution of the biological problem is technically simple. What complicates the situation is the legal significance which the state has placed on biological parenthood. Because the custody of and parental responsibility for the child of an unmarried mother is automatically assigned to her upon the child's birth, it is necessary to terminate her parental rights[79] and bestow them on the biological father and his wife[80] through adoption of the child by the latter. Yet this final stage of the surrogate arrangement is apparently interdicted by the anti-black-market statutes.

Because the statutes prohibiting black-market transactions are normally couched in terms of a prohibition against receiving compensation for child placement,[81] surrogate motherhood contracts appear to be proscribed by the statutory language if it is read literally. But it is a certainty that surrogate motherhood was not within the contemplation of the legislators who enacted these statutes, and surrogate motherhood contracts present few of the evils of baby-buying. Where statutory language is of doubtful meaning, a reasonable construction must be given to effect the purpose of the statute; the spirit of the statute should prevail over the strict letter to avoid unjust applications and absurd consequences.[82] Additionally, the fact that these statutes carry criminal sanctions requires that they be narrowly interpreted. Ambiguities with respect to the ambit of criminal statutes should be resolved in favor of lenity.[83] Finally, even if such statutes render surrogate motherhood con-

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79. *See* Willmott v. Decker, 56 Hawaii 462, 464, 541 P.2d 13, 15 (1975); In Interest of Jones, 34 Ill. App.3d 603, 607, 340 N.E.2d 269, 273 (1975).

80. *See In re* Del Moral Rodriguez, 552 P.2d 397, 399 (Okla. 1976); Browning v. Tarwater, 215 Kan. 501, 505, 524 P.2d 1135, 1139 (1974).

81. Note, *Black-Market Adoptions*, 22 CATH. L. 48, 50 n.12 (1976).

82. Webster v. Rotary Electric Steel Co., 321 Mich. 526, 531, 33 N.W.2d 69, 71 (1948).

83. United States v. Enmons, 410 U.S. 396, 411 (1973); Rewis v. United States, 401 U.S. 808, 812 (1971).

tracts technically illegal, it may not follow that they are invariably unenforceable. The rule that contracts requiring the doing of an illegal act are unenforceable is not inflexible, and the courts must look to the legislative intent before invalidating such agreements.[84] No specific intent to invalidate surrogate motherhood contracts can be shown, since such arrangements have only recently come to the attention of the public. Courts should await explicit legislative direction before invalidating these voluntary agreements among adults.

There are several decisions which suggest that there is not necessarily a public policy objection to paying compensation incident to an adoption agreement, at least within the family context. A Kansas decision, *In re Shirk,* involved an agreement between the grandmother and the mother of a child whereby the mother consented to adoption of the child by the grandmother, in return for which both the daughter and the child would share in the grandmother's estate upon her death.[85] The grandmother had already taken the child into her home because the mother was financially unable to provide adequate care.[86] Later, all parties consented to the readoption of the child by her own mother and her husband after she remarried and her circumstances improved.[87] In considering the claims of the mother and child against the grandmother's estate, the Kansas Supreme Court considered whether the contract was against good morals and public policy.[88] For the court it was "fundamental that parents may not barter or sell their children nor may they demand pecuniary gain as the price of consent to adoptions."[89] In this case, though, the motivation for both parties was the desire to provide the best home possible for the child.[90] Under the circumstances, this "family compact" was in the best interest of the child and not against public policy:

> [A] contract of a parent by which he bargains away for his pecuniary gain the custody of his child to a stranger and attempts to relieve himself from all parental obligation, placing the burden on another who assumes it, without natural affection or moral obligation, but only because of the bargain, is void as against public policy. Such a contract would be the mere sale of the child for money. But the instant case involves a family compact. The proposal for adoption upon which the contract was based came from

84. Vic Hansen & Sons, Inc. v. Crowley, 57 Wis.2d 106, 116-17, 203 N.W.2d 728, 734 (1973); Ruelas v. Ruelas, 7 Ariz. App. 98, 101, 436 P.2d 490, 493 (1968).
85. *In re* Shirk, 186 Kan. 311, 317, 350 P.2d 1, 4 (1960).
86. *Id.* at 317, 350 P.2d at 7.
87. *Id.* at 318, 350 P.2d at 8.
88. *Id.* at 319, 350 P.2d at 9.
89. *Id.* at 323, 350 P.2d at 11.
90. *Id.* at 325, 350 P.2d at 12.

> the grandmother. It was not prompted by self-seeking on the part of the mother. Implicit in it is the favorable inference that the controlling consideration was the welfare of the two-year-old child. That fact permeates all the circumstances alleged. While the mother received the promise of the grandmother that she would receive one-third of her estate we cannot say that, under all the circumstances alleged and the favorable inferences to which they are entitled, the mother's consent to the adoption falls within the rule that a parent may not transfer his parental rights and duties to another in an attempt to sell or barter his child for his own financial gain.[91]

Although there are differences, in many respects the *Shirk* situation is analogous to the surrogate motherhood situation. The initiative was taken by the adopting party and was not prompted by material "self-seeking." If the "controlling consideration" is the welfare of the child, it is clear that it serves the best interests of the child, in all but the most extraordinary circumstances, to be adopted by his biological father and his wife rather than remain the surrogate mother's responsibility. Custody of the child is not given to a stranger who assumes it, without natural affection or moral obligation, because of the bargain; custody is granted to the child's own biological father and his wife. Since the biological father and the biological mother at the outset both have parental obligations toward the child, it is possible to view their contract as a sort of "family compact," although it is the compact which gives rise to the family relationship and also provides for its supersession by a different one. The most important difference, in terms of the factors which concerned the *Shirk* court, is that both parties in *Shirk* were found to have acted out of affection rather than pecuniary motives, whereas in surrogate motherhood pecuniary motivation may be important for the mother, though not the father. Yet this did not prevent the *Shirk* court from approving payment from the grandmother's estate for the *mother* as well as the child. Presumably the best interests of the child could have been served by making the child the sole beneficiary and framing the agreement as a third-party beneficiary contract. If nothing else, *Shirk* suggests that it is going too far to lay down a general rule that payment of compensation for consent to adoption is immoral and invariably adverse to the child's own interests. In surrogate motherhood, as in *Shirk,* the rule ought not to apply when the adopting party feels "natural affection" for his own offspring and "moral obligation" for a child he has brought into being.

In 1975, a federal court sustained an agreement reminiscent of the one in *Shirk* in terms which suggest that the "best interests of the child"

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91. *Id.* at 324, 350 P.2d at 12.

is the determinant of whether an adoption contract is against public policy:

> [I]t is not against public policy to enforce an agreement to provide for the mother of an illegitimate child in the putative father's will, incidental to an agreement to permit the adoption of the child by its father, where the adoption was in the best interests of the child and pecuniary gain was not the motivating factor on the mother's part.[92]

As in *Shirk,* the court distinguished such a case from baby-buying because the agreement was between family members: "The fears that approval of such a policy would lead to the bartering or sale of children are not borne out where we deal only with agreements between parents or close family members."[93] Surrogate motherhood contracts, of course, are also agreements "between parents," or at any rate prospective parents. Cases like these suggest some judicial willingness to depart from old doctrines in novel circumstances where the rationales of the old rules have limited relevance. In the states where these cases were decided, though, there were no statutes outlawing adoption contracts. Absent repeal or revision of prohibitory statutes in the states where they are in effect, those interested in surrogate motherhood contracts may have to challenge the constitutionality of those statutes[94] in order to assure their right to form a family on this basis.

III. Surrogate Motherhood as a Constitutional Right

Domestic relations has long been regarded as the virtually exclusive province of state law.[95] In recent years, however, state action in this area has increasingly been subjected to federal constitutional limitations. The most important of these is the constitutional right of privacy. There exists a private realm of family life which the state cannot enter and which has been accorded both substantive and procedural protection.[96] Among the decisions which an individual may make without unjustified interference are personal decisions relating to marriage, contraception, family relationships, and child rearing and education.[97] The right of privacy means the right of an individual, married or single, to

92. Reimche v. First Nat'l Bank of Nevada, 519 F.2d 187, 189 (9th Cir. 1975).

93. *Id.* at 190.

94. The first challenge to the constitutionality of an anti-black market statute insofar as it applied to compensation for surrogate mothers was an action for declaratory judgment brought in Michigan seeking invalidation of the Michigan statute. The trial court upheld the statute's constitutionality. Doe v. Kelley, No. 78-815 531 CZ (Wayne Cty., Mich. Cir. Ct., Jan. 28, 1980).

95. Sosna v. Iowa, 419 U.S. 393, 404 (1975).

96. Smith v. Organization of Foster Families, 431 U.S. 291 (1977).

97. Carey v. Population Services Int'l, 431 U.S. 678, 684-85 (1977); Roe v. Wade, 410 U.S. 113, 152-53 (1973).

be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.[98] Insofar as they invalidate surrogate motherhood contracts by which individuals effectuate their rights of procreation[99] and familial self-determination,[100] the anti-black-market statutes and equivalent judicial decisions appear to invade the protected realm of privacy in a most direct and devastating way.

Nonetheless the statutes are not invalid merely because they affect decision-making relative to procreation and the family. However, where a decision as fundamental as whether to bear or beget a child is involved, regulations imposing a burden on it may be justified only by compelling state interests, and must be narrowly drawn to express only those interests.[101] The regulation must be no more restrictive than necessary to accomplish the purpose.

Several possible purposes of the anti-black-market statutes — namely, the promotion of the family and the prevention of "commercialization" of adoption decisions — have already been examined.[102] The statutes are not narrowly drawn to accomplish either of these purposes. As applied to the compensation of a surrogate mother by a childless married couple, the statutes actually prevent a family from alleviating the childlessness which may endanger the family's viability.[103] It is not just the traditional nuclear family which can claim the protection of the right of privacy.[104]

As to "commercialization," the issues are somewhat more clouded. Generally, however, otherwise constitutionally protected activity cannot be deprived of protection simply because it is the subject of commerce.[105] Statutes which make it a crime to *pay* a physician for deliver-

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98. Planned Parenthood of Missouri v. Danforth, 428 U.S. 52, 70 n.11 (1976); Eisenstadt v. Baird, 405 U.S. 438, 453 (1972).

99. *See* Skinner v. Oklahoma, 316 U.S. 535, 541-42 (1942) (invalidating a statute providing for sterilization of certain convicted criminals).

100. *See* Moore v. East Cleveland, 431 U.S. 494, 504-06 (1977) (zoning ordinance limiting occupancy of dwelling unit to nuclear family members held an invalid interference with "family choice").

101. Carey v. Population Services Int'l, 431 U.S. 678, 686 (1977); Roe v. Wade, 410 U.S. 113, 155-56 (1973); *see also* Griswold v. Connecticut, 381 U.S. 479, 485 (1965).

102. *See* notes 69-73 and accompanying text *supra.*

103. *See* notes 67-70 and accompanying text *supra.*

104. Moore v. East Cleveland, 431 U.S. 494, 503-04 (1977).

105. In New York Times Co. v. Sullivan, 376 U.S. 254, 265-66 (1964), involving the tort liability of a newspaper for publishing libelous criticism of a public official in a paid political advertisement, the Supreme Court rejected the argument that:

> [T]he constitutional guarantees of freedom of speech and of the press are inapplicable here, at least so far as the Times is concerned, because the allegedly libelous statements were published as part of a paid, "commercial" advertisement. . . .
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> That the Times was paid for publishing the advertisement is as immaterial in this connection as is the fact that newspapers and books are sold.

ing a baby or performing an abortion would unquestionably be held unconstitutional. Yet to say that a surrogate mother has the right to conceive and bear a child but not to be compensated is to make essentially the same argument.[106] What the state cannot overtly prohibit, it cannot indirectly outlaw either. A state-created obstacle need not be absolute to be impermissible.[107] Thus, requirements which unduly burden the right to abortion are unconstitutional.[108]

The Supreme Court's decision in *Carey v. Population Services International*[109] furnishes an instructive analogy. Prior decisions of the Court had invalidated laws forbidding the use of contraceptives whether by married[110] or unmarried[111] persons. In *Carey,* the Court was faced with a state law forbidding the *distribution* of nonmedical contraceptives to adults except through a licensed pharmacist.[112] The Court held that the distinction between use and distribution was not constitutionally significant; what the Constitution protects is the individual decision in matters of childbearing.[113] By way of example, the Court suggested that a prohibition against the *sale* of contraceptives would be just as repressive as a prohibition against their use.[114]

Because limiting the distribution of nonprescription contraceptives "clearly imposes a significant burden on the right of individuals to use contraceptives if they choose to do so,"[115] the restriction was invalid. The *Carey* argument is even more compelling as applied to surrogate motherhood than when applied in the contraception context, since the services of a surrogate mother are far too onerous to be provided gratuitously. Just as a prohibition on the sale of contraceptives would be tantamount to a prohibition on their use, so too would a prohibition on compensation for surrogate motherhood be equivalent to be a prohibition of the practice.

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106. Yet much the same argument has been made in the course of the only proceeding to date to consider the constitutionality, from the standpoint of surrogate motherhood, of an anti-black market statute. *See* Brief for Defendant William L. Cahalan, Doe v. Kelley, No. 78-815, 531 CZ (Wayne Cty., Mich. Cir. Ct., Jan. 28, 1980).

107. Maher v. Roe, 432 U.S. 464, 469-70 (1977).

108. *See, e.g.,* Bellotti v. Baird, 428 U.S. 132, 147 (1976).

109. 431 U.S. 678 (1977).

110. Griswold v. Connecticut, 381 U.S. 479 (1965).

111. Eisenstadt v. Baird, 405 U.S. 438 (1972).

112. 431 U.S. at 686.

113. *Id.* at 687.

114. Specifically, the Court clarified the significance as follows:

> Restrictions on the distribution of contraceptives clearly burden the freedom to make such decisions. A total prohibition against sale of contraceptives, for example, would intrude upon individual decisions in matters of procreation and contraception as harshly as a direct ban on their use. Indeed, in practice, a prohibition against all sales, since more easily and less offensively enforced, might have an even more devastating effect upon the freedom to choose contraception.

Id. at 687-88.

115. *Id.* at 689.

Any state concern over "commercialization," then, must be addressed to the particular abuses to which payments in connection with adoption may lend themselves. The underlying danger is that "the welfare of the baby and the natural mother, as well as the fitness of the adoptive parents, are subordinated to the profit motive of the black marketeer."[116] But some adoption contracts are in the "best interests of the child,"[117] and the evils of the black-market are attenuated or absent in the surrogate mother situation where, as in the ordinary family situation, the would-be parents decide upon and arrange for the birth of the child thev desire.[118]

The argument has been made that reliance on the right of privacy to justify surrogate motherhood contracts is misplaced because there is no fundamental right to adopt a child; prospective adoptive parents cannot invoke the state's machinery for adoption while rejecting some of the conditions which the state imposes on adoption.[119] It was an argument along these lines which a Michigan judge found persuasive when he rejected privacy objections to the Michigan anti-black-market statute as applied to surrogate motherhood contracts.[120]

It is true that adoption is purely statutory.[121] Ordinarily there must be strict compliance with adoption statutes in order to consummate a valid adoption.[122] Nonetheless, the argument misses the point that, whether or not the state is obliged to authorize adoption, once it has done so, its activity in that area is subject to constitutional limitations.[123] Thus a state is not constitutionally compelled to provide for appeals in criminal cases,[124] but if it does so, due process and equal protection forbid the state from requiring indigent appellants to pay for transcripts if they cannot afford to do so.[125] A state need not maintain public schools and may allow them to be closed, but not if the object is to circumvent a racial desegregation order.[126] A city does not have to allow flyers to be posted on utility poles, but if it opens the forum by allowing any such

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116. Note, *Black-Market Adoptions*, 22 CATH. L. 48, 50 (1976) (footnote omitted).

117. *See* notes 85-93 and accompanying text *supra*.

118. *See* note 68 and accompanying text *supra*.

119. Brief for Defendant William L. Cahalan in Opposition to Plaintiff's Motion for Summary Judgment, at 4, 5, Doe v. Kelley, No. 78-815, 531 CZ (Wayne Cty., Mich. Cir. Ct., Jan. 28, 1980).

120. Doe v. Kelley, No. 78-815, 531 CZ, at 7 (Wayne Cty., Mich. Cir. Ct., Jan. 28, 1980).

121. Lyman v. Sullivan, 147 Conn. 134, 136-37, 157 A.2d 759, 760 (1960).

122. *See In re* Garlow's Estate, 313 Mich. 402, 408-09, 21 N.W.2d 178, 180-81 (1946); Westbrook v. Elder, 264 Mich. 138, 142-43, 249 N.W. 617, 618 (1933) (holding that adoption contracts cannot be enforced unless they comply with the laws of the state).

123. *Cf.* Maher v. Roe, 432 U.S. 464, 469-70 (1977).

124. McKane v. Durston, 153 U.S. 684, 687-88 (1894).

125. Griffin v. Illinois, 351 U.S. 12, 18 (1956).

126. Griffin v. County School Bd. of Prince Edward County, 377 U.S. 218, 231 (1964).

use of utility poles it cannot condition such use on the prior permission of city officials unguided by explicit and nondiscriminatory standards.[127]

Where the state monopolizes the means of implementing certain fundamental decisions protected by the right of privacy, it may not impose conditions which effectively exclude some individuals from resorting to the only means provided. In *Boddie v. Connecticut*[128] the Supreme Court held that the due process clause forbids a state imposing court fees and costs on indigents which restrict their access to the courts for the purpose of seeking a divorce.[129] Due process is implicated because resort to state courts is the "only avenue to dissolution of [a] marriage."[130] "[A] statute may be held constitutionally invalid as applied when it operates to deprive an individual of a protected right, even if its general validity as a measure enacted in the legitimate exercise of state power is beyond question."[131]

The right to go to court "is the exclusive precondition to the adjudication of a fundamental human relationship. The requirement that these appellants resort to the judicial process is entirely a state-created matter."[132] What the court held in *Boddie* with respect to divorce is equally valid with respect to adoption. Whether a state must provide for divorce or adoption, once it does so, the procedures to be followed and the conditions to be complied with are subject to constitutional limitations. Adoption, like divorce, is a method of effectuating basic decisions about family affiliation — a method which is monopolized by the state. The state's general authority to impose fees on divorce petitioners or prohibit payment for consent to adoption may be well established, but if the *application* of these conditions effectively prevents particular classes of people from exercising their familial privacy rights, then as to those classes the requirements are unconstitutional. It is irrelevant that the state is not to blame for the sterility of certain married women who desire children, just as it is irrelevant that the state is not to blame for the poverty of certain married persons who desire a divorce. The point is that the state has provided the means — the only means — to implement their respective marital decisions. Consequently, the state cannot enforce requirements which in practice prevent access to a state-created and state-monopolized procedure.

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127. Dulaney v. Municipal Court, 11 Cal.3d 77, 82, 112 Cal. Rptr. 777, 781, 520 P.2d 1, 5 (1974).

128. 401 U.S. 371 (1971).

129. *Id.* at 380-81.

130. *Id.* at 376.

131. *Id.* at 379.

132. *Id.* at 383. Some Justices concluded that the imposition of fees in this context violated equal protection as well as due process. *Id.* at 388-89 (Brennan, J., concurring in part).

The right of privacy is the constitutionally protected interest most obviously implicated by anti-black-market legislation, but other constitutional questions may also be raised. The disparate treatment accorded payment of "surrogate fathers" involved in AID as opposed to surrogate mothers is a type of discrimination by sex which may violate the equal protection clause.[133] The uncertainty as to whether, in fact, payments to a surrogate mother for various purposes (*e.g.*, for the use of her reproductive capacity, for foregone income, for medical expenses, for consent to adoption, etc.) are forbidden may also render such statutes void for vagueness as applied to the surrogate motherhood situation.[134] Enactments like the Michigan statute which prohibit paying consideration in connection with adoption except for charges and fees approved by the court may well work a denial of due process in that no standards are provided to guide the decision-maker's discretion.[135] Insofar as surrogate motherhood arrangements among consenting and competent adults represent an exercise of personal liberty which is not detrimental to third parties or society, state interference with these arrangements on moralistic grounds may be unconstitutional simply because it exceeds the scope and proper purposes of state action under our constitutional system.[136] As surrogate motherhood becomes more common, inevitably these and other constitutional questions will have to be litigated unless the statutory and decisional law is modified to accommodate the unique features of the surrogate motherhood situation.

IV. Enforcing the Surrogate Motherhood Contract

Even if surrogate motherhood contracts were lawful and enforceable, the unique features of the arrangement would still present practical difficulties in the event of a breach. If the biological father and his wife breached the contract, by refusing to pay the agreed-upon compensation or to adopt the child, the surrogate mother could simply give the child up for adoption and sue the married couple for the compensation

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133. *See, e.g.*, Weinberger v. Wiesenfeld, 420 U.S. 636 (1975); Reed v. Reed, 404 U.S. 71 (1971). It is arguable also that differential treatment of adoption and procreation decisions is in itself invidiously discriminatory. "The right to have children is one of the basic civil rights of man. We find no distinction between the right of procreation of children and the adoption of children." *In re* Del Moral Rodriguez, 552 P.2d 397, 399 (Okla. 1976).

134. *See* Papachristou v. City of Jacksonville, 405 U.S. 156, 161-62 (1972); United States v. Harris, 347 U.S. 612, 617 (1954); Lanzetta v. New Jersey, 306 U.S. 451, 453 (1939).

135. *See* Niemotko v. Maryland, 340 U.S. 268, 271-72 (1951); *cf.* Lovell v. City of Griffin, 303 U.S. 444, 451 (1938) (free expression case).

136. *See* Black, *Obscenity and Freedom of Expression in Michigan*, 56 U. DET. J. URB. L. 27, 55-57 (1978); *see, e.g.*, People v. Sinclair, 387 Mich. 91, 133, 194 N.W.2d 878, 896 (1972) (Kavanagh, J., concurring); American Motorcycle Ass'n v. Department of State Police, 11 Mich. App. 351, 353-54, 158 N.W.2d 72, 73-74 (1968), *leave denied*, 381 Mich. 763 (1968). *Contra*, Lochner v. New York, 198 U.S. 45, 75 (1906) (Holmes, J., dissenting).

due. Such a turn of events should be rare, since couples entering into such arrangements are likely to be motivated by a strong desire for a child, especially if it is the offspring of the husband. In any event, their breach presents no novel legal problems.

Breach by the surrogate mother, in contrast, poses a difficult problem in finding an appropriate remedy.[137] If she breaches by refusing to submit to artificial insemination, the married couple could probably sue for recovery of compensation already advanced to her,[138] but beyond that their remedies are uncertain. Money damages (apart from restitution of money advanced) would almost certainly be inadequate; the couples' out-of-pocket pecuniary losses should be recoverable[139] but are likely to be small. The real loss they suffer is of course the distress and the frustration of their parental aspirations, but damages for emotional distress are usually not recoverable in contract actions.[140] An alternative possibility is an action in tort for intentional or negligent infliction of mental or emotional distress.[141] Even if such a suit is successfully brought, however, it may well be that the defendant cannot satisfy a substantial money judgment; rich women are not likely to contract to become surrogate mothers in the first place.

The alternative remedy, available where money damages are not an adequate remedy, is specific performance, *i.e.*, an order that the breaching party perform as she has promised.[142] As regards a pre-birth breach, however, it is inconceivable that a court would order a woman to submit or resubmit to artificial insemination, to become pregnant and to give birth to a child. The general rule is that courts will not order specific performance of contracts for personal services because of the impracticality of assuring satisfactory performance.[143] In this situation the enforcement problems would be monumental. The reluctant surrogate might surreptitiously practice contraception, or engage in activities detrimental to the health of the fetus, or even arrange to be impregnated by someone other than the husband of the sterile wife. Clearly the contract could not be enforced short of taking the surrogate into

137. For an excellent overview of contract remedies law, *see* Farnsworth, *Legal Remedies for Breach of Contract*, 70 COLUM. L. REV. 1145 (1970).

138. *See* J. CALAMARI & J. PERILLO, THE LAW OF CONTRACTS 371-72 (1970); D. DOBBS, HANDBOOK ON THE LAW OF REMEDIES 222 (1973).

139. *See* Barr v. Rhoades, 274 Cal. App.2d 852, 855, 79 Cal. Rptr. 505, 507 (1969).

140. *See* O'Neil v. Spillane, 45 Cal. App.3d 147, 158-59, 119 Cal. Rptr. 245, 254 (1975).

141. *See, e.g.*, Young v. Hecht, 3 Kan. App.2d 510, 514, 597 P.2d 682, 687 (1979); Richardson v. Paidmune, 97 Cal. App.2d 124, 130, 217 P.2d 113, 117 (1950).

142. *See, e.g.*, Takahashi v. Pepper Tank & Contracting Co., 58 Wyo. 330, 339, 131 P.2d 339, 346 (1942); Centex Homes Corp. v. Boag, 128 N.J. Super. 385, 389, 320 A.2d 194, 196 (Chancery Div. 1974).

143. *See* Kfox, Inc. v. United States, 510 F.2d 1365, 1375 (Ct. Cl. 1975); Northern Delaware Industrial Dev. Corp. v. E.W. Bliss Co., 245 A.2d 431, 433 (Del. Ch. 1968); Lumley v. Wagner, 1 De. G.M. & G. 604, 619, 42 Eng. Rep. 687, 693 (Ch. App. 1852).

custody. In case of pre-birth breach by the surrogate mother, then, there is not much that can be done.

The situation is not the same where the surrogate mother, having given birth, decides to keep the child and refuses or retracts her consent to its adoption. Such cases have already occurred.[144] In these circumstances, specific performance should be feasible, since all that is needed is to order the surrogate to consent to the adoption and deliver the child to the custody of its other biological parent. If the controversy is reached without regard for the contract, it reduces to a dispute between the two biological parents[145] of an illegitimate child. Currently, most courts look with disfavor upon prenatal releases of parental rights or consent to adoption by the expectant mother,[146] and this is one area where reform is imperative to accommodate the special circumstances of surrogate motherhood. Such a release and consent, given in the context of a deliberate, pre-pregnancy decision to bear a child for another, should not only be lawful but irrevocable. Present law regarding revocation of consent varies widely from state to state, but the tendency in most jurisdictions "is to hold that the natural parent may not withdraw his consent to the adoption without careful scrutiny by the courts."[147] Because of the infant's tendency to form psychological ties with the parent who has custody,[148] prompt resolution of the custody dispute is a matter of urgency.[149] It would be desirable if, upon a prima facie showing of a surrogate motherhood contract containing consent to adoption, custody of the child were transferred to the biological father pending a final custody decision made on an expedited basis.[150]

Since no surrogate motherhood contract apparently has ever been litigated, a discussion of enforcement problems can only be tentative

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144. *See Agreement by Couple to Pay Girl for Having Baby*, THE TIMES (London), June 21, 1978, at 1, col. 8.

145. Unlike an anonymous sperm donor, a man who knowingly furnishes semen to a particular woman to be used to impregnate her "takes upon himself the responsibilities of fatherhood." C.M. v. C.C., 152 N.J. Super. 160, 167, 377 A.2d 821, 824 (Cumberland County Juv. & Dom. Rel. Ct. 1977). For a discussion of this unusual case, *see* Smith, *A Close Encounter of the First Kind: Artificial Insemination and an Enlightened Judiciary*, 17 J. FAM. L. 41 (1978-79).

146. *See, e.g.*, *In re* Adoption of Krueger, 104 Ariz. 26, 30, 448 P.2d 82, 86 (1969). *But see* Johnson v. Cupp, 149 Ind. App. 611, 616, 274 N.E.2d 411, 414 (1971).

147. H.H. CLARK, THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES 627 (1968).

148. *See* J. GOLDSTEIN, A. FREUD & A. SOLNIT, BEYOND THE BEST INTERESTS OF THE CHILD 17-19 (1979).

149. *Id.* at 43.

150. This survey does not exhaust the possible legal problems resulting from breach by the surrogate mother. Proof of paternity, ironically, is apparently made impossible by the literal language of some statutes designed to relieve AID donors from parental responsibility, such as CAL. CIV. CODE § 7005(b) (West Supp. 1979): "The donor of semen provided ... for use in artificial insemination of a woman other than the donor's wife is treated in law as if he were not the natural father of a child thereby conceived." On this and other problems *see* Comment, *Contracts to Bear a Child*, 66 CAL. L. REV. 611, 614-16 (1978).

and to some extent speculative. But it does appear that surrogate motherhood, like AID,[151] calls for comprehensive legislation which treats the arrangement as a totality. Focusing on isolated facets of the contract tends to distort the contract's real nature and obscure its human dimensions. The illegality of surrogate motherhood contracts does not reflect any conscious policy decision to outlaw the practice; the illegality is the unintended consequence of decisions made in dealing with altogther different factual situations.

CONCLUSION

Surrogate motherhood is growing in popularity because it more adequately meets the needs of those who have chosen it rather than any of the other alternatives. As a consensual arrangement it is as worthy of legal protection as artificial insemination by a donor which, though formerly suspect, is now accepted.[152] Labelling the consensual impregnation of a surrogate mother as an adulterous act between her and a donor is ludicrous and inconsistent with statutory and decisional definitions of adultery. When a woman consents to a surrogate motherhood arrangement, there is no rational basis for treating the fertilization as an act of adultery. Public policy is not contravened by such an arrangement; rather, it is promoted by fostering the establishment of a complete family where none previously existed. Statutes which outlaw the sale or black-marketeering of infants were not drafted to encompass a surrogate motherhood situation. Applying these laws to preclude a surrogate motherhood arrangement is tenuous at best. Moreover, these statutes intrude upon the constitutionally protected realm of marital privacy. Such a direct invasion of a fundamental interest exceeds the ambit of state action under our constitutional system. However, some state or federal regulatory measures may be required to forestall exploitation by third parties. In the final analysis, surrogate motherhood, subject to reasonable regulation, deserves a place among the growing panoply of methods available to individuals for the ordering of their own marital and reproductive lives.

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151. *See* note 35 *supra* (citing statutes regulating various facets of AID).

152. Among formerly illegal contractual arrangements relating to family matters whose legality is now fully settled are abortion, Roe v. Wade, 410 U.S. 113 (1973), and antenuptial agreements, Harden v. First Union Nat'l Bank, 28 N.C. App. 75, 78, 220 S.E.2d 136, 138 (1975).

The Duty to Bargain in the Public Sector: Some Constitutional Considerations

*Steven C. Schwab**

The author discusses public employees' bargaining power, their first amendment rights, and the public employer's corresponding duty to bargain with labor organizations. Specifically, Professor Schwab discusses recently developed case law in this area. He concludes that limitations placed on public employees are consistent with their first amendment rights and that issues concerning public sector employment rights and duties are more appropriately addressed by legislation and administrative agencies.

In the private sector, section 7 of the National Labor Relations Act (NLRA) guarantees those employees to whom its coverage extends the right to join and form labor organizations and the right to engage in collective bargaining with their employers.[1] Section 8(a)(1) of the act makes it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of . . . rights" conferred by section 7.[2] Section 8(a)(5) makes it an unfair labor practice for an employer "to refuse to bargain collectively"[3] about "wages, hours, and other terms and conditions of employment"[4] with a labor organization which represents an appropriate bargaining unit of its employees. No federal legislation creates or protects comparable rights in the public sector. However, during the past two decades many states have enacted

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1. NLRA, 29 U.S.C. § 157 (1976).
2. *Id.* § 158(a)(1).
3. *Id.* at § 158(a)(5).
4. *Id.* at § 158(d).

legislation which establishes and secures the rights of public employees to join and form labor organizations and to bargain collectively. As a corollary, such legislation invariably imposes a duty on a public employer to bargain in good faith with a labor organization which represents a majority of its employees in a bargaining unit. In a jurisdiction where such legislation has not been enacted or where such legislation excludes specific groups of employees, the first amendment,[5] subject to reasonable limitations,[6] protects the right of public employees to join and form labor organizations. In *Arkansas State Highway Employees, Local 1315 v. Smith,*[7] the Supreme Court of the United States in very specific dicta addressed the extent to which the first amendment creates a right to engage in collective bargaining with a public employer, as well as the extent to which the first amendment creates a corresponding duty on the part of a public employer to bargain in good faith with labor organizations which represent bargaining units composed of its employees.

This Article will examine the extent to which the first and fourteenth amendments[8] create or affect rights and duties to bargain in the public sector. First, it will review the well-established right of public employees to join and form labor organizations.[9] Second, those limited circumstances under which the equal protection clause of the fourteenth amendment requires a public employer to bargain with a labor organization which represents a bargaining unit of its employees will be identified. Next, the Article will examine whether or not a public employer who voluntarily or involuntarily extends bargaining rights to its employees may condition the exercise of those rights on its ability to exclude certain categories of individuals or certain categories of labor organizations as spokesmen or representatives of its employees. Finally, it will conclude with an examination of *Arkansas State Highway Employees, Local 1315 v. Smith*[10] and an evaluation of the present trends in this recently developed body of constitutional law.

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5. The first amendment provides in part: "Congress shall make no law ... abridging ... the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. CONST. amend I.

6. *See* note 17 *infra.*

7. 441 U.S. 463 (1979).

8. The fourteenth amendment provides in part: "No state shall ... deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend XIV.

9. *See, e.g.,* Lontine v. Van Cleave, 483 F.2d 966, 967 (10th Cir. 1973); Orr v. Thorpe, 427 F.2d 1129, 1131 (5th Cir. 1970); AFSCME v. Woodward, 406 F.2d 137, 139 (8th Cir. 1969); McLaughlin v. Tilendis, 398 F.2d 287, 288 (7th Cir. 1968); Atkins v. City of Charlotte, 296 F. Supp. 1068, 1077 (W.D.N.C. 1968).

10. 441 U.S. 463 (1979).

I. THE CONSTITUTIONAL RIGHT TO JOIN AND FORM LABOR ORGANIZATIONS IN THE PUBLIC SECTOR

Until the latter half of this century, courts consistently ruled that a public employee could be prohibited from joining or forming a labor organization.[11] Justice Holmes's famous aphorism well expressed the traditional rule: "The petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman."[12] Indeed, not until the Seventh Circuit Court of Appeals's seminal decision in *McLaughlin v. Tilendis*[13] did a federal court rule that the first amendment requires the recognition of a public employee's right to join and form a labor organization.

In *McLaughlin* two untenured high school teachers filed a civil rights action[14] against the school superintendent and members of the board of education. The defendants refused to offer one plaintiff a second contract and dismissed the other plaintiff during his second year of teaching. The complaint alleged that these actions were taken because of plaintiffs' affiliation with a labor organization and that defendants had denied rights secured by the first amendment.[15] The district court, in an unreported decision, concluded that such interests were not protected under the first amendment and dismissed the complaint. The court of appeals, relying on several Supreme Court decisions which had ruled that under the first amendment public employment may not be constitutionally subjected to unreasonable conditions, reversed and held that the complaint stated a cause of action under the statute.[16]

McLaughlin, in establishing the constitutional nature of a public employee's right to join and form a labor organization, by implication

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11. *See, e.g.,* AFSCME, Local 201 v. City of Muskegon, 369 Mich. 384, 120 N.W.2d 197, *cert. denied,* 375 U.S. 833 (1963); King v. Priest, 357 Mo. 68, 206 S.W.2d 547 (1947), *appeal dismissed,* 333 U.S. 852 (1948); Perez v. Board of Police Comm'rs, 78 Cal. App.2d 638, 178 P.2d 537 (1947).

12. McAuliffe v. Mayor of New Bedford, 155 Mass. 216, 29 N.E. 517 (1892).

13. 398 F.2d 287 (7th Cir. 1968).

14. 42 U.S.C. § 1983 (Supp. III 1979) provides:

> 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.

15. McLaughlin v. Tilendis, 398 F.2d 287, 288 (7th Cir. 1968).

16. *Id.* at 288-89. The court cited several cases to support the proposition that public employment may not be subjected to unreasonable restraints. *See* Pickering v. Board of Educ., 391 U.S. 563 (1968) (impermissable burdens on freedom of speech); Keyishian v. Board of Regents, 385 U.S. 589 (1967) (overbroad loyalty oaths); Shelton v. Tucker, 364 U.S. 479 (1960) (requirement that teachers file an affidavit which listed each organization to which they had belonged during the previous five years); Garrity v. New Jersey, 385 U.S. 493 (1967) (discharge for invoking fifth amendment's privilege against self-incrimination).

raised a larger issue. If a public employee's right to join and form a labor organization is secured by the first amendment, is this right meaningful if employees have no constitutional right to bargain through labor organizations and if labor organizations have no constitutionally protected right to represent bargaining units which have chosen them as their representatives for purposes of collective bargaining? If the answer to these questions is affirmative, and the first amendment does create bargaining rights, then logically it would impose on a public employer a correlative duty to bargain in good faith with a labor organization which represents a majority of the employees in a bargaining unit.

II. CONSTITUTIONAL ASPECTS OF THE DUTY TO BARGAIN

A. Equal Protection Considerations:

It is a common practice for a public employer to bargain with labor organizations which represent certain bargaining units in its workforce and to refuse to bargain with organizations which represent other bargaining units. Efforts to challenge the constitutionality of such practices under the equal protection clause of the fourteenth amendment have not been successful. The few cases which have addressed this issue have held that a public employer is given considerable discretion in deciding whether to bargain with an organization which represents a particular employee bargaining unit when he has bargained with an organization which represents another unit. Those decisions have consistently used the traditional "rational basis" standard of equal protection review and have concluded that such a practice is permissible as long as it involves no purposeful discrimination and is based on some reasonable classification or criterion.[17]

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17. Subsequent decisions have consistently reached the result which the court reached in *McLaughlin*. *See* note 11 *supra*. *McLaughlin* had indicated that a public employer may be able to forbid its employees to join labor organizations if such a prohibition constitutes a reasonable condition of employment. McLaughlin v. Tilendis, 398 F.2d at 288-89. Two subsequent decisions of a federal district court within the Seventh Circuit have attempted to apply the reasonable condition requirement of *McLaughlin*. In Elk Grove Firefighters' Local 2340 v. Willis, 400 F. Supp. 1097 (N.D. Ill. 1975) *aff'd*, 539 F.2d 714 (7th Cir. 1976) (unpublished order), the court upheld a rule which prohibited firefighter lieutenants and captains from joining labor organizations which represent the rank and file. The court found that the rule did not violate the first amendment because of the employer's legitimate and substantial interest in avoiding a situation in which its firefighter lieutenants and captains would be subjected to potential conflicts of interest. *Accord*, Local 2263, IAFF v. City of Tupelo, 439 F. Supp. 1224 (N.D. Miss. 1977). Subsequenly, in Mescall v. Rockford, 101 L.R.R.M. 3136 (N.D. Ill. 1979), the same court, on the authority of *Elk Grove*, invalidated a police department rule which prohibited policemen from belonging to a labor organization whose membership is not limited to persons who are employed on a full-time basis as law enforcement officers. *Id.* at 3138-39. *See also* Melton v. City of Atlanta, 324 F. Supp. 315 (N.D. Ga. 1971) (state law making it a misdemeanor for a policeman to join or form a labor union

In *Beauboeuf v. Delgado College*[18] a group of teachers sought an injunction ordering the College, its board of managers, the chairman of the Board and the city of New Orleans to bargain collectively with the union which represented teachers employed by the college.[19] Their complaint asserted that because the college was an agency of the city, the equal protection clause required bargaining with the union, since the city had previously bargained with organizations representing other city employees.[20]

In ruling that the complaint failed to state a claim under the fourteenth amendment, the court relied upon the fact that the city had not bargained with any union which represented teachers. The court found that a decision not to bargain with organizations composed of teachers was a reasonable decision free from arbitrary classifications prohibited by the equal protection clause. The court observed that different, but reasonable, policy considerations are involved in decisions to bargain with representatives of one type of employee and not to bargain with representatives of other types of employees and that courts should ordinarily extend considerable deference to such decisions.[21]

O'Brien v. Leidinger[22] presented a similar issue. Under Virginia law, local governments may not *bargain* with labor organizations without statutory authorization.[23] They may, however, *discuss* wages, hours and conditions of employment with representatives of employee organizations.[24] The city manager and the city council of Richmond, Virginia, refused to discuss these subjects with representatives of a union representing members of the city's police force, despite the fact

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held unconstitutional). However, the court in Norbeck v. Davenport Community School Dist., 545 F.2d 63 (8th Cir. 1976), *cert. denied*, 431 U.S. 917 (1977), ruled that a school district could constitutionally refuse to renew the contract of a high school principal who served as the chief negotiator for a union which represented teachers whom he supervised, disciplined and evaluated.

18. 303 F. Supp. 861 (E.D. La. 1969), *aff'd*, 428 F.2d 470 (5th Cir. 1970) (per curiam).

19. There is a division of authority on whether a union has standing to file a civil rights action and allege that a public employer has interfered with employees' first amendment rights to join and form labor organizations. *See, e.g.*, Elk Grove Firefighters' Local 2340 v. Willis, 391 F. Supp. 487 (N.D. Ill. 1975); and Service Employees Int'l Union v. County of Butler, 306 F. Supp. 1080 (W.D. Pa. 1969), which hold that a union has standing to file under 42 U.S.C. § 1983 in either a representative or individual capacity. For authority *contra, see e.g.*, Lontine v. Van Cleave, 80 L.R.R.M. 3240 (D. Colo. 1972), *aff'd on other grounds*, 483 F.2d 966 (10th Cir. 1973).

20. The city recognized unions which represented sanitation workers, firefighters and employees of the sewerage and water board. 303 F. Supp. at 865.

21. *Id.* at 866. The court observed, however, that: "Conceivably, a public body might bargain so universally with unions representing other employees that the denial of the right of union representation to teachers might be considered a denial of equal protection." *Id.*

22. 452 F. Supp. 720 (E.D. Va. 1978).

23. The Supreme Court of Virginia reached this result in Commonwealth v. County Bd. of Arlington County, 217 Va. 558, 232 S.E.2d 30 (1977). *See* O'Brien v. Leidinger, 452 F. Supp. 720, 722 (E.D. Va. 1978).

24. O'Brien v. Leidinger, 452 F. Supp. at 723.

that the city had entered into discussions concerning employment relationships with representatives of other employee groups. Unlike the defendants in *Delgado,* however, the city of Richmond made no attempt to articulate any criteria or classifications on which their decisions to enter into selected discussions were made.[25] Accordingly, the court concluded that the defendants had failed to rebut a prima facie case of an equal protection violation, even under a "rational basis" standard of equal protection review.[26]

The court found, however, that the equal protection clause was violated with respect to refusals to discuss the subjects with union representatives *who were also employees of the city* ("inside agents"). The court ruled that the city had not violated the equal protection clause when it refused to discuss the subjects with union representatives who were not also city employees ("outside agents"), because in the past the city had discussed these subjects only with representatives who were city employees.[27]

B. First Amendment Restrictions on the Ability to Limit the Freedom to Select Collective Bargaining Representatives

While the *O'Brien* court ruled that the city did not violate the equal protection clause by its refusal to discuss subjects of employment with "outside agents," the court did find that the city's policy of excluding "outside agents" from its discussions unconstitutionally abridged plaintiffs' first amendment right of association, a right which encompasses a freedom to select those persons who will bargain on behalf of a unit. The court reached this conclusion by relying on the well-established first amendment principle that a public body may not condition the availability of a right, benefit or privilege which it creates or recognizes on a recipient's waiver of a substantive right created by the first amendment, unless some compelling state interest justifies the imposition of such a condition.[28] The court found that the city had failed

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25. Defendants claimed to have followed a policy under which the city discussed "working conditions, including wages and hours, with individual employees or with organizations which they form, so long as these are not unions." 452 F.2d at 723. The court found as a factual matter that no such policy had been followed. *Id.*

26. *Id.* at 724.

27. *Id. See also* Confederation of Police v. City of Chicago, 529 F.2d 89 (7th Cir.) *vacated on other grounds,* 427 U.S. 902 (1976); Beauboeuf v. Delgado College, 303 F. Supp. 861 (E.D. La. 1969), *aff'd per curiam,* 428 F.2d 470 (5th Cir. 1970). In *Confederation of Police,* the court ruled that no equal protection violation existed where the defendant city extended bargaining rights to non-academic employees of the school board while denying such rights to police officers. 529 F.2d at 93.

28. O'Brien v. Leidinger, 452 F. Supp. at 725-26.

to meet such a standard of proof. Thus, the exclusion of "outside agents" violated the first amendment.[29]

Similarly, in *Kenai Peninsula Borough School District v. Kenai Peninsula Borough School District Classified Ass'n,*[30] the defendant had adopted a rule that in negotiating with non-certificated employees (*e.g.*, secretarial, custodial, and cafeteria personnel), it would not negotiate with any individual who was not an employee of the school district or with an employee organization affiliated with any state or national labor union.[31] The court concluded that the right to join and form labor organizations and the right to freely select representatives for collective bargaining purposes are constitutionally indistinguishable.[32] However, the school district had argued that even if the

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29. *Id.* at 724-27. The city had argued that it should not be required to discuss employment matters with "outside agents" because: (1) "harmonious employment relationship[s]" are fostered by limiting discussions to employees, and (2) "direct discussions with their employees are more efficient in finding mutually acceptable solutions to grievances." *Id.* at 726. The court found that these factors, if true, did not justify the limitations which were placed on the plaintiffs' first amendment rights; because, as the plaintiffs maintained: (1) none of the local employee-members possessed experience or skill in presenting grievances or in labor negotiations; and (2) "outside agents," as non-employees, were not subject to harassment and intimidation as were employee representatives. *Id.*

O'Brien did not hold that a labor organization has a constitutional right to bargain with a public employer, if a majority of employees in a bargaining unit designate it as their collective bargaining representative, or that a public employer under such circumstances has a constitutional duty to bargain with a labor organization. The court held only that if a public employer voluntarily extends to employees a right to discuss subjects of employment through representatives of labor organizations or if a public employer is ordered to do so to correct a denial of equal protection, "the First Amendment necessarily defines what limits, if any, the City may permissibly place on that right." *Id.* at 725-26. Nevertheless, in a footnote, the court suggested a doctrine which is not viable after the United States Supreme Court's decision in Arkansas State Highway Employees, Local 1315 v. Smith, 441 U.S. 463 (1979):

> The City suggests that even if plaintiffs have a right to speak through any union representative they select, the City has no duty to listen to such a representative. This attempted distinction misconceives the very nature of the jurisprudential concept of rights and duties. Wherever there exists a *right* in any person, there also exists a correlative *duty* in some other person or persons not to abridge or interfere with the exercise of that right. Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning,* 23 YALE L.J. 16 (1930). As Justice Harlan has stated, "the right to have one's voice heard and one's views considered by the appropriate governmental authority is at the core of the right of political association." Williams v. Rhodes, 393 U.S. 23, 41, 89 S.Ct. 5, 16, 21 L.E.2d 24 (1968) (concurring opinion). Thus, if plaintiffs have a right to be represented by an agent of their choosing in discussions with the City, they also have the right to have their views, expressed by their agent, heard by the City. In defendants' terms, the City, acting through defendants, would have a "duty to listen" to the plaintiffs' representative, correlative to and inseparable from the plaintiffs' right to speak through that representative.

Id. at 726 n.5.

30. 590 P.2d 437 (Alaska 1979).

31. The plaintiffs conceded that whatever collective bargaining rights they enjoyed were created by "the labor relations policy enacted by the District" and did not maintain that the first amendment created any constitutional rights or duties to bargain in the public sector. *Id.* at 439.

32. *Id.* at 439-40. The court relied on ambiguous langauge in NLRB v. Jones & Laughlin

first amendment protects the right to join and form labor organizations and the right to select one's representatives for collective bargaining purposes, the first amendment did not preclude it from refusing to bargain with representatives who fail to meet the requirements which it had imposed. In rejecting this argument the court ruled that a governmental body cannot confer a benefit or a privilege and then condition the availability of that benefit or privilege on the forfeiture of a right created by the first amendment. As in *O'Brien,* the court ruled that the employer could condition the availability of such a benefit or privilege upon the curtailment of interests protected by the first amendment only if they could satisfy a demanding burden of proof.[33] The court ruled that the employer had the burden to show that its policy was supported by some "paramount" interest "of vital importance"[34] which could not be implemented under a less restrictive alternative. Since the defendant's justification for the policy asserted no such interests, the court concluded that the policy violated the first amendment.[35]

III. The First Amendment as a Possible Source of Rights and Duties to Bargain in the Public Sector: The Law Before the *Smith* Decision

Within a year of its decision in *McLaughlin,* the Seventh Circuit held in *Indianapolis Education Association v. Lewallen:*

> [T]here is no constitutional duty to bargain collectively with an exclusive bargaining agent. Such duty, when imposed, is imposed by statute. The refusal of the defendants-appellants to bargain in good

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Steel Corp., 301 U.S. 1 (1937), which can be read in support of the proposition that the right to select one's bargaining representative is constitutionally protected:

> [I]n safeguard[ing] the right of employees to self-organization and to select representatives of their own choosing for collective bargaining or other mutual protection without restraint or coercion by their employer ... [the National Labor Relations Act goes no further than to safeguard] a fundamental right. . . . Hence the prohibition by Congress of interference with the selection of representatives for the purpose of negotiation and conference between employers and employees, "instead of being an invasion of the constitutional right of either, was based on the recognition of the rights of both."

590 P.2d at 439, *quoting* NLRB v. Jones & Laughlin Steel Corp., 301 U.S. at 33-34 (citations omitted).

33. *Id.* at 439-40.

34. *Id.* at 440, *quoting* Elrod v. Burns, 427 U.S. 347, 362 (1976).

35. *Id.* at 440-41. The court expressed a certain skepticism about the reasons given in support of the defendant's policy. The court remarked:

> The essence of the District's asserted interest is that it needs to exercise prospective control over the vigor with which its non-certificated employees will be represented at the bargaining table. We can see in this no more than a bald assertion that it will lead to too much labor unrest if public employees are permitted to exercise their first amendment rights.

Id. at 441.

In the private sector § 7 of the NLRA, 29 U.S.C. § 157 (1976) gives a labor organization which

> faith does not equal a constitutional violation of plaintiffs-appellees' positive rights of association, free speech, petition, equal protection, or due process. Nor does the fact that the agreement to collectively bargain may be enforceable against a state elevate a contractual right to a constitutional right.[36]

Similarly, the courts in *Atkins v. City of Charlotte*[37] and *Alaniz v. City of San Antonio,*[38] upheld North Carolina and Texas statutes[39] which prohibited state and local governments from engaging in collective bargaining. In *Atkins* the court stated a position which no court has yet rejected and which is consistent with the recent United States Supreme Court decision in *Smith:*

> We find nothing unconstitutional in G.S. § 95-98. It simply voids contracts between units of government within North Carolina and labor unions and expresses the public policy of North Carolina to be against such collective bargaining contracts. There is nothing in the United States Constitution which entitles one to have a contract with another who does not want it. It is but a step further to hold that the state may lawfully forbid such contracts with its instrumentalies.[40]

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represents a bargaining unit an almost absolute right to select the individuals who will negotiate on its behalf. To justify a refusal to bargain with the negotiators whom the labor organization has selected an employer must demonstrate that the selection of these individuals constitutes a clear and present danger to meaningful bargaining between it and the labor organization. An employer who refuses to bargain with specific negotiators and who is unable to satisfy this burden of proof commits unfair labor practices under NLRA § 8(a)(1), 29 U.S.C. § 158 (a)(1), and § 8(a)(5), 29 U.S.C. § 158(a)(5) (1976). *See* General Electric Co. v. NLRB, 412 F.2d 512, 520 (2d Cir. 1969).

36. 72 L.R.R.M. 2071, 2072 (7th Cir. 1969). The Seventh Circuit reaffirmed *Lewallen* in Hanover Township Fed'n of Teachers v. Hanover Community School Corp., 457 F.2d 456 (7th Cir. 1972). In *Smith* the Supreme Court cited both *Lewallen* and *Hanover* favorably. 441 U.S. at 464, 465 n.2.

37. 296 F. Supp. 1068 (W.D.N.C. 1969).

38. 80 L.R.R.M. 2983 (W.D. Tex. 1971).

39. N.C. GEN. STAT. § 95-98 (1965); TEX. REV. CIV. STAT. ANN. art. 5154c, §§ 1 & 2 (Vernon 1971).

40. Atkins v. City of Charlotte, 296 F. Supp. at 1077. The court in *Atkins* ruled unconstitutional, on the authority of *McLaughlin,* N.C. GEN. STAT. § 95-97 (1965) which prohibited employees of state and local governments from becoming members of trade unions or labor organizations. Subsequently, in Winston-Salem/Forsyth County Unit, North Carolina Ass'n of Educators v. Phillips, 381 F. Supp. 644 (M.D.N.C. 1974), the court relied extensively on *Atkins* to uphold the constitutionality of N.C. GEN. STAT. §§ 95-98 (1965). In Newport News Firefighters' Ass'n Local 794, IAFF, v. City of Newport News, Virginia, 339 F. Supp. 13, 17 (E.D.Va. 1972), the court said: "We hold that it is not within the function of this court to decide whether or not the City of Newport News must enter into a collective bargaining agreement. That decision rests with the general assembly of Virginia and the City Council of Newport News." Similarly, in Gary Teachers' Union, Local No. 4 v. School City of Gary, 284 N.E.2d 108, 111 (Ind. App. 1972), the court observed: "[T]here is no constitutional ... duty on the public employer of such a school teacher public employee to bargain collectively with the elected representatives of such school teacher public employees. . . ."

IV. THE *SMITH* DECISION:

In *Arkansas State Highway Employees, Local 1315 v. Smith*[41] two employees of the Arkansas State Highway Commission were subjected to disciplinary action. In response to that action they initiated grievance proceedings and requested that a union to which they belonged represent them throughout the grievance process. When the union attempted to file a written grievance on behalf of the employees, the Commission refused to accept it pursuant to Rule 2 of the Commission's Grievance Procedure which authorized only the aggrieved individual to file a written grievance.[42] In a complaint alleging a civil rights violation, the union and aggrieved employees alleged that Rule 2 was unconstitutional under the first amendment insofar as it interfered with the right of a union to file grievances on behalf of its members and to assist them in the presentation of their grievances. The district court agreed, holding that the right of an employee to join a labor organization implied that the union possessed such limited representational rights under the first amendment, and held Rule 2 unconstitutional to the extent that it prohibited the union from filing a written grievance on behalf of an aggrieved employee.[43] The Eighth Circuit affirmed in a short *per curiam* opinion.[44]

By a vote of 7 to 1 the Supreme Court, without the benefit of oral

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41. 585 F.2d 876 (8th Cir. 1978), *aff'd*, 441 U.S. 463 (1979).

42. The grievance procedure, adopted by the Commission on May 23, 1973, provides:

1. The employee with a complaint or grievance will take this matter up first with his supervisor. (Supervisor in this sense means the person who usually gives the orders directly. His title may be squad boss, lead man, foreman, etc.) It is the duty of the supervisor to give an impartial hearing, make a thorough investigation and, if possible, make a decision which is mutually agreeable. The supervisor may keep a brief informal record of the matter for his own information and for reference later if the grievance is taken to the Employer Representative.
2. If a settlement is not reached with the supervisor, the employee should submit his complaint in writing to the appropriate Arkansas State Highway Department Employer Representative.

For the purpose of dealing with complaints regarding working conditions, the Arkansas State Highway Department Maintenance Engineer is hereby designated as Employer Representative.

For the purpose of handling questions as to wages and hours of ASHD employees, the Arkansas State Highway Department Personnel Officer is hereby designated Employer Representative.

Agents representing Arkansas State Highway Department employees are required to deal exclusively with the designated Employer Representative in the presentation of employee grievances.

3. The Employer Representatives will immediately review all the evidence available to them and if indicated, make further investigation into the matter. After all of the facts have been considered, a written report will be made to the Director. The decision of the Director as to matters under consideration shall be final. The employee will then be notified in writing of the decision.

Arkansas State Highway Employees, Local 1315 v. Smith, 459 F. Supp. 452, 435-54 (E.D. Ark. 1978).

43. Arkansas State Highway Employees Local 1315 v. Smith, 459 F. Supp. 452, 455-56 (E.D. Ark. 1978). The district court rejected the plaintiff's additional argument that the grievance pro-

arguments, reversed in a *per curiam* opinion which consists of just six paragraphs.[45] The Court ruled that the complaint failed to state a cause of action because "the First Amendment is not a substitute for the national labor relations laws."[46] After noting that the case did not present any issues with respect to employees' rights to join or form labor organizations, to persuade others to recognize such rights, or to advocate specific ideas, the Court in very broad language wrote:

> [T]he First Amendment does not impose any affirmative obligation on the government to listen, to respond or, in this context, to recognize the association and bargain with it.[47]
>
> Far from taking steps to prohibit or discourage union membership or association, all that the Commission has done in its challenged conduct *is simply to ignore the union. That it is free to do.*[48]

In a short dissent Justice Marshall criticized the Court's summary approach to "deciding vital constitutional questions without even a plenary hearing."[49]

While the actual holding of *Smith* — that a public sector labor organization has no constitutional right to file a written grievance on behalf of an aggrieved employee — is relatively insignificant, the implications of the decision for collective bargaining in the public sector are very significant. In dicta which is relatively free from ambiguity, the Court declared that the Constitution recognizes no rights or duties to bargain collectively in the public sector. While the Court's language could conceivably be limited to the facts of *Smith,* the Court's citations do not warrant a narrow reading of its opinion. Admittedly, when the Court wrote that the first amendment did not require the Commission

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cedure was unconstitutional insofar as it did not allow the union to be present at every stage of the grievance process. The court held:

> What is critical is that the grievance procedure provides the employees with the opportunity to present their grievances with assistance by the union at a meaningful time and in a meaningful manner. *See Norton v. Blaylock,* 409 F.2d 772 (8th Cir. 1969). The grievance procedure did give the employee and the union this opportunity. The union represented both Watson and Hughes at the meetings with the employer representative. At the meetings the union could supplement the investigation undertaken by the supervisor and conduct its own presentation. Moreover, the union was free to communicate with the Highway Commission about the grievance at any step in the procedure, although it was unable to be present at every step. Thus, the union was not deprived of its right to petition government for the redress of grievances because it was unable to be present at each step of the grievance procedure.

Id. at 456.

44. Arkansas State Highway Employees, Local 1315 v. Smith, 585 F.2d 876 (8th Cir. 1978).

45. 441 U.S. 463 (1979). Justice Powell took no part in the consideration of the case.

46. *Id.* at 464. The Court remarked: "Were public employees such as the Commission subject to the same labor laws applicable to private employers, this refusal might well constitute an unfair labor practice." *Id.* at 465.

47. *Id.*

48. *Id.* at 466 (emphasis added).

49. *Id.*

"in this context, to recognize the association and bargain with it,"[50] it did not decide a case in which a labor organization sought to bargain with a public employer as the chosen representative of a bargaining unit. The same observation applies equally to the Court's statement that "all that the Commission has done ... is simply to ignore the union. That it is free to do."[51] However, the Court's favorable references to the holding of the Seventh Circuit in *Hanover Township Federation of Teachers v. Hanover Community School Group*[52] (that a public

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50. *Id.* at 465.

51. *Id.*

52. 457 F.2d 456 (7th Cir. 1972). In seeking certiorari the defendants in *Smith* maintained that review should be granted because the Eighth Circuit's affirmance of *Smith* conflicted with *Hanover's* ruling that there is no constitutional right or duty to bargain in the public sector. *See* Petition for Certiorari at 8-9, Arkansas State Highway Employees, Local 1315 v. Smith, 441 U.S. 463 (1979). The existence of such a conflict is far from obvious. To hold that a union which does not represent a bargaining unit must be allowed to file a written grievance at the request of an aggrieved member is not necessarily inconsistent with the proposition that the Constitution creates no rights and corresponding duties to bargain collectively in the public sector.

The plaintiffs sought to avoid characterizing the union's attempt to file the grievance as a demand for recognition as a bargaining representative. *See* Brief for Respondents in Opposition to the Granting of Certiorari at 10-11, Arkansas State Highway Employees, Local 1315 v. Smith, 441 U.S. 463 (1979). The plaintiffs relied extensively on language in Brotherhood of R. Trainmen v. Virginia *ex rel.* Virginia State Bar, 377 U.S. 1 (1964); and UMW, District 12 v. Illinois State Bar Ass'n, 389 U.S. 217 (1967). Brief for Respondents in Opposition to the Granting of Certiorari at 3-6, Arkansas State Highway Employees, Local 1315 v. Smith, 441 U.S. 463 (1979). In *Brotherhood* the union maintained a nationwide legal department which recommended to members and their families' attorneys who were competent to represent them in personal injury actions. In reversing a judgment of the Supreme Court of Virginia and ruling that the first amendment forbade state attempts to prohibit the program the Court held:

> It cannot be seriously doubted that the First Amendment's guarantees of free speech, *petition* and assembly give railroad workers the right to gather together for the lawful purpose of helping and advising one another in asserting the rights Congress gave them in the Safety Appliance Act and the Federal Employers' Liability Act, statutory rights which would be vain and futile if the workers could not talk together freely as to the best course to follow. *The right of members to consult with each other in a fraternal organization necessarily includes the right to select a spokesman from their number who could be expected to give the wisest counsel.* That is the role played by the members who carry out the legal aid program. And the right of the workers personally or through a special department of the Brotherhood to advise concerning the need for legal assistance — and, most importantly, what lawyer a member could confidently rely on — is an inseparable part of this constitutionally guaranteed right *to assist and advise each other.*

377 U.S.at 5-6 (emphasis added).

In *UMW* the union paid an attorney a salary to represent members in workmens' compensation actions. The Supreme Court of Illinois ruled that such an arrangement involved the union in an unauthorized practice of law. In holding that the first amendment protected the union's arrangement with the attorney the Supreme Court said:

> ... We hold that the freedom of speech, assembly *and petition* guaranteed by the First and Fourteenth Amendments give petitioner the right to hire attorneys on a salary basis to assist its members in the assertion of their legal rights.
>
> We start with the premise that the rights to assemble peaceably and to petition for a redress of grievances are among the most precious of the liberties safeguarded by the Bill of Rights. These rights, moreover, are intimately connected, both in origin and in purpose, with the other First Amendment rights of free speech and free press. . . . The First Amendment would, however, be a hollow promise, if it left government free to destroy or erode its guarantees by indirect restraints so long as no law is passed that prohibits free

employer may constitutionally bypass a labor organization which represents a bargaining unit of its employees) and its favorable reference to *Hanover's* quotation of the Seventh Circuit's earlier decision in *Indianapolis Education Association v. Lewallen*[53] ("there is no constitutional duty to bargain collectively with an exclusive bargaining agent")[54] make a narrow reading of *Smith* all but implausible. The upshot of *Smith* is clear: the Court has, at least for the time being, rejected the argument that the Constitution creates rights and corresponding duties to bargain in the public sector.[55]

CONCLUSION

All of the cases which this Article has discussed have reached results which are sound in terms of the rules of constitutional law which they have both applied and developed. The decisions are also quite sound to the extent that they involve choices of basic policy alternatives. The equal protection rule of *Delgado* and *O'Brien* — that a public employer may refuse to bargain with the representative of one bargaining unit and bargain with the representative of another unit as long as its decision is free from the use of some arbitrary criterion or classification — is consistent with the Supreme Court's decision in *Smith*. If, as *Smith* declares, the Constitution does not vest in public employees and organizations whom they select as their representatives a basic right to bargain collectively with an employer, then by definition, a decision to bargain with the representative of one unit and not to bargain with the representative of another unit cannot affect a fundamental right. Accordingly, such a decision need not be justified under a higher standard

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> speech, press, petition or assembly as such. We have therefore repeatedly held that laws which actually affect the exercise of these vital rights cannot be sustained merely because they were enacted for the purpose of dealing with some evil within the State's legislative competence, or even because the laws do in fact provide a helpful means of dealing with such an evil. . . .

389 U.S. at 221-22 (emphasis added).

The gist of the union's argument in *Smith* was that *Brotherhood* and *UMW*, insofar as they held that the first amendment protected two specific union efforts to make available legal services to their members, analogously supported the proposition that a labor organization has a first amendment right to provide its members with legal and quasi-legal services through the filing of grievances on behalf of aggrieved employee-members. *See* Brief for Respondents in Opposition to the Granting of Certiorari at 6, Arkansas State Highway Employees, Local 1315 v. Smith, 441 U.S. 463 (1979). Justice Marshall's brief dissent in *Smith*, 441 U.S. at 465-66, suggests that he found the plaintiffs' argument at least plausible.

53. 72 L.R.R.M. 2071, 2072 (7th Cir. 1969).

54. *Id.* at 2072.

55. In unrelated litigation between the same parties the court in Arkansas State Highway Employees Local 1315 v. Kell, 628 F.2d 1099 (8th Cir. 1980), ruled that a unilateral rescission of a gratuitously extended dues check-off violated neither the first amendment, as interpreted in *Smith*, nor the equal protection or due process clauses of the fourteenth amendment.

of review which the equal protection clause imposes when actions under color of state law have such an impact on fundamental constitutional rights.[56]

The first amendment rule set out in *O'Brien* and *Kenai* — that a public employer may not condition its decision to engage in collective bargaining on its ability to limit the freedom of its employees to select the labor organizations or negotiators which will represent them — is equally sound in terms of contemporary first amendment doctrine.[57] Allowing a public employer to impose such restrictions would obviously permit it to condition the availability of a state-created right or privilege on its employees' waiver of their first amendment right to join and form labor organizations and to freely select their representatives for purposes of collective bargaining. Such a rule is a clear violation of the first amendment except in an exceptional case where some compelling state interest might conceivably dictate the imposition of such a requirement.

In terms of basic labor policy *Smith's* rejection of the argument that the first amendment creates rights and corresponding duties to bargain

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56. The equal protection standard of *Delgado* and *O'Brien* is reinforced, to an extent, by City of Charlotte v. Local 66, IAFF, 426 U.S. 283 (1976), in which the Court held that a public employer may deny a labor organization's request for a dues check-off, even if it grants other *types* of requests to withhold amounts from employees' paychecks. The Court held that the equal protection clause presents no obstacle to such a practice as long as the decisions are free from arbitrariness and are based on some rational classification or criterion.

The *City of Charlotte* case did not decide under what circumstances a public employer may grant a dues check-off to a labor organization which represents one bargaining unit and deny it to an organization which represents another unit. In Edwards v. Alhambra Elementary School District, No. 63, 448 P.2d 498 (Ariz. App. 1971), the court ruled that the school district could, consistent with the equal protection clause, grant a dues check-off to a labor organization which represented teachers and deny such a concession to an organization which represented support staff. The court held that there existed "a valid reasonable classification between teacher employees and non-teacher employees for the purpose of allowing the school district to contract on different terms of employment between these groups." *Id.* at 501. However, in Truckdrivers & Helpers, Local 728 v. City of Atlanta, 468 F. Supp. 620, 623 (N.D. Ga. 1979), the court held that defendant city could not justify, under "a relatively relaxed standard of reasonableness" a decision to grant a dues check-off to a labor organization which represented firefighters and deny such a request when made by an organization which represented police officers. In Bauch v. City of New York, 21 N.Y.2d 599, 237 N.E.2d 211, 289 N.Y.S.2d 951, *cert. denied* 393 U.S. 834 (1968), the court ruled that the city could, consistent with a reasonable relationship standard of equal protection review, grant a dues check-off to an organization which represented a city-wide bargaining unit and deny such a request to an organization to which a minority of the employees in the unit belonged.

In Local 995, IAFF v. City of Richmond, 415 F. Supp. 325 (E.D. Va. 1976), the court rejected the argument that the first amendment requires a public employer to grant a dues check-off to a labor organization, because the absence of a check-off interfered with the financial viability of the organization and therefore interfered with associational rights protected by the first amendment.

57. *See* note 16 *supra* and cases cited therein. *See also* Branti v. Finkel, 445 U.S. 507 (1980) (affiliation with a political party may not be a requirement for public employment unless it is reasonably related to the duties of the job); *accord,* Elrod v. Burns, 427 U.S. 327 (1976) (political patronage systems invalid); Givhan v. Western Line Consolidated School District, 439 U.S. 410

in the public sector is a wise decision. An opposite result would have placed every court in the country, and especially the Supreme Court, in an unacceptable position. Had the Court ruled that the first amendment creates such rights and duties, courts throughout the country would have been given authority to develop a body of labor law which would define in more detail the scope of such rights and duties. In the process of discharging that task courts would have had to decide on a case-by-case basis, as a matter of constitutional law, a myriad of issues which can only be meaningfully addressed through legislation and through decisions of administrative agencies which have been given jurisdiction to implement and administer comprehensive collective bargaining legislation. For example, courts would have had to address, as a matter of constitutional law, such questions as: what is an appropriate bargaining unit? when and how does a union become the representative of such a unit? what constitutes a failure to bargain in good faith? to which subjects of collective bargaining does the duty extend?

Smith rejected a very dangerous argument and recognized appropriate limitations on the function of the judiciary. For this reason alone, this relatively unnoticed *per curiam* decision has made a meaningful contribution to the development of labor policy in the public sector by placing the responsibility for the development of a specific body of law where it belongs: in legislatures and in appropriate administrative bodies.[58]

(1979) (private expression of views to public employer is protected unless the employer can show some compelling state interest justifying disciplinary action for such expressions).

58. To the extent that National League of Cities v. Usery, 426 U.S. 833 (1976), implied that the tenth amendment forbids congressional efforts to regulate the labor relations of state and local governments and reflected a policy of limiting the involvement of the federal government in the regulation of those labor relations, *Smith,* by prohibiting *federal courts* (as well as state courts) from recognizing first amendment rights and duties to bargain in the public sector, vindicates the same policy. In *National League of Cities* the Court held unconstitutional legislation which extended the protection of the Fair Labor Standards Act, 29 U.S.C. § 201, to employees of state and local governments. The Court ruled: "We hold that insofar as the challenged amendments operate to directly displace the States' freedom to structure integral operations in areas of traditional governmental funtions, they are not within the authority granted Congress by Art. I, § 8, cl. 3." 426 U.S. at 852. If Congress cannot constitutionally apply the FLSA to state and local governments, it appears that Congress is foreclosed by the tenth amendment from passing legislation which would regulate the labor relations of state and local governments. In a footnote, however, the Court observed that: "We express no view as to whether different results might obtain if Congress seeks to affect integral operations of state governments by exercising authority granted it under other sections of the Constitution such as the spending power, Art. I, § 8, cl. 1, or § 5 of the Fourteenth Amendment." *Id.* at 852 n.17. Within days of the *National League of Cities* decision the Court in *Fitzpatrick v. Bitzer,* 427 U.S. 445 (1976), held that the tenth amendment provides no defense to legislation passed under their fourteenth amendment to enforce the substantive guarantees of that amendment.

The Court has not yet ruled whether Congress may, under the spending clause, condition a state or local government's receipt of federal funds on its agreement to do something which Con-

gress cannot directly compel under the *National League of Cities* decision. If Congress may do so, then apparently it can insist that a state or local government agree to some federal regulation of its labor relations in order to become eligible for federal assistance available under specific federal programs.

Two major decisions suggest the power of Congress to regulate the labor relations of state and local governments under the spending clause. In City of Macon v. Marshall, 439 F. Supp. 1209 (M.D. Ga. 1977), the court upheld the Secretary of Labor's refusal to certify the plaintiff city as being in compliance with § 13 of the Urban Mass Transportation Act, 49 U.S.C. § 1609(c) (1976), which requires a municipality to make protective arrangements for the continuation of collective bargaining rights when funds authorized by the act are used to acquire a private transportation company which has established a collective bargaining relationship with a labor organization. The city, which could not engage in collective bargaining under state law, argued that through § 13 Congress had, in the language of *National League of Cities,* attempted to "directly displace the state's freedom to structure integral operations in areas of traditional governmental functions," 426 U.S. at 852. *See* City of Macon v. Marshall, 439 F. Supp. 1209, 1224 (M.D. Ga. 1977). The court rejected the argument and held that what Congress is precluded from doing directly under the commerce clause because of the tenth amendment, it may do indirectly under the spending clause. In County of Los Angeles v. Marshall, 422 F. Supp. 1186 (D.D.C. 1977), *aff'd,* 631 F.2d 767 (D.C. Cir. 1980), the court reached a result similar in upholding the 1976 amendments to the Federal Unemployment Tax Act, 26 U.S.C. §§ 3301-3311 (1976), which require that states make unemployment benefits available to employees of state and local governments in order to be eligible for federal funding under the act.

Investment Company Reorganization with "Cash Companies" and the Continuity of Business Enterprise Doctrine: One Current View

*Richard A. Westin**

Recently, the Treasury Department has reacted to a perceived problem in the area of close corporation/mutual fund mergers. New regulations have been promulgated aimed at clarifying the "continuity of business enterprise" doctrine. Professor Westin examines the justifications and ramifications of the new regulations. While concluding that justification does exist, the author questions the propriety of the method adopted by the Treasury to correct the perceived problem.

There has been a recent re-emergence of taxpayer efforts to diversify out of closely held corporations into publicly traded "mutual funds,"[1] perhaps in large measure as a side effect of the merger movement in general.[2] Recently, however, the Treasury has balked in a number of respects. Most significantly, the government has issued final regula-

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1. The term "mutual fund" is used in lieu of the more cumbersome term "regulated investment company," used in section 851 of the Internal Revenue Code. Subsequent references to the Internal Revenue Code shall be made by merely citing the indivídual section numbers.

2. Perhaps the best evidence is that one major investment advisory corporation (Fidelity Mngm't & Research Co. of Boston) has formed a "series fund" (Triad Fund) appropriate to absorbing close corporations. Further evidence of the popularity of the close corporaton — mutual fund merger pattern and technical discussions thereof include the following commentaries: Bloom, *The Resurrection of a Dormant Doctrine: Continuity of Business Enterprise,* 7 J. CORP. TAX. 315 (1981); Freeman, *Corporate Organizations and Reorganizations,* 6 J. CORP. TAX. 332 (1980); *IRS Places Hold on Dreyfus Fund Type Rulings,* 49 J. TAX. 319 (1978); *New — Business — Sale Technique by Exempt Mutual Fund,* 49 J. TAX. 127 (1978); Aidinoff & Lopata, *The Continuity of Business Enterprise Requirement and Investment Company Reorganizations,* 58 TAXES 914

tions[3] which sharply reduce the capacity of a corporation which has recently disposed of its assets[4] (tax-free or otherwise) to engage in a tax-free reorganization with a mutual fund. The effect of this particular mechanism has been to greatly expand, by regulation, the so-called "continuity of business enterprise" doctrine,[5] which until recently has been relatively uncontroversial and comparatively insignificant.

By so doing, it appears the Treasury has altered greatly the tax-free reorganization rules. Such regulations go beyond the mere remedy of the originally perceived problem — mutual mergers with close corporations — and draw into question the force of the government's "reincorporation" theories.[6]

I. BACKGROUND

The history of taxpayer efforts to diversify out of overconcentrated investments without paying taxes is one of long standing.[7] The problem characteristically arises where a taxpayer's assets are overconcentrated in a family company. It can also arise where a taxpayer's assets consist of stock of a corporation which recently acquired a close corporation in a tax-free transaction. In the latter instance, the taxpayer could hold acquiring company stock in the belief[8] that the law compels continued ownership of stock of the acquiring company in order not to retroactively invalidate the tax-free status of the merger or acquisition. Underlying this belief is the notion that there is no "reorganization" if there is no continuing proprietary interest in the target corporation

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(1980); Faber, *Continuity of Interest and Business Enterprise: Is it Time to Bury Some Sacred Cows?*, 34 TAX LAW. 239 (1981); Warner, *Continuity of Business Enterprise: Change in IRS Position*, [1980] TAX MNGM'T (BNA) 80-7 Tax Mngm't Memo, at 3 (Apr. 7, 1980); *Treasury Study Would Disqualify Certain Corporate Reorganizations*, [1979] TAX MNGM'T (BNA) 79-7 Tax Mngm't Memo, at 10 (Mar. 26, 1979); *Corporate Reorganizations: No Ruling Area*, [1978] TAX MNGM'T (BNA) Tax Mngm't Memo, at 7 (Nov. 20, 1978); Snyder, *Personal Investing*, FORTUNE, Aug. 14, 1978, at 189; Westin, *Mutual Fund Mergers with Closely Held Corporations*, 14 MERGERS & ACQUISITIONS 32 (1979). These articles tend to be highly critical of the new regulations (which were only proposed then) and tend to overlook Hendee v. Commissioner, 98 F.2d 934 (7th Cir. 1938), and the purposes of the original reorganization rules.

3. *See* Treas. Reg. § 1.368-1(d), 45 Fed. Reg. 86,433 (1980).

4. A corporation which disposes of its assets is often referred to as a "cash company," meaning its principal assets are the proceeds of the sale of its business properties or securities acquired with such proceeds.

5. For a thorough discussion of this doctrine, *see* Tarleau, *"Continuity of the Business Enterprise" in Corporate Reorganizations and Other Corporate Readjustments*, 60 COLUM. L. REV. 792 (1960). *See also* B. BITTKER & J. EUSTICE, FEDERAL INCOME TAXATION OF CORPORATIONS AND SHAREHOLDERS § 14.03 (4th ed. 1979) [hereinafter cited as B. BITTKER & J. EUSTICE].

6. *See* notes 96-142 and accompanying text *infra*.

7. *See generally* B. BITTKER & J. EUSTICE, *supra* note 5, at ¶¶ 3.02, 14.19.

8. Rev. Rul. 66-23, 1966-1 C.B. 67 suggests a post-reorganization holding period of 5 years. This has been viewed seriously by the commentators. *See, e.g.*, E. VROOMAN, *Corporate Acquisition* — (A) Reorganizations, 77-3rd TAX MMNGM'T PORTFOLIOS at A-14 (1974).

through ownership of the acquiring company where the target company shareholders promptly dispose of their stock or securities of the acquiring company.[9]

An early technique to gain diversification was the so-called "swap fund," a device by which taxpayers transferred their securities to a newly-formed investment company in a tax-free organization under section 351 of the Internal Revenue Code (IRC).[10] The new corporation would have a diversified portfolio, hence less volatility, as a consequence of the multiple contributions of stock. The Internal Revenue Service (IRS or Service) first suspended rulings in 1962,[11] and in 1966 Congress added the predecessor of section 351(d), denying tax-free status for transfers to "investment companies" which result in "diversification."[12] The term "investment companies" now encompasses mutual funds and corporations unduly laden with liquid investments.[13]

A more recent obstacle arose in the Tax Reform Act of 1976[14] in the amendment to section 368,[15] defining "reorganizations" in order to exclude certain transactions involving "investment companies" as defined in section 368(a)(2)(F)(ii). That provision appears to be a somewhat porous rule, as will be suggested below.

A. Mutual Fund Reorganization Formats

There are good non-tax reasons why a close corporation and its shareholders may want to reorganize with a mutual fund. The owners may be old, and no new generation may have come forward to take over the business. The old generation may want the liquidity for their estates associated with holding mutual fund shares. They may prefer to convert their ownership from an equity interest to a bond fund holding, often of the tax-free variety.[16] There are also tax reasons, such as the wish to avoid imposition of the personal holding company tax.[17] Another can-

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9. *See* B. BITTKER & J. EUSTICE, *supra* note 5, ¶ 14.22, at 14-24.

10. *See generally* B. BITTKER & J. EUSTICE, *supra* note 5, ¶ 3.01; Chirelstein, *Tax Pooling and Tax Postponement — The Capital Exchange Funds,* 75 YALE L. J. 183 (1965).

11. Rev. Proc. 62-32, 1962-2 C.B. 527.

12. Foreign Investors Tax Act of 1966, Pub. L. No. 89-809, § 203(a), 80 Stat. 1539, 1577 (1966).

13. *See* I.R.C. § 351(d); Treas. Reg. § 1.351-1(c)(1)(ii) (1967).

14. Pub. L. No. 94-455, 90 Stat. 1520 (1976).

15. I.R.C. § 368(a) contains the general definitions of a "reorganization" for Federal income tax purposes, subject to certain modifications in I.R.C. § 368(a)(2).

16. Now permitted by I.R.C. § 852(b)(5).

17. I.R.C. § 542 defines a "personal holding company" as a corporation which at any time during the last half of the taxable year was 50 percent owned by five or fewer individuals and during the last taxable year 60 percent or more of its adjusted ordinary gross income was composed of so-called personal holding company income (generally, passive income). If a personal holding company is found, I.R.C. § 541 imposes a 70 percent tax on undistributed income. However, the capacity to make "consent dividend" distributions in later years largely undercuts the *in terrorem* effect of the tax. I.R.C. § 561(a)(2) and I.R.C. § 565.

didate for tax motivated reorganization with a mutual fund is a company which has, or is in danger of having, excessive undisturbed accumulated earnings.[18]

Assuming a tax-free reorganization with a mutual fund is possible, the rewards are substantial. In addition to deferred capital gains taxation,[19] shareholders are relieved of estate illiquidity, managerial succession, under-diversification of assets, personal holding company or accumulated earnings taxation,[20] and it is even possible that the character of the income received by shareholders will change from taxable to tax-free, all of which constitutes a rich dessert. These transactions can be quite complex. State blue sky laws and Securities and Exchange Commission (SEC) requirements must be met,[21] shareholder votes must be obtained,[22] and the various requirements of the federal income tax laws must be met.

The IRC mandates that the transactions fall within the definition of the term "reorganization" found in section 368(a)(1), and various judicial requirements must be satisfied, especially the need for a "business purpose," "continuity of proprietary interest," and the revised "continuity of business enterprise" requirement as well.[23] Despite these difficulties, the rewards of a successful corporate marriage are great for both sides. The target company shareholders' benefits have been described above. The benefit to the acquiring mutual fund's advisor is the increase in management fees associated with managing a larger portfolio, and shareholders of the mutual fund may benefit in that the average management fee per share of stock may decline.[24]

Of the tax free "reorganization" possibilities only the "A" and "C" types are logical choices in this context.[25] The "A" type reorganization contemplates a merger or consolidation pursuant to state law, with the

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18. These earnings are potentially subject to I.R.C. § 531, pursuant to which tax is imposed at the Draconian rates of 27½ percent of the first $100,000 of unreasonable accumulations and 38½ percent on the balance, after an exemption of not less than $150,000. I.R.C. § 535(c)(2).

19. I.R.C. § 358 provides for transferor's basis, subject to certain adjustments.

20. The two are mutually exclusive. *See* I.R.C. § 532(b)(1).

21. Especially §§ 6(c), 17(d) & 22 of the Investment Company Act of 1940, 15 U.S.C. §§ 80a-6(c), 80a-17(d), 80a-22 (1975), and rule 17d-1 thereunder. *See* Westin, *supra* note 1, at 36-37 for a terse discussion of these issues.

22. Such votes, at least of target company shareholders, are generally a state corporate law requirement. *See, e.g.*, DEL. CODE ANN. tit. 8, § 251 (Michie Supp. 1978).

23. *See generally* B. BITTKER & J. EUSTICE, *supra* note 5, at ¶ 14.03. *See also* notes 81-142 and accompanying text *infra*.

24. Because the management fees are typically graduated in a series of discrete steps, an infusion of capital is not necessarily helpful in all cases. For example, an advisor to a fund might charge an annual management fee of 1% of net assets under management for amounts up to $10,000,000 and ½% on the balance. If the fund were only $5,000,000 in size, an infusion on $1,000,000 would not necessarily help other fund shareholders, whereas they would be helped if the infusion were $10,000,000 as average fees per dollar invested would decline.

25. *See* note 15 *supra*.

target company shareholders' stock being converted into shares of the acquiring corporation, and with all target company assets and liabilities becoming those of the acquiring company.[26] The "C" reorganization contemplates the acquisition of substantially all the target company's assets in exchange for stock of the acquiring company.[27] Liabilities transferred are those designated by the aquiring company; hence it is the most commonly used format.

These statutory requirements appear straightforward; however, certain judicial doctrines may pose problems.[28] Mutual fund reorganizations are simple in the sense that the consideration paid by the acquiring mutual fund will be its common stock; hence the "continuity of proprietary interest" requirement is easily met. There will be "continuity of business enterprise" because the acquiring mutual fund will continue the investment business of the target company. "Business purpose" is relatively easy to show for the acquiring fund in that more assets generally mean lower management fees.[29] The Service has previously approved a target company's interest in professional management and diversification and the acquiring fund's interest in expansion as business purposes for mutual fund mergers with close corporations.[30]

B. Creative Alternatives

One innovation involves converting a going business corporation into a registered investment company. The candidates are publicly traded corporations controlled by top management groups which own large blocks of stock, shares of which are selling at prices below book value. One major Wall Street investment firm offers a program in which the corporation can "go private" through a sale of assets at prices in excess of the aggregate value of the outstanding stock.[31] The investment firm

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26. I.R.C. § 368(a)(1)(A).

27. I.R.C. § 368(a)(C).

28. *See* text accompanying note 23 *supra*.

29. Rev. Rul. 155, 1974 - 1 C.B. 86. The IRS rulings staff used to agree. *See, e.g.*, Private Letter Ruling No. 7825045 (Mar. 23, 1978), *reprinted in* [1978] 69 IRS LETTER RULINGS REP. (CCH). Such mergers are not necessarily useful for the public shareholders; therefore, it seems prudent for the fund's independent directors to approve such transactions by a requisite vote. The specific problem is that such transfers invariably increase aggregate management fees of the advisor, and the advisor typically has representation (or control) on the mutual fund's board of directors.

30. Such private letter rulings are quite numerous. *See, e.g.*, Private Letter Ruling No. 7829097 (Apr. 24, 1978), *reprinted in* [1978] 73 IRS LETTER RULINGS REP. (CCH); Private Letter Ruling No.7926150 (Mar. 30, 1978), *reprinted in* [1978] IRS LETTER RULINGS REP. (CCH); Private Letter Ruling No.7816007 (Jan. 17, 1978), *reprinted in* [1978] 59 IRS LETTER RULINGS REP. (CCH). *Quaere:* if the business purpose question arises in the course of a series of step transactions, when does it apply? If at the outset, then there may be no germane "business purpose" because investment assistance, etc. is of no use to a manufacturer.

31. Wall St. J., Sept. 14, 1978, at 48, col. 1.

buys the assets of the target company for cash, a transaction qualifying for capital gains treatment, and transfers them to a new corporation. Alternatively, the newly-formed buying corporation can purchase the assets directly.[32] Either of these purchases could be tax-free liquidations to the selling corporation pursuant to section 337 of the Code.[33] The assets thus have a basis equal to their fair market value.[34] Consequently, future income can be sheltered by higher depreciation deductions related to these assets.[35] The officer-shareholders of the old corporation are given attractive incentives from the investment firm to stay with the new, private corporation.

The old corporation has two choices. If the transaction is closer to a section 337 liquidation, then the cash must be distributed to the shareholders.[36] The shareholders will be treated as having exchanged their stock for the proceeds and thus will receive sale or exchange treatment.[37] Alternatively, the corporation may decide to recognize the gain or loss from sale of assets and not liquidate. In this instance, the old corporation remains in existence with assets consisting principally of cash. Shareholders could be granted an opportunity to redeem their shares in the old corporation. Again, this would be a capital transaction if their redemption is complete or substantial under the complex provisions of section 302.[38] Then the old corporation can be converted into a registered "closed-end" fund, provided there are at least 100 shareholders. Shareholders' liquidity is likely to be improved, although not as much as it would be had the corporation merged with an open-end fund which offers continuous redemption at net asset value.[39] Becoming a regulated investment company for tax purposes is, however, only possible if the fund is not rendered a personal holding company. This is principally a matter involving the distributions of ownership and satisfaction of the diversification of investment requirements of section 851. If the transaction succeeds, the old company, having become a registered investment company, could invest its

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32. The SEC is concerned with the rights of minority shareholders in such transactions and has questioned the adequacy of proxy disclosures in this area, particularly regarding conflicts of interest, reasons for the asset sale, and significant features of the plan. *See* 17 C.F.R. § 240.14a-3 for regulations governing proxy disclosures. Some companies claim to have found these rules burdensome. *See* Wall St. J., Apr. 2, 1979, at 16, col. 2.

33. *See* I.R.C. § 337, which permits corporations engaged in complete liquidations to sell their property tax-free, provided all assets or sales proceeds are distributed to shareholders within 12 months after adoption of the plan of liquidation.

34. *See* I.R.C. § 1012, which establishes a cost basis for purchased property.

35. *See* I.R.C. § 167.

36. *See* I.R.C. § 337.

37. *See* I.R.C. § 331.

38. *See* I.R.C. § 302(b)(2)-(b)(3).

39. *See* I.R.C. § 851(a).

funds in tax-free municipal bonds, the income of which can be passed through to its shareholders free of federal income taxes.[40]

Another valuable tax opportunity involves the ten percent investment tax credit described in section 47. Because the operating assets of the target will commonly include tangible personal property qualifying for the investment tax credit, the acquiring corporation can, in effect, acquire qualified property for ninety percent of its fair market value and the recaptured amount will likely be less than the new credit. In the alternative, investors can first buy the assests and later contribute them to a corporation. In such a case, the individuals could claim the investment tax credit for themselves and suffer no recapture on later asset transfers to the corporation, provided: (i) substantially all of the assets were transferred; (ii) the trade or business of the target was continued; and (iii) the investors retained a substantial interest in the new operating company.[41] This credit, as well as greater depreciation and the deductibility of interest on funds borrowed to buy the target company's assets, operate as strong stimuli to these unusual transactions.

Creativity went too far when the Service was persuaded to issue a private letter ruling which stated that a business corporation could sell its television operation for cash, dispose of its oil well assets, and thereafter be acquired tax-free in a "C" reorganization.[42] The acquiring corporation, a tax-free bond fund, would wind up with cash in exchange for newly issued mutual fund shares. Acquired company shareholders would go untaxed,[43] have a carryover basis[44] and a "tacked" holding period[45] in their mutual fund shares. This private letter ruling would typically benefit an operating company which decides to go out of business through a sale of assets. The novelty is that the corporation has a high basis in its assets such that if they are sold, little or no corporate tax would be due on their sale. Assuming the target company shareholders have a low basis in their shares, if a section 337 liquidation were undertaken,[46] they would be heavily taxed when they receive their liquidation proceeds. However, in a non-liquidation situation, the corporation sells its assets and suffers a small capital gains tax.[47] Then the corporation exchanges the cash proceeds of the sale for shares of the

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40. *See* I.R.C. § 852(b)(5).

41. Treas. Reg. § 1.47-3(f)(6) Examples (1) & (2).

42. Private Letter Ruling No. 7829097 (Apr. 24, 1978), *reprinted in* [1978] 73 IRS LETTER RULINGS REP. (CCH). This ruling is commonly attributed to the Dreyfus Tax Exempt Bond Fund.

43. *See* I.R.C. § 354(a)(1).

44. *See* I.R.C. § 358(a).

45. *See* I.R.C. § 1223(1). A tacked holding period, for capital gains purposes, includes the period during which acquired company shareholders held their target company shares. *Id.*

46. As contemplated by I.R.C. §§ 331-337.

47. The corporation may also face a minimum tax under I.R.C. § 57(a)(9)(B) as well.

bond fund in a nontaxable "C" reorganization.[48] Again, a shareholder of the target company incurs no tax on the transaction and has a basis in the acquiring bond fund equal to his former basis in the shares of the liquidated corporation.[49] The effect is a significant tax deferral, diversification for the acquired company shareholders, and a small tax at the acquired company level. This is the factual circumstance which is understood to have precipitated the Treasury's reinforcement of the "continuity of business enterprise" doctrine[50] as well as its suspension of private rulings regarding certain mutual fund reorganizations.[51]

There is an additional twist in this situation which merits attention. The federal courts are divided over whether the tax-free section 337 liquidation and reorganization provisions are mutually exclusive. The Court of Claims adopted the government position that these provisions are mutually exclusive in *FEC Liquidating Corp. v. United States.*[52] There, the corporation engaged in a type "C" reorganization and subsequently sold some of the stock acquired in the transaction. It then liquidated by passing the remaining stock to its shareholders. The issue before the court was whether sale of the stock prior to distribution could receive tax-free liquidation treatment or was to be taxed as a capital gain to the corporation. The Court of Claims held that the corporation must pay tax on the sale of stock.[53] However, the court was not asked to determine the tax consequences to the shareholders of the acquired corporation upon the distribution of the acquiring company's stock. The decision appears obtuse in that it dwells on the superficial fact that in "reincorporation" cases the courts have treated reorganizations and liquidations as mutually exclusive, and concludes that this same "either-or" reasoning applies to prohibit an acquisitive reorganization combined with a section 337 liquidation where the issue of reincorporation is not presented.[54]

General Housewares Corp. v. United States[55] presented the Fifth Circuit with an opportunity to discuss a similar situation. In this case a corporation exchanged all of its assets for stock in the acquiring company. It then sold some of the newly acquired stock in order to satisfy debts and expenses. Afterwards, it completed its liquidation by distributing the remaining stock and cash to its shareholders.[56] The court held that

48. *See* I.R.C. § 368(a)(1)(C).
49. *See* I.R.C. § 358(a).
50. *See generally* Treas. Reg. § 1.368-1(d), 45 Fed. Reg. 86, 433 (1980).
51. Rev. Proc. 79-68, 1979-2 C.B. 600, *amending* Rev. Proc. 79-14, 1979-1 C.B. 496.
52. FEC Liquidating Corp. v. United States, 548 F.2d 924 (Ct. Cl. 1977).
53. *Id.* at 927-28.
54. *Id.* at 927.
55. General Housewares Corp. v. United States, 615 F.2d 1056 (5th Cir. 1980).
56. *Id.* at 1057-58.

the initial reorganization was tax-free under section 368(a)(1)(C),[57] that the subsequent sale by the corporation of the acquiring company's stock was tax-free under section 337[58] and that the distribution to the shareholders was governed by sections 354(a)(1) and 356.[59] Thus, the stock distributed to the shareholders triggered no immediate tax; the taxpayers kept the basis in their old shares as the basis in their new stock.[60] However, the cash distributed in the liquidation was treated as ordinary income.[61] The matter seems ripe for Supreme Court review. The Court would have to decide whether section 337 liquidations and section 368 reorganizations are mutually exclusive and, if they are, which provision will govern.

Another interesting case which could be presented to the Court would arise if the fearless shareholders of a closely held corporation elected to cause their company (i) to sell assets in a section 337 liquidation for cash and (ii) to have the cash company acquired in a tax-free "A" or "C" reorganization. This could test both the proposed "continuity of business enterprise" regulations with respect to the mutual fund merger and the *General Housewares* decision which treats section 337 and the reorganization rules as compatible. Given the Supreme Court's preference for deciding cases on narrow grounds, it would probably not render a holding that reached both issues.

General Housewares may account in part for the Treasury's new position. Before *General Housewares* the Treasury could assume that even though the transfer of cash to the acquiring corporation might be part of a non-taxable reorganization, the prior liquidation would be taxable at the corporate level. The new regulations bar this double benefit by treating the transfer of cash, or portfolio stock acquired with such cash in a step transaction, as not part of a tax-free reorganization.

C. The IRC Section 368(a)(2)(F) Limitation

In order to thoroughly eradicate "exchange funds," the Tax Reform Act of 1976[62] amended the reorganization rules regarding "investment company" mergers.[63] Specifically, IRC section 368(a)(2)(F) now provides that if two or more "investment companies" merge, tax-free reorganization status will be denied to the acquired company if its investments are not sufficiently diversified at the time of the reorganiza-

57. *Id.* at 1061.
58. *Id.* at 1061-62.
59. *Id.* at 1065.
60. *Id.* at 1065.
61. *Id.* at 1065-66.
62. Pub. L. No. 94-455, 90 Stat. 1525 (1976).
63. *See* STAFF OF JOINT COMM. ON TAX., 94TH CONG., 2D SESS., GENERAL EXPLANATION OF THE

tion.[64] For purposes of this provision, a corporation is an "investment company" if it is a real estate investment trust, a regulated investment company, or a corporation in which more than fifty percent of the value of its total assets is in stock and securities and more than eighty percent of the value of its total assets is held for investment.[65] Cash, cash items, and government securities are disregarded.[66] Section 368(a)(2)(F) was amended again in 1978,[67] among other reasons, to deny losses on mergers of commonly owned mutual funds which fail to meet the requirements of section 368(a)(2)(F), and to clarify the "reverse acquisition" rule which can penalize an undiversified acquiring investment company by making such transactions taxable.[68]

An investment company is deemed sufficiently diversified, and a tax-free reorganization is possible, "if not more than 25 percent of the value of its ... assets is invested in the ... securities of any one issuer, and not more than 50 percent of the value of its total assets is invested in the stock and securities of five or fewer issuers."[69] Again, cash, cash items, and government securities are disregarded.[70]

Section 368(a)(2)(F)(iv) provides that assets acquired to meet the diversification requirements just described will be disregarded.[71] If, for example, a personal holding company buys some more stock from other issuers in order to broaden its holdings in preparation for a tax-free reorganization with a mutual fund, those purchases will be ignored. Neither the Code nor the new regulations reach the case of the true cash company because it is not within the definition of the term "investment company," as it holds no "stock or securities." However, cash companies do run afoul of the new continuity of business enterprise regulations, and may also have serious personal holding company problems. If they acquire a diversified portfolio of securities, the new regulations under section 368 require all facts and circumstances to be considered in determining whether the new acquisitions are part of a plan of reorganization.[72] If, under all the facts and circumstances, the diversifying acquisitions are found to be part of a plan of reorganization, then

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TAX REFORM ACT OF 1976, 661-67 (Comm. Print 1976). In light of its post-enactment status, this may be considered unreliable authority in researching legislative history.

64. I.R.C. § 368(a)(2)(F)(i).

65. I.R.C. § 368(a)(2)(F)(iii). These percentages were subsequently amended to read "50 percent or more" and "80 percent or more" respectively. Pub. L. No. 95-600, § 701(j)(1), 92 Stat. 2905 (1978).

66. I.R.C. § 368(a)(2)(F)(iv).

67. Pub. L. No. 95-600, § 701(j)(1), 92 Stat. 2905 (1978).

68. *See* I.R.C. § 368(a)(2)(F)(vi).

69. I.R.C. § 368(a)(2)(F)(ii).

70. *See* I.R.C. § 368(a)(2)(F)(iv).

71. *Id.*

72. *See* Treas. Reg. 1.368-1(d)(3)(iii), 45 Fed. Reg. 86,438 (1980).

the new regulations will deny reorganization treatment because of established step transaction principles.[73]

III. THE NEW REGULATIONS

A. Background

The Treasury has been troubled by the notion of tax-free takeovers of private investment companies for years, a fact clearly reflected in its erratic willingness to issue private letter rulings on the subject.[74] On December 31, 1980, following earlier proposed regulations and extensive public comments, the Treasury Regulation which is the central subject of this article was published.[75]

The preamble to the proposed regulations stated that the problem area was the sale of operating assets for cash, followed by a tax-free merger of such cash-rich companies with mutual funds.[76] This regulation might not have been adopted were it not for the ruling believed issued in connection with the Dreyfus Tax Exempt Bond Fund.[77] In other words, the Treasury felt it had gone too far and now had to retreat from its own position. Were it not for the fact that private letter rulings are now made public, one wonders if this reversal would ever have occurred. The final regulations make no mention of the mutual fund/cash company reorganization dilemma, but it seems safe to presume that this original factual concern remains the motive for the Treasury's rulemaking.

In the Treasury's discussion of the new regulations, the draftsman asserts, *inter alia,* that although the acquiring company (the transferee) in a tax-free merger need not continue one or all of the target company's (the transferor's) historic businesses,[78] it must, in such cases, nevertheless use a "significant portion of [the transferor's] historic business assets in a business."[79] This purported restatement of the law is

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73. *See* Treas. Reg. 1.368-1(d) (commentary), 45 Fed. Reg. 86,436 (1980).

74. *See* Rev. Proc. 72-9, 1972-1 C.B. 719, *modified,* Rev. Proc. 73-15, 1973-2 C.B. 464; Rev. Proc. 74-10, 1974-1 C.B. 420; Rev. Rul. 74-155, 1974-1 C.B. 86; Rev. Proc. 76-13, 1976-1 C.B. 553; Rev. Proc. 72-1, 1972-1 C.B. 693. The I.R.S. will rule on the significance of assets or a line of business. *See* 45 Fed. Reg. 86, 433 (1980).

75. Treas. Reg. § 1.368-1(d), 45 Fed. Reg. 86,433 (1980).

76. Proposed Treas. Reg. § 1.368-1(d) (summary), 44 Fed. Reg. 76,813 (1979).

77. *See* note 42 and accompanying text *supra.*

78. "Historic business" is defined as "the business [a corporation] has conducted most recently . . . [but] not one the corporation enters into as part of a plan of reorganization." Proposed Treas. Reg. § 1.368-1(d)(3)(iii), 44 Fed. Reg. 76,814-15 (1979). "A corporation's historic business assets are [those] assets used in its historic business." Proposed Treas. Reg. § 1.368-1(d)(4)(ii), 44 Fed. Reg. 76,318 (1979). There are instances where cash presumably constitutes "historic assets." *See, e.g.,* Simon Trust v. United States, 402 F. 2d 272 (Ct. Cl. 1968) (cash for carpenter's bonding needings).

79. Treas. Reg. § 1.368-1(d)(4)(i), 45 Fed. Reg. 86,438 (1980). The new regulations treat the

the linchpin of the new regulations. The Treasury had earlier announced the pending revocation of a prior pro-taxpayer revenue ruling on continuity of business enterprise and issued a revenue ruling which stated that the anticipated merger of an operating company which had sold its assets and invested in government securities into a mutual fund did not constitute a reorganization.[80]

The discussion section introducing the new regulations contains extensive authorities in support of the Treasury's position, and includes examples of non-qualifying transactions. These matters will be considered below. The critical questions are (i) whether the proposed regulations are valid and (ii) whether they are sound as a policy matter.

B. Validity of the New Regulations

The legal conclusion that a tax-free reorganization has occurred depends not only on literal compliance with the definitions of a "reorganization" found in the statute, but also on three judicially-created doctrines: "continuity of interest," "business purpose," and "continuity of business enterprise."[81] This portion of the Article focuses on the case law developing the last of these doctrines, especially as it relates to mergers of "cash companies" with mutual funds.

1. Transfer of Assets for Disposition by the Transferee

The courts have consistently held that a transfer of assets to a corporation with a view to having the transferee dispose of such assets cannot give rise to a reorganization. Rather, the transfer will be treated as a sale, with the transferee corporation treated as a mere conduit for the later disposition.[82] The reason for using a conduit is often that the transferor corporation wants the transferee, commonly a related company, to take over the net operating losses of the transferor. In such cases, the taxpayer will be attempting to show there was indeed a

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question of "significance" as contextual. Treas. Reg. § 1.368-1(d)(4)(iii), 45 Fed. Reg. 86,438 (1980).

80. *See* Rev. Rul. 63-29, 1963-1 C.B. 77. The Treasury also announced that it would issue a revenue procedure which would bar private letter rulings on transactions that do not satisfy Proposed Reg. § 1.368-1(d). *See* 44 Fed. Reg. 76,813-14 (1979). It did so in Rev. Proc. 79-68, 1979-2 C.B. 600, *modifying* Rev. Proc. 79-14, 1979-1 I.R.B. 496, declaring that no private letter ruling would be issued on transactions not in compliance with the proposed regulations until after the proposed regulations have been finalized. It also issued Rev. Rul. 79-434, 1979-2 C.B.155 which barred a tax-free reorganization result where a cash company which recently sold its assets merged with a mutual fund, finding a purchase rather than a reorganization, such that the liquidation would be taxable under I.R.C. § 331, presumably not displacing I.R.C. § 337. However, the rationale for the "purchase" conclusion is inappropriately unstated.

81. *See* B. BITTKER & J. EUSTICE, *supra* note 5.

82. This concept is reflected in Example (5) of the new regulations. *See* Treas. Reg. § 1.368-1(d)(5), Example (5), 45 Fed. Reg. 86,438 (1980).

"reorganization." Or, the assets may be worth more than their tax bases, so that finding a "sale" would trigger income taxation.

An exemplary case is *Graham v. Commissioner,*[83] wherein a company engaged in a complete liquidation transferred some residual assets to a new corporation formed solely to dispose of them. The Board of Tax Appeals refused to find a reorganization on the ground that there was no plan of reorganization, rather a plan to sell assets through a shell company which did no business.[84] This decision relied heavily on the famous *Gregory v. Helvering*[85] decision which required that a reorganization be motivated by a bona fide business purpose. Likewise, *Standard Realization Co. v. Commissioner*[86] held that a liquidating transfer of all assets to a newly formed corporation organized to act as a conduit for the sale of the assets gave rise to a sale and not a reorganization.

Matters become more complex if the transferee retains some of the assets of the transferor. The *Laure v. Commissioner*[87] decision suggests a borderline retention of assets that might cause a court to find a reorganization. There, a plastic molding manufacturing corporation, W-L Molding, acquired by merger the assets of an insolvent air charter service corporation, Lakala, which owned aircraft and also repaired plastic molds. All the assets, other than some land and a hangar, were sold to third parties around the time of the merger. The Tax Court stated that"there must be some use of the transferor's assets in the transferee's business"[88] if the transferor's business was terminated, which it was, thus contrasting the mere conduit circumstances of *Standard Realization.* One might infer from the court's fairly extensive discussion of the failure of the transferee to use the land in its business that had the land in fact been rented profitably, a reorganization might have been found. One can draw one's own conclusions as to the weight of the following language: "Without additional information, W-L Molding's holding of the land and hangar (perhaps for only a brief period) does not disturb our conclusion that W-L Molding was just a

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83. 37 B.T.A. 623 (1938).

84. *Id.* at 629.

85. 293 U.S. 465 (1935).

86. 10 T.C. 708 (1948), *acq.*, 1948-2 C.B. 3. *See* Dean Palmer, 11 T.C. MEM. DEC. (P-H) ¶ 42,432 (1942). Inconsistent language in the reorganization area is extensive. In deciding *Standard Realization,* the Tax Court stated: " 'The plan of reorganization must comprehend, and the new corporation created, must when consummated carry on in whole or in part the corporate business of the old corporation.' " 10 T.C. 708, 715, *quoting* Survaunt v. Commissioner, 162 F.2d 753, 757 (8th Cir. 1947). There is no doubt that if and when the new regulations are litigated, this sort of loose language is going to confuse the judiciary and force a great deal of misunderstanding and research.

87. 70 T.C. 1087 (1978), *appeal docketed,* No. 79-1231/1232 (6th Cir. Feb. 27, 1979).

88. *Id.* at 1103.

conduit to aid Lakala's termination."[89] In addition, as a separate ground for the decision, the Tax Court found the merger devoid of a business purpose.[90]

The same result was obtained in *Mitchell v. United States,*[91] where an oil surveying company, which went out of business in Libya, transferred trivial assets to a related company doing a similar overseas business in order to sell them free of the risks of Libyan caprice. The Service claimed the assets were not completely liquidated, but rather "reincorporated" in the transferee. However, the facts were adverse to the government. The transferee intended to sell the assets at once, and only two drilling trucks and three former employees of the transferor were used in the transferee's business, and then only for a brief period. Accordingly, the court devised what distills to a *de minimis* rule: what is otherwise a liquidating transfer to a related party acting as a conduit will not be deemed a reorganization even if the transferee makes minor, incidental use of the transferor's asset. It is curious that the Tax Court in *Laure* did not review and apply *Mitchell,* rather than leave open the question of what level of asset use might support a reorganization result.

Finally, there is *Wortham Machinery Co. v. United States.*[92] The fact pattern is typical of the conduit cases. A corporation which was clearly out of business transferred its only assets, an hydraulic ditcher and forklift attachment, to a related corporation in a purported "C" reorganization, obviously for the purpose of seeing that the defunct company's net operating loss benefited its sister company. The district court found no business purpose for the alleged reorganization.[93] The Tenth Circuit agreed and further found no continuity of business enterprise. The transferee intended only to sell the assets, and in the words of the court, "[l]iquidation of assets is not continuation of a business enterprise."[94] The assets were ephemeral in the hands of the transferee; they had no germane relation to its regular business.

The Treasury draftsman placed heavy emphasis on several conduit cases as authority for the "historic assets" and "historic business" tests.[95] The government's position may be rational on a substance-over-

89. *Id.* at 1105. *Laure* also shows the difficulties that often plague the courts in trying to sort the business purpose rule from the continuity of business enterprise rule. The distinctions can be ineffable: "For a transaction to have a business or corporate purpose in support of a reorganization it must be germane to the continuance of the business of a corporation, a party to the reorganization." *Id.* at 1104.

90. 70 T.C. at 1105-07.

91. 451 F.2d 1395 (Ct. Cl. 1971).

92. 521 F.2d 160 (10th Cir. 1975).

93. 375 F. Supp. 835, 839 (D. Wyo. 1974).

94. 521 F.2d at 163.

95. 45 Fed. Reg. 86,435-36 (1980).

form theory, but the fact is the conduit cases have been treated by the courts as a sui generis class which do not control if the transferee is not acting as a cooperating seller for the transferor.

2. Transfer of Assets to be Retained by the Transferee.

The conduit cases are easy. Judges can assert either a lack of business purpose, lack of continuity of business enterprise, or on occasion, both. The questions become thornier where the transferee keeps those assets. At this point a review of the continuity of business enterprise doctrine is in order. The doctrine crept into the 1934 Code regulations as a consequence of *Cortland Specialty Co. v. Commissioner.*[96]

Briefly, in *Cortland* a corporation transferred the bulk of its assets to a new corporation for cash and notes, which were distributed to the shareholders of the transferor corporation. The Second Circuit found a "sale" rather than a reorganization because the consideration received did not create a continuing proprietary interest in the transferee. From that decision the following dictum was incorporated in the regulations: "Reorganization presupposes continuance of business under modified corporate forms."[97] The words are now an indelible part of various regulations.[98] The court was concerned with the shareholder's interest alone in deciding the case, but this dictum is evidently the origin of the doctrine. Note that the court did not demand the same business be continued by the transferee.

The other antique but always treacherous decision in this area is *Gregory v. Helvering.*[99] In *Gregory* the taxpayer had an offer from an outsider to buy certain securities held by her controlled corporation. Rather than have the controlled corporation distribute the stock to her, with attendant tax cost, she formed a new controlled corporation, Averill, to which the securities were transferred. Averill promptly liquidated and transferred the securities to Mrs. Gregory, who sold them. The tax avoidance character of the arrangement was obvious, and the taxpayer's defense that she met literal requirements of the statute was rejected, principally for lack of business purpose. However, the decision contains language hinting at continiuty of business enterprise:

> What do we find? Simply an operation having no business or corporate purpose — a mere device which put on the form of a corporate reorganization as a disguise for concealing its real character,

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96. 60 F.2d 937 (2nd Cir.), *cert. denied,* 288 U.S. 599 (1932).
97. *Id.* at 940.
98. *See, e.g.,* Treas. Reg. § 1.368-1(b) (1967); Treas. Reg. § 1.368-2(g) (1967).
99. 293 U.S. 465 (1935).

> and the sole object and accomplishment of which was the consummation of a preconceived plan, *not to reorganize a business or any part of a business,* but transfer a parcel of corporate shares. . . .[100]

The first significant decision thereafter appears to be *Hendee v. Commissioner,*[101] in which the taxpayer, who held a minority interest in a manufacturing company, was offered an attractive price for his securities. An elaborate scheme was consummated, pursuant to which he became the owner of a corporation holding a $600,000 block of government bonds. The transaction fell within the letter of the reorganization statute. Although business purpose was clearly lacking, the court stressed the lack of continuity of business enterprise as an alternate ground for denying reorganization status:

> Petitioner cites many cases in which the exemption was permitted under circumstances which he claims makes them authority for the allowance of the exemption to him. We think it can fairly be said of all of these cases that the securities obtained in exchange were in new, related corporations, parties to a real reorganization, where the business of the new corporation bore some relationship to that of the old. This cannot be said of the exchanges here involved, where petitioner started out with 1286 shares of stock of Line Material Company, a manufacturing company, and ended up with most of the 100 shares of the Hendee Investment Company, a family holding corporation owning conservative investment securites.[102]

This case may come as a surprise. It suggests that if the character of the company into which the taxpayer has transferred his stock or securities differs radically from the character of the previously held company, then there can be no reorganization.[103] This further suggests that if the contrast is between an operating company and a mutual fund, there can be no reorganization. It seems safe to assume that if the operating company temporarily became a holding company, but had planned throughout to merge into a particular mutual fund, the step transaction doctrine would dictate the same result. Put another way, *Hendee* supports the new regulations, although the decision is some-

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100. *Id.* at 469 (emphasis added).

101. 98 F.2d 934 (7th Cir. 1938).

102. *Id.* at 937 (citations omitted).

103. Contrast the result of *Hendee* with the statement of Wolfman, *"Continuity of Interest" and the American Law Institute Study,* 57 TAXES 840, 840-41 (1979):

> In our system we have always sought not to tax unrealized appreciation, and, with corporations subject to tax separately from their shareholders, we have treated the shareholder's interest in corporate earnings as unrealized until it is distributed or until the shareholder disposes of his shares. Realization at the shareholder level has not been triggered by corporate diversification, by it sale or purchase of assets, by the termination of one corporate venture and the start of another.

what ambivalent in that the court blended the lack of business nexus among the corporate parties with the change in character of the transferor and transferee corporations.

Post-*Hendee* decisions are clearly more favorable to taxpayers. Unfortunately, courts have not carefully considered *Hendee;* hence its contours and validity remain unclear. The gist of the later decisions is that continuity of business enterprise will be found if the historic assets of the transferor, or cash proceeds from their sale, are used in the transferee's business, even though the new business differs sharply from the old one.

Thus, in *Lewis v. Commissioner,*[104] a corporation engaged in three lines of business liquidated two of them, and transferred the assets of one major line of business to a new corporation which actively managed those assets until a buyer could be found. *Lewis* is clearly reflected in Example (1) of the new regulations, which supports a reorganization result.[105] Earlier, in *Morley Cypress Trust v. Commissioner,*[106] the Tax Court held that where a corporation engaged in a liquidation and transferred what was formerly timberland to a new company engaged in oil exploration, there was a reorganization. The continuity of business enterprise issue was not reached, but presumably it was considered satisfied.

If the regulations are invalid, the invalidity will probably be found principally on the basis of *Becher v. Commissioner.*[107] There, a canvas product manufacturing company, Sponge-Aire, which had gone out of business and was in the course of liquidation, transferred certain of its assets, the bulk of which were cash and items intended to be turned into cash, to a new corporation, Chandler, which was to manufacture upholstered furniture. The government pressed for, and the Second Circuit affirmed, the Tax Court's finding of a tax-free "D" reorganization,[108] despite the taxpayer's assertion that the new company was engaged in a new line of business.

As found in the opinion of the Tax Court:

> The doctrine of *Gregory v. Helvering, supra,* does not support petitioners' contention. There the Supreme Court held . . . that a reorganization was not effected by "a transfer of assests by one corporation to another in pursuance of a plan having no relation to the business of either *** an operation having no business or cor-

104. 176 F.2d 646 (1st Cir. 1949).

105. *See* Treas. Reg. § 1.368-1(d)(5) Example (1), 45 Fed. Reg. § 86,438 (1980).

106. 3 T.C. 84 (1944), *acq.* 1944 C.B. 20.

107. 22 T.C. 932 (1954), *aff'd,* 221 F.2d 252 (2d Cir. 1955).

108. 221 F.2d at 253. One must wonder how the *Becher* courts felt the requirement of § 368(a)(1)(D), that the transferee corporation acquire substantially all the (operating) assets of the transferor corporation, was met.

> porate purpose — a mere device which put on the form of a corporate reorganization as a disguise for concealing its real character, ***" Although the opinion in the *Gregory* case states that a reorganization presupposes an intent to reorganize a business or a part of a business, there is no implication that the business when reorganized must be the same, or even bear any similarity to the business previously conducted. "Reorganization presupposes continuance of business under modified corporate forms,"... but does not require that the business conducted be the same.[109]

This pronouncement has further support from later cases; what is significant is the conclusion regarding the transfer of cash and assets intended to be reduced to cash:

> Nor is it material that the business of Sponge-Aire was wiped out by the termination of the war, that it transferred merely assets and not a going business to Chandler, or that the assets acquired by Chandler consisted primarily of cash and assets which were to be converted into cash. The important factor is that Chandler was created to carry on corporate business indefinitely, although with a different line of manufacture from that conducted by its predecessor. Corporate business was to be continued indefinitely, and the same shareholders remained in "control" and their investment remained "in solution." Therefore, there was compliance with both the letter and spirit of [the former reorganization statute].[110]

Hendee was distinguished as a case in which the transferee was not engaged in a "substantial business."[111] This opens up an obvious question: is a mutual fund engaged in a substantial business? Unfortunately, for purposes of future analysis *Becher* is not a perfectly clear case because the assets transferred included a building which was in fact used in Chandler's business. The building had been depreciated to zero value, but its fair market value was unstated. This fact creates the possibility that some tax litigant will assert that substantial business assets were in fact transferred, thus bending the case into the more traditional reorganization mold. The Tax Court, however, did not consider that detail and evidently would not have been concerned if cash alone had been transferred. *Becher* does not directly repudiate *Hendee* in the sense that *Hendee* demands "some continuity of business interest between the elements in the reorganization."[112] *Becher* found a

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109. 22 T.C. at 940-41 (citations omitted).
110. *Id.* at 941 (citation omitted).
111. *Id.* at 942.
112. 98 F.2d at 936.

reorganization in circumstances which arguably satisfy this *Hendee* requirement, despite great qualitative differences between the pre- and post-reorganization business.

By way of contrast, in *Bentsen v. Phinney*[113] three family-controlled land development corporations transferred their land to a new insurance company and then liquidated. It is unclear whether the land was sold; it seems to have been, and the Treasury assumed so.[114] The government's assertion that the new business and the old business must be identical or similar was flatly rejected, and the regulations were held invalid to that extent. Instead the court inartfully stated: "All that is required is that there must be continuity of the [sic] business activity."[115]

The *Hendee* requirement of sufficient post-reorganization activity has been considered in several instances. In *Pebble Springs Distilling Co. v. Commissioner*[116] a reorganization was found where the surviving company was quite inactive. The facts involved a distilling company that went out of business. It disposed of its inventory in a distribution to shareholders, but entered a winning, minimum protective bid to bar a sale of the remaining assets at an unreasonable discount. It then rented out part of the plant as "dead storage" to various tenants. The distilling business was patently defunct. The court found a reorganization, stressing that the successor corporation had rented out spaces to some 20 or 25 tenants pursuant to its charter powers.[117]

The level of business activity in *Pebble Springs* seems on its face to be less than that of a public mutual fund. If the confined reading of *Hendee* has vitality, then *Pebble Springs* suggests that business activity on the part of a mutual fund suffices to allow a reorganization result.

Continuing the exploration of the requisite level of activity to support a reorganization, one can turn to *Abegg v. Commissioner,*[118] in which an operating company, Hevaloid, terminated active business and operated as a personal holding company for two years. It then liquidated, selling some of its assets and transferring the proceeds as well as a hefty portfolio of stocks to the taxpayer. The taxpayer, in turn, transferred those securities and others to his personal holding company, Cresta.

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113. 199 F. Supp. 363 (S.D. Tex. 1961).

114. Bentsen v. Phinney is discussed in the information preceding the new regulations. 45 Fed. Reg. 86,434-35 (1980).

115. 199 F. Supp. at 367. This decision was perhaps the cause for (now revoked) Revenue Ruling 63-29, in which the Treasury found a reorganization where the transferee had disposed of its business assets for cash and taken receipt of, and used, the transferor's business assets in its new business. 1963-1 C.B. 77.

116. 23 T.C. 196 (1954), *aff'd,* 231 F.2d 288 (7th Cir. 1956), *cert. denied,* 352 U.S. 836 (1956).

117. 23 T.C. at 201.

118. 50 T.C. 145 (1968), *aff'd,* 429 F.2d 1209 (2d Cir. 1970), *cert. denied,* 400 U.S. 1008 (1971).

The purported liquidation was rejected by the court; the transactions were "telescoped" by the IRS and viewed as a reorganization under section 368(a)(1)(D). The continuity of business enterprise issue was given short shrift, as the court found the putatively liquidated corporation and the transferee were both personal investment companies:

> As the court pointed out in *Davant v. Commissioner* . . . the intention of Congress in enacting the complete liquidation provisions contemplated that the operating assets would no longer be used by the stockholders to carry on the business as a corporation. Here the assets of Hevaloid are being used by Cresta in the same way as formerly used by Hevaloid. The fact that both were personal holding companies does not require a different conclusion.[119]

In short, an investment company's merger with an investment company can give rise to a reorganization. This, of course, assumes that the transferor company is suitably "aged" into an investment company.

Where the cash company was not suitably aged, a reorganization result sought by the government was denied in *Workman v. Commissioner.*[120] *Workman* involved a co-shareholder in two corporations who had a falling out with his co-owner. To settle their differences the taxpayer exchanged his stock in one of the companies for his co-owner's stock in the second company, LPJ, the business of which was leasing land and improvements to the former company. The taxpayer then caused his wholly-owned corporation to sell its land for a note and mortgage, and to liquidate, distributing the note and mortgage to himself. The taxpayer asserted a liquidation result, even though he had immediately transferred the note and mortgage to his new wholly-owned coporation. The new company, Industrial Trends, was totally inert. The Tax Court refused to find a "D" or "F" reorganization because in its view the proper contrast was between LPJ before it sold its assets and Industrial Trends — that is, between an active realty company and a passive holding company. Hence, a valid liquidation was found. While the decision never alluded to the continuity of business enterprise doctrine, it appears that the court relied on the different natures of the corporations' activities as the basis for its decision. That is, the Tax Court was evidently impressed by the fact that for a year after the alleged "reincorporation," Industrial Trends "carried on no business at all, and had no income,"[121] although it failed to analyze this factor. The *Workman* decision is purportedly reflected in Example 4 of the new regulation, which states that the sale of operating assets for cash,

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119. *Id.* at 157 (citation omitted).
120. 36 TAX CT. MEM. DEC. (CCH) 1534 (1977).
121. *Id.* at 1535.

followed two months later by a mutual fund merger, will not qualify for reorganization treatment.[122]

Workman is vague in that it fails clearly to explain the basis for its decision. The Service pressed for a "D" or "F" reorganization. The "F" result is clearly insupportable as the court insisted on contrasting an operating company with a holding company. However, what about the "D" reorganization's requirement that the transferee receive substantially all the operating assets? Was the basis of the decision that because there were, in effect, no operating assets, there could be no "D" reorganization? This possibility was left ambiguously open. Certainly, the Service can be expected to raise this technical argument should the occasion arise.

The remaining relevant cases can be disposed of quickly. In *United States v. Adkins-Phelps, Inc.,*[123] the Eighth Circuit fashioned a rule that where a transferor temporarily suspends its business for reasons of financial distress, but resumes business before merging with the transferee, the temporary cessation will not violate the continuity of business enterprise rule.[124] The court busied itself distinguishing *Pridemark, Inc. v. Commissioner;*[125] the judicial activity was needless, as *Pridemark* was an "F" reorganization decision which involved the much more difficult standard of showing that the reorganization transfer was a "mere change in identity, form, or place of organization. . . ."[126]

Finally, in *Atlas Tool Co. v. Commissioner,*[127] the continuity of business enterprise requirement was held satisfied where the transferee in a purported "D" reorganization acquired assets which it placed in reserve for potential future use to ensure a ready supply of goods in the event foreign suppliers failed to provide such goods at lower prices.[128] The decision contains a thorough study of the continuity of business enterprise doctrine, distinguishing the conduit cases from those in which "any part of the transferor's business"[129] will be continued, and went on to confirm *Becher's* rule that although the assets transferred may merely be "cash and assets expected to be turned into cash," there is nonetheless continuity of business enterprise indefinitely.[130] The court

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122. Treas. Reg. 1.368-1(d)(5) Example (4), 45 Fed. Reg. 86,438 (1980).
123. 400 F.2d 737 (8th Cir. 1968).
124. *Id.* at 743.
125. 345 F.2d 35 (4th Cir. 1965). Pridemark's irrelevance has been noted by the courts. *See* Atlas Tool Co. v. Commissioner, 70 T.C. 86, 104 (1978), *aff'd,* 614 F.2d 860, 866 (3rd Cir. 1980).
126. *See* I.R.C. § 368(a)(1)(F).
127. 70 T.C. 86 (1978), *aff'd,* 614 F.2d 860 (3rd Cir. 1980).
128. 70 T.C. at 101-04.
129. *Id.* at 102.
130. *Id.* at 103.

concluded that the assets transferred were "integrally related to [the transferee's] business. . . ."[131] Clearly, the court approved *Becher,* although its authority for decision on this point was blurred in a shotgun blast of pro-taxpayer authorities. The Tax Court went on to distinguish the "F" reorganization decisions as sui generis, and to criticize *Wortham Machinery Co. v. United States*[132] as containing "unnecessary statements" regarding continuity of business enterprise.[133] On the other hand, the case contains the statement that "what is critical is whether the new corporation carries forward the business enterprise of the old."[134] The key to the decision was evidently the relevance of the transferred assets to the business of the transferee as a matter of "business purpose."[135]

3. Analysis of the Cases

Returning to the original question concerning the validity of the proposed regulations as regards an operating company which sells its assets and shortly thereafter merges with a mutual fund, what does one find? Reading the leading decisions together, the analysis in the case of a cash company/mutual fund merger favors taxpayers. On the Treasury's side, *Hendee* suggests that a material change in the nature of the corporation, from manufacturing to passive investment, fouls the continuity of business enterprise requirement. That rule is at best a minority view and seems thoroughly antiquated. Even the Treasury does not cling to it.[136] Still, *Hendee,* and to an uncertain extent *Workman,* support a rule that changing from an "active" corporation to a passive holding company does not satisfy the business continuity requirement. Assuming a cash company/mutual fund merger fulfills the continuity of proprietary interest and business purpose requirements,[137] the Treasury must argue that it does not satisfy the continuity of business enterprise requirement. To do so, the Treasury must show that a mutual fund is more like a passive holding company than an operating com-

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131. *Id.* at 104.

132. 521 F.2d 160 (10th Cir. 1975). *See* text accompanying notes 92-94 *supra.*

133. 70 T.C. at 105.

134. 614 F.2d at 867.

135. *Id.*

136. The new regulations only require that the "historic assets" be used by the transferee. Thus, for example, a commercial building used by a grocery store transferor as a sales area could be used as a manufacturing area by a transferee without violating the regulations. *See* Treas. Reg. 1.368-1(d) discussion, 45 Fed. Reg. 86,435-36 (1980).

137. The former clearly is in the "C" reorganization because the target company's assets are exchanged for the acquiring company's stock. The latter should be where the fusion will likely reduce costs to existing mutual fund shareholders.

pany. Interested taxpayers will argue the opposite: that a mutual fund is a dynamic, actively managed corporation.

Taxpayers will assert that if *Hendee* and *Workman* demand post-reorganization activity, then *Abegg* is a borderline case which shows that managing a small portfolio, as opposed to merely holding a basket of unmanaged assets, constitutes sufficient activity to justify a reorganization result. Furthermore, a mutual fund is substantially more active than Mr. Abegg's little personal holding company. Likewise, *Pebble Springs* will be cited to show a level of business activity less than that of a mutual fund, but still great enough to find a reorganization. Taxpayers will argue that *Becher* supports a post-business-termination transfer of cash, that applying the "historic business assets" test directly violates accepted judicial authority to the contrary, that the "historic business assets" test did not in fact evolve in the courtroom, and that the regulations therefore go too far. Additionally, taxpayers will point out that even in cases where the transferee did acquire historic business assets, there is no language suggesting the continuity of business enterprise requirement would not have been met if the assets had not been "historic" under the new regulations.[138]

The government can be expected to dredge up unfavorable language supporting the "historic business assets" test from such decisions as *Atlas Tool Co. v. Commissioner,*[139] and *Standard Realization Co.*.[140] Taxpayers can fairly reject the language as dictum or not controlling. If the Treasury is to prevail on this issue, it will most likely result from a court being persuaded that a mutual fund/cash company merger is unique in that it involves a transfer of cash or liquid assets to an investment company, or that it falls under the shadow of *Workman.* While such an assertion may be supportable, it is rather facile and requires a complicated narrowing of many cases.[141] At the same time it avoids the basic question of the facial validity of the regulations. On the other hand, contextual approaches to technical questions have been used before, with some success.[142]

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138. *See* notes 104-06 & 116-17 and accompanying text *supra.*

139. 70 T.C. 86 (1978), *aff'd,* 614 F.2d 860 (3rd Cir. 1980).

140. 10 T.C. 708 (1948), *acq.,* 1948-2 C.B. 3.

141. *See, e.g,* Benson v. Phinney, 199 F. Supp. 363 (S.D. Tex. 1961); Abegg v. Commissioner, 50 T.C. 145 (1968), *aff'd,* 429 F.2d 1209 (2d Cir. 1970); Pebble Springs Distilling Co. v. Commissioner, 23 T.C. 196 (1954), *aff'd,* 231 F.2d 288 (7th Cir. 1956); Becher v. Commissioner, 22 T.C. 932 (1954).

142. *See, e.g.,* I.R.C. § 301, involving distributions not essentially equivalent to a dividend, a contextual inquiry that has generated much uncertainty. *See also* Rafferty v. Commissioner, 452 F.2d 767 (1st Cir. 1971), wherein the question of whether a divisive reorganization involves a "device" to distribute earnings and profits was analyzed contextually; it has the effect, *inter alia,* of disregarding personal justification if the transaction has considerable bail-out potential.

C. *Collateral Issues Regarding Validity*

1. Reenactment

The Treasury will unquestionably assert that the continuity of business enterprise requirement, as first established in 1955 in the regulations under section 368,[143] has been "made law" by repeated reenactment of pertinent sections in subsequent Revenue Acts. This argument is likely to carry no weight although it might provide some sort of judicial escape hatch. First, the reenactment doctrine is unpredictable and has been expressed so inconsistently as to be analytically unreliable.[144] Second, the new regulation which interprets the continuity of business enterprise requirement should not be accorded the same weight as long standing regulations.[145] However, the long standing regulations are ambiguous on their face and implicitly refer to federal case law.

2. Weight to be accorded regulations *qua* regulations

There is a judicial preference for upholding regulations, provided they are not inconsistent with the statute or unreasonable. Particular weight is accorded regulations which are promulgated contemporaneously with the statute they interpret.[146] The latter condition does not exist here. Furthermore, because the new regulations involve an administrative interpretation of judicial doctrine, they are particularly handicapped. In short, the judicial preference cannot be significant under these circumstances.

3. Preemption by IRC section 368(a)(2)(F)

Taxpayers can be expected to assert that section 368(a)(2)(F), which lays down careful rules designed to bar "diversifying" tax-free reorganizations by "investment companies," represents an implict approval of cash company/mutual fund mergers if the "sin of diversification" is absent. One problem with the argument is that under section 368(a)(2)(F) and under the new regulations an "investment company"

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143. Treas. Reg. § 1.368-1(b), T.D. 6152 (Dec. 2, 1955), *reprinted in* FEDERAL TAX REG., [1956] U.S. CODE CONG. & AD. NEWS 115.

144. *See* Griswold, *A Summary of the Regulations Problem*, 54 HARV. L. REV. 398 (1941).

145. The re-enactment doctrine generally applies only to long-standing regulations. *See, e.g.*, Griswold, *supra* note 144, at 408.

146. *See* Rogovin, *The Four R's: Regulations, Rulings, Reliance and Retroactivity — A View From Within*, 43 TAXES 756 n.12 (1965). The Treasury clearly has the authority to issue interpretative regulations in the area because the "continuity of business enterprise" requirement is itself used to interpret the term "reorganization." The only question is the dignity to which such interpretative regulations are entitled.

does not include a company holding cash only. Hence, pure cash company mergers with mutual funds are outside the scope of the section. Also, the new regulations all but presume that the cash-laden target company, which may have invested in securities, occupies a transitory status between operating company and mutual fund; *i.e.,* it is not an investment company. The *Workman* decision supports the Treasury in this regard.[147] In short, the taxpayer will have to overcome the step-transaction doctrine and show the absence of any overall multi-step plan of reorganization. These concepts are well embedded in case law,[148] and the legislative history of IRC section 368(a)(2)(F) reflects no intention to uproot them.[149]

Also, as the Treasury correctly pointed out in its defense of the new regulations, section 368(a)(2)(F) does not purport to preempt the general judicial requirements for a reorganization, even though it is true the diversification rules of this section are heavily scented with the continuity of business enterprise doctrine. The government position is persuasive. Section 368(a)(2)(F) is designed to bar the sin of tax-free diversification and is not concerned with the unrelated judicial concept of business continuity.[150]

4. Discrimination

There are some fairly obvious discrimination problems, although it is difficult to speculate over the weight a court would accord this factor in evaluating the "reasonableness" of the proposed regulation. The regulations discriminate in favor of the large corporation in that if it can meet the 100 shareholder test,[151] it could simply become a registered investment company without having to be acquired. They may also be said to discriminate in favor of the prosperous investment company which happens to have an investment function, so that it can assert that the portfolio acquired by the mutual fund constitutes a historic asset.

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147. *See* notes 120-22 and accompanying text *supra.*

148. As to multi-step plans of reorganization, *see, e.g.,* Fry v. Commissioner, 5 T.C. 1058 (1945); May Broadcasting Co. v. United States, 200 F.2d 852 (8th Cir. 1953). For a compendium, *see* J. MERTENS, 3 LAW OF FEDERAL INCOME TAXATION § 20.95 (1972 & Cum. Supp. 1980). As to step transactions, *see* PAUL & ZIMET, *Step Transactions in,* SELECTED STUDIES IN FEDERAL TAX. 200 (2d ser. 1938). The recent narrow reading which demands a binding commitment may make the finding of a plan of reorganization more difficult. *See* Commissioner v. Gordon, 391 U.S. 83 (1967). *But see* King Enterprises, Inc. v. United States, 418 F.2d 511 (Ct. Cl. 1969).

149. *See* note 63 *supra.*

150. *See* H. R. REP. NO. 1049, 94th Cong., 2d Sess. 4, 9-10, 14-18 (1976), *reprinted in part in* 1976-3 C.B. 1, 4, 9-10, 14-18.

151. *See* I.R.C. § 851(a).

5. General policies

On the government's side, there is the argument that the first significant reorganization rules were intended to rehabilitate postwar industrial America and not to permit operating companies to become investment companies.[152] This suggests a fairly limited purpose and a justification for a narrow reading of section 368(a)(1). Conversely, generous judicial remarks about the scope of the reorganization provisions are commonplace[153] and would go far to neutralize any such arguments. The narrower topics of continuity of business enterprise and business purpose are likely to push this debate off the stage.[154]

Another general approach would be to study the underlying question of whether the transaction is more like a sale than a merger or consolidation. This distinction was developed in cases like *Pinellas Ice & Storage Co. v. Commission.*[155] Mutual fund mergers with cash companies or small portfolio companies are in fact very much like "sales." However, it is difficult to see a meaningful distinction between taking back mutual fund stock as opposed to stock of some major conglomerate corporation. Bittker and Eustice tidily present this problem in the following terms:

> The statutory definition of "reorganization" thus hauls in a most variegated catch but does almost nothing to segregate the transactions according to their economic consequences. Thus, the

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152. *See* H.R. REP. No. 767, 65th Cong., 2d Sess. 1-2, 20 (1918). Although the hearings fill more than 650 pages the explicit historical purposes for including the very tersely worded reorganization provision was never expressed therein. However, S. Rep. No. 617, 65th Cong., 3d Sess. 5 (1918) does contain a statement by the Senate Finance Committee that the "provision ... inserted [was] designed to establish the rule for determining taxable gains in the case of exchanges of property and to negative the assertion of tax in the case of certain purely paper transactions." The courts have tended to understand the reorganization provision to have the same meaning [reflecting the very brief Committee Reports' commentary]. *See, e.g.*, Commissioner v. Gilmore's Estate, 130 F.2d 791 (3d Cir. 1942).

153. A good example of favorable language is found in the Second Circuit's opinion in Helvering v. Gregory, 69 F.2d 809, 811 (2d Cir. 1934): "The purpose of the section is plain enough; men engaged in enterprises — industrial, commercial, financial, or any other — might wish to consolidate, or divide, to add to, or subtract from, their holdings. Such transactions were not to be considered as 'realizing' any profit, because the collective interests still remained in solution." *Id. See also* Carlberg v. United States, 281 F.2d 507 (8th Cir. 1960); J. MERTENS, *supra* note 148, at § 20.55.

154. The relevant doctrinal requirement is only that there be a business purpose for the reorganization. The absence of a tax avoidance purpose is not enough. Commissioner v. Wilson, 353 F.2d 184 (9th Cir. 1965). Although earlier cases commonly required a business purpose at the surviving corporation level, recent cases inspect the shareholders' purposes in a close corporation context. *See* Parshelsky v. Commissioner, 303 F.2d 14 (2d Cir. 1962).

155. 287 U.S. 462 (1932).

> reincorporation of a corporation in another state, entailing no significant changes in the rights of the corporation's shareholders and creditors, is a "reorganization," but so is the merger of an independent corner grocery store into a national food chain, although the local merchant who has exchanged his stock for the marketable stock of the surviving corporation may feel, quite rightly, that he has "sold out."[156]

It is certainly true that the utility of the continuity of business enterprise doctrine becomes doubtful in these circumstances as well as in many others, but such conclusions lead to ambivalent inferences: (i) the rule is often an empty formalism and should be cast out, or (ii) too liberal as applied and should be significantly tightened.

Finally, there might be merit to the argument that the transactions were instead an acquisition of the target company's assets in exchange for acquiring company stock. This would be followed by a sale of those assets by the fund. Presumably this would not be a "reorganization." There should be no difference in tax burdens if the mutual fund instead acquires the proceeds from the sale of those assets. That is, given that the conduit cases flatly reject a reorganization result, the result should not be different if the transferor rather than the transferee corporation sells the business assets, then transfers the proceeds to the transferee. Yet, if the new regulations are rejected,[157] taxpayers can, on occasion at least, choose between a taxable or non-taxable transaction at the shareholder level. In this respect, the conduit cases are not so easily dismissed. On the other hand, *Becher* supports this elective result, thereby elevating form well above substance. This conceptual approach may be the government's most persuasive support for the new regulations.

There is a tendency among proponents of an expansive reading of the reorganization rules to use existing rules and a touch of symmetery analysis to advance their preferences, while ignoring the underlying fact that the reorganization rules are a major exception to capital gains taxation. It has been argued that if there is no tax levied on shareholders when the corporation sells its assets and goes into a new line of business, then there should also be no tax merely because the sales proceeds later fall into the hands of the acquiring corporation in a statutory

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156. *See* B. BITTKER & J. EUSTICE, *supra* note 5, ¶ 14.01, at 14-5.

157. In addition, Rev. Rul. 79-434, 1979-2 C.B. 155, which held that a transaction that is in effect a purchase is not a reorganization, would also have to be rejected.

reorganization.[158] This ignores consideration of the underlying reasons for the reorganization rules and the limits which should be imposed on them as a matter of legislative intent and sound economic policy.

6. Practical Avoidance of the Regulations

The practical impact of the regulations on mergers of cash companies with mutual funds is fairly clear. There is going to be an audit problem over the factual question of a plan of reorganization. Well-heeled closely held corporations will be advised to "age" their transactions, avoiding any evidence of an intention to merge with a mutual fund. In the interim period, the close corporation will operate as an investment company and will likely contract for professional investment advice. Personal holding company tax problems can be mitigated by recapitalizations to solve the distribution of ownership problem and the portfolio can be tilted in favor of tax-free income, as such income is not subject to the personal holding company tax. This pattern of activity can make good business sense as well as good tax sense. It takes the pressure off an immediate irrevocable merger with a mutual fund and allows time to evaluate an investment advisor's competence. Once some reasonable period of time has passed, perhaps five years, it should be possible to contemplate a mutual fund merger without concern for adverse tax consequences. Section 368(a)(2)(F) and the regulations should not be a problem as long as the target company has churned away its stock acquired for purposes of diversification, thereby rendering its portfolio both diversified and untainted. The curiosity is that a mutual fund's merger with a portfolio company is, if anything, particularly graced by the new regulations and the other requirements for obtaining a tax-free reorganization. The target company's portfolio, although subject to adjustment by the mutual fund, will constitute its historic business assets, and those assets will be uniquely germane to the fund's business, even if they are largely cash. The "business purpose" requirement will likely be met as to both the target, through greater diversification, liquidity, and continuous professional management and the acquiring mutual fund, through greater portfolio volume causing lower per capita management fees. The continuity of proprietary interest requirement will be satisfied because the consideration for the portfolio will be mutual fund stock.

The audit or private letter ruling issue will revolve around whether the foregoing transactions were part of an overall plan of reorganization. Such factual matters are always problematical. If the directors can show

158. Faber, *supra* note 2, at 292.

in good faith that they were prepared to sell the operating assets even though a mutual fund merger was never possible, and that they were prepared to operate their company indefinitely, then the taxpayers should clearly prevail.

7. Summary

The new regulations are of doubtful validity. They are neither supported by general principles of statutory construction such as reenactment, nor the doctrine favoring the validity of regulations. While not preempted by section 368(a)(2)(F), they discriminate among taxpayers. There is strong authority for rejecting them in the form of *Becher* and *Bentsen,* which validated pure cash transfers to corporations in different businesses in the context of achieving a tax-free reorganization. *Abegg, Workman* and *Pebble Springs* suggest that as long as there is some economic activity by the successor corporation, the continuity of business enterprise requirement is met. However, there remains the practical judicial possibility of finding the regulations valid in the *sui generis* circumstances of a mutual fund merger with a cash company. It is submitted that to validate the regulations on the basis of present case law would be largely sophistry and could, if the analysis were based strictly on contextual factors, seriously disturb this coherent body of uncontroversial tax law. Just as the commentators on the then proposed regulations have exaggerated the significance of *Becher,* while downplaying *Hendee,*[159] the Treasury draftsmen have failed to reconcile *Hendee* with *Becher, Bentsen,* and other decisions developing the continuity of business enterprise theory. As a result, the regulations and the case law are in conflict. One reconciling technique might have been to expand the term "historic business" to include the basic industry of the transferor and transferee (such as manufacturing). That still leaves *Bentsen* unreconciled, but at least the field of conflict would be confined. On the other hand, the Treasury might be able to prevail by arguing that absent the new regulations, a reorganization result is altogether elective with taxpayers, thus rendering congressional attempts to have the tax laws follow economic substance in this field meaningless.

CONCLUSION

The Treasury appears to have overreacted in several respects to the perceived problem of cash company mergers with mutual funds. First, it has sought to resolve the issue with regulations that reach far beyond

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159. For several of these commentators, *see* note 2 *supra.*

the practice which it sees as villainous and has chosen to disturb a previously uncontroversial area of the tax law. These regulations deny tax-free reorganization status to a class of transactions (*i.e.*, the format of *Becher*) which lie outside the evil the Treasury originally viewed as in need of correction. Furthermore, it proposes to change a judicially-developed doctrine which the current regulations incorporate by reference. The doubtful authority of such regulations is likely to provoke expensive litigation and possibly remedial legislation backed by the lobbying efforts of industry. Also, the regulations will weaken the Treasury's capacity to fight the reincorporation issue.[160] This seems to be poor tax administration. However, the Treasury may overcome this hardship by reliance on *Telephone Answering Service Co. v. Commissioner.*[161] In this decision the tax court, urged by the Treasury to find a reorganization and by the taxpayer to find a section 337 liquidation, found neither.[162] Thus, the Treasury may argue that a particular trans-

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160. Briefly, taxpayers have frequently attempted to undertake taxable liquidations followed by, or in connection with, a transfer of assets, sales proceeds, or both, to another corporation for a multitude of tax-motivated reasons. These include (i) elimination of the earnings and profits account (on the basis of which the amount of taxable dividends is determined), (ii) to strip off unwanted assets, and (iii) to increase the basis of distributed assets to fair market value in order to create larger depreciation deductions. *See* B. BITTKER & J. EUSTICE, *supra* note 5, at ¶ 14.54.

The Service has historically countered with the argument that these liquidation — reincorporations are in substance reorganizations. The result is characteristically a tax-free transaction combined with boot or a "functionally unrelated" corporate distribution. *See* Bazely v. Commissioner, 331 U.S. 737 (1947).

The problem with the new regulations is that they create an obstacle to finding a reorganization. The requirement that historic assets of the transferor come to rest in the hands of the other corporate party to the reorganization limits the Service's capacity to fight the reincorporation problem.

While there is a minority view that there can be a reincorporation under laxer standards than those imposed to find a "reorganization," the majority view is clearly contrary. *See, e.g.*, Commissioner v. Morgan, 288 F.2d 676 (3d Cir.), *cert. denied,* 368 U.S. 836 (1961); South Texas Rice Warehouse Co., 43 T.C. 540 (1965), *aff'd sub nom.* Davant v. Commissioner, 366 F.2d 874 (5th Cir. 1966), *cert. denied,* 386 U.S. 1022 (1967).

In light of this fact, it is clear that the regulations will increase the difficulty of finding a reincorporation.

161. 63 T.C. 423 (1974), *aff'd,* 546 F.2d 423 (4th Cir. 1976), *cert. denied,* 431 U.S. 914 (1977) [hereinafter cited as *TASCO*].

162. Briefly, *TASCO* involved a corporation (TASCO) which, in advance of liquidation, transferred its operating assets to a newly formed, practically identical corporation (New TASCO) followed by a transfer of the cash from the sale of a subsidiary and the stock of New TASCO to shareholders of TASCO. The taxpayers asserted a complete liquidation of TASCO under section 337, such that the gain from the sale of the subsidiary would be tax-free at the corporate level. The Service asserted a "D" reorganization. The Tax Court ignored the reincorporation arguments and held *sua sponte* that the requirements of section 337 were not met because the liquidation was not *bona fide,* as the putatively liquidated corporation continued to exist in the form of its 'alter ego,' New TASCO. *Id.*

While the results of *TASCO* are clearly not in, it seems the Treasury would logically only

action should be a reorganization, or that even if no reorganization is found, liquidation treatment should be denied, or both.

Unfortunately, the new regulations are vague in certain respects. What constitutes "a significant line of business" is not clearly defined. Nor is the length of time which a transferee must retain a transferor's assets elucidated. By failing to provide useful answers, or at least safe-haven rules, the Treasury can only expect a rise in the volume of private ruling requests.

One can understand the Treasury's sentiments. The mutual fund cash company merger seems too much of a good thing and violates what the Treasury perceives as proper policy reasons underlying the exception from taxation granted by the reorganization rules. Indeed, one could argue that the mutual fund exception was designed to let the "little man" into the securities market and not to let the rich man slip from owning an ongoing business into the status of a mere investor without a "toll charge."[163] Confronted with a Congress no longer preoccupied with tax reform and the judiciary's general preference for validating regulations, the judgment to pursue the cash company/mutual fund merger by rulemaking is understandable,[164] notwithstanding the potential for eroding the "reincorporation" doctrine.

It has been pointed out that the investment company reorganization rules of section 368(a)(2)(F) are more parsimonious than the prior rulings.[165] One solution may be to seek legislation to amend section 368(a)(2)(F) to include "cash companies" as undiversified investment companies and revoke the new regulations.[166] Certainly this proposal would plug an apparent loophole, but it is not necessarily consistent with the purpose of the anti-diversification rules. Furthermore, under the new regulations the cash company can still buy and then turn over a diversified portfolio, thereby meeting the requirements of section 368(a)(2)(F)(iii); this could be followed by a reorganization with a

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place very limited reliance on *TASCO* as a backstop for constricted 'reincorporation' rules. *TASCO's* facts are highly confined: (i) the whole transaction was clearly designed to evade taxes, (ii) New TASCO was a virtual 'clone' of TASCO, (iii) New TASCO got all of TASCO's operating assets, and (iv) there was no suspension of TASCO's business.

163. There is no history of the origin of mutual funds because the early provisions were added to the 1936 Revenue Act in Conference, without comments. Instead, there is testimony before the Senate Finance Committee. *See* Hearings before Senate Finance Committee on the 1936 Revenue Act, 74th Cong., 2d Sess. 776 (1936).

164. The Treasury's decision to avoid trying to amend section 368(a)(2)(F) to expand the term "investment company" so as to include a pure "cash company" may be the better part of valor. The Carter administration was notably unsuccessful at getting its way at tax legislation.

165. *See* Aidinoff & Lopata, *supra* note 2, at 929.

166. *Id.*

mutual fund subject to the risks of the step-transaction doctrine. This in turn raises the imponderable question as to when a transaction is so "old and cold" that it will not be telescoped into other transactions.

Furthermore, the Treasury is faced with a risk of a substantial revenue loss. If *General Housewares* is broadly adopted, and it does seem the better rule, there is a material risk that operating companies will engage in tax-free liquidations at the corporate level, followed by "C" reorganizations with mutual funds, especially with tax-free bond funds or so-called "series funds" (those with several classes of stock, which can be used in combination to best meet the needs of various classes of shareholders). Thereafter, shareholders would enjoy the ultimate relief of section 1014, which steps up the basis of property to fair market value at death, thereby wiping out the unrealized appreciation in the stock taken back in the reorganization.[167]

Given this rather complex perspective, it seems preferable as a matter of sound tax administration for the Treasury to confine itself to combating the perceived problem by narrowing the regulations in a fashion that limits them to the fact pattern about which the government has expressed genuine concern. The Service should select a suitable target for litigation wherein the cash company/mutual fund merger issue can be judicially resolved. In court, the continuity of business enterprise doc-

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167. In addition, under the new regulations, the following situations could result in revenue loss:

Liquidation at a loss: Workman provides the paradigm. The taxpayer causes his controlled corporation to sell its assets at a gain for cash or liquid assets. He then causes a distribution to himself, at a capital loss, followed by a transfer of the proceeds to a portfolio company. *Workman* finds a § 337 liquidation rather than a reorganization, evidently for lack of business continuity. The new regulations clearly support *Workman,* and they will encourage such transactions where the target company has a basis in its assets lower than the shareholders' basis in their stock. That is, the target company will sell its assets tax-free under § 337 and then liquidate at a loss to shareholders. Then, the shareholders can safely contribute the proceeds, including a cautious amount of assets. to a new corporation in a new business. The reincorporation risk will be gone.

Cash "strip-offs" in liquidation: Becher provides the example of a corportion which sells assets and distributes a substantial amount of proceeds to shareholders and transfers the remainder, including some operating assets, to a controlled corporation in a new line of business in what would heretofore have been a "D" reorganization combined with the risk of a dividend. *See generally,* Bazely v. Commissioner, 331 U.S. 737 (1947). Under the new regulations, there would be a true liquidation, hence a capital gain to the distributees; section 356(a)(2) can be avoided because there is no reorganization. Could there be a dividend? It seems not, as the liquidation is complete hence protected by section 331(a)(1). Clearly, some taxpayers could benefit from the regulations, especially where (i) the corporation's assets are worth approximately their bases, (ii) the cash distributed is substantial, (iii) the shareholder's stock has not greatly appreciated, and (iv) there is a large earnings and profits account. Thanks to the greatly reduced rate of taxation of capital gains, and the high rates of taxation to which dividends are subject, the *Becher*-style transaction is made attractive.

trine can be refined with impunity in light of delphic congressional pronouncements.[168] After all, the doctrine is a judicial invention.

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168. Since the adoption of the reorganization provisions in 1918, Congress has given little indication as to whether the reorganization rules require the acquired corporation to continue at least part of its business after the reorganization. The stated purpose of the original reorganization statute (§ 202(b) of the 1918 Revenue Act) was to eliminate taxes on exchanges which were purely paper transactions. S. REP. NO. 615, 65th Cong., 3d Sess. 5 (1918-1919).

In enacting the 1921 Act with respect to tax-free reorganization, A.W. Gregg, special assistant to the Secretary of the Treasury, explained: "These provisions are based upon the theory that the types of exchanges specified in Section 203 are merely changes in form and not in substance. . . ." N.Y. Times, Jan. 5, 1924, at 8, col. 4. No committee reports specifically addressed the continuity of business enterprise issue.

In regard to the Revenue Act of 1924, the House Committee explained the reorganization statute as expressing a

> policy of exempting from tax the gain from exchanges made in connection with a reorganization in order that ordinary business transactions will not be prevented on account of the provisions of the tax law. If it is necessary for this reason to exempt from tax the gain realized by the stockholders, it is even more necessary to exempt from tax the gain realized by the corporation.

H.R. REP. No. 179, 68th Cong., 1st Sess. 13 (1924), *reprinted in* 1939-1 C.B. (Pt. 2) 241, 251. Again, Congress failed to confront the continuity of business enterprise issue, even though it could be argued that if the acquired business is completely liquidated an "ordinary business transaction" has not occurred.

The reorganization provisions have been severely criticized for providing loopholes to corporations that can avail themselves of tax-free reorganizations. While Congress has legislated against some of these loopholes, many still remain. *See* H.R. REP. No. 708, 72d Cong., 1st Sess. 56 (1931-1932), *reprinted in* 1939-1 C.B. (Pt. 2) 457, 470. It has been argued that Congress has shifted the responsibility for plugging these loopholes to the courts. *See* Sandberg, *The Income Tax Subsidy to "Reorganizations,"* 38 COLUM. L. REV. 98, 124 (1938). *See also* Hellerstein, *Mergers, Taxes, and Realism,* 71 HARV. L. REV. 254, 259 n.22 (1957).

APPENDIX

The text of the new regulation, Treas. Reg. 1. 368-1(d), 45 Fed. Reg. 86,437-38 (1980), is as follows:

§ 1.368-1 Purpose and scope of exception or reorganization exchanges.

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(d) *Continuity of business enterprise*—(1) *Effective date.* (i) This paragraph (d) applies to acquisitions occurring after January 30, 1981.

(ii) For an asset acquisition, the date of acquisition is the date of transfer. To determine the date of transfer, see § 1.381 (b)-1(b).

(iii) For a stock acquisition, the date of acquisition is the date on which the exchange of stock occurs. If all stock is not exchanged on the same date, the date of exchange is the date the exchange of all stock under the plan of reorganization is complete.

(2) *General rule.* Continuity of business enterprise requires that the acquiring corporation (*P*) either (i) continue the acquired corporation's (*T*'s) historic business or (ii) use a significant portion of *T*'s historic business assets in a business. The application of this general rule to certain transactions, such as mergers of holding companies, will depend on all facts and circumstances. The policy underlying this general rule, which is to ensure that reorganizations are limited to readjustments of continuing interests in property under modified corporate form, provides the guidance necessary to make these facts and circumstances determinations.

(3) *Business continuity.* (i) The continuity of business enterprise requirement is satisfied if *P* continues *T*'s historic business. The fact *P* is in the same line of business as *T* tends to establish the requisite continuity, but is not alone sufficient.

(ii) If *T* has more than one line of business, continuity of business enterprise requires only that *P* continue a significant line of business.

(iii) In general, a corporation's historic business is the business it has conducted most recently. However, a corporation's historic business is not one the corporation enters into as part of a plan of reorganization.

(iv) All facts and circumstances are considered in determining the time when the plan comes into existence and in determining whether a line of business is "significant".

(4) *Asset continuity.* (i) The continuity of business enterprise requirement is satisfied if *P* uses a significant portion of *T*'s historic business assets in a business.

(ii) A corporation's historic business assets are the assets used in its historic business. Business assets may include stock and securities and intangible operating assets such as good will, patents, and trademarks, whether or not they have a tax basis.

(iii) In general, the determination of the portion of a corporation's assets considered "significant" is based on the relative importance of the assets to operation of the business. However, all other facts and circumstances, such as the net fair market value of those assets, will be considered.

(5) *Examples.* The following examples illustrate this paragraph (d).

Example (1). *T* conducts three lines of business: manufacture of synthetic resins, manufacture of chemicals for the textile industry, and distribution of chemicals. The three lines of business are approximately equal in value. On July 1, 1981, *T* sells the synthetic resin and chemicals distribution businesses to a third party for cash and marketable securities. On December 31, 1981, *T* transfers all of its assets to *P* solely for *P* voting stock. *P* continues the chemical manufacturing business without interruption. The continuity of business enterprise requirement is met. Continuity of business enterprise requires only that *P* continue one of *T*'s three significant lines of business.

Example (2). *P* manufactures computers and *T* manufactures components for computers. *T* sells all of its output to *P*. On January 1, 1981, *P* decides to buy imported components only. On March 1, 1981, *T* merges into *P*. *P* continues buying imported components but retains *T*'s equipment as a backup source of supply. The use of the equipment as a backup source of supply constitutues use of a significant portion of *T*'s historic business assets, thus establishing continuity of business enterprise. *P* is not required to continue *T*'s business.

Example (3). *T* is a manufacturer of boys' and men's trousers. On January 1, 1978, as part of a plan of reorganization, *T* sold all of its assets to a third party for cash and purchased a highly diversified portfolio of stocks and bonds. As part of the plan *T* operates an investment business until July 1, 1981. On that date, the plan of reorganization culminates in a transfer by *T* of all its assets to *P*, a regulated investment company, solely in exchange for *P* voting stock. The continuity of business enterprise requirement is not met. *T*'s investment activity is not its historic business, and the stocks and bonds are not *T*'s historic business assets.

Example (4). *T* manufactures children's toys and *P* distributes steel and allied prod-

ucts. On January 1, 1981, *T* sells all of its assets to a third party for $100,000 cash and $900,000 in notes. On March 1, 1981, *T* merges into *P*. Continuity of business enterprise is lacking. The use of the sales proceeds in *P*'s business is not sufficient.

Example (5). *T* manufactures farm machinery and *P* operates a lumbermill. *T* merges into *P*. *P* disposes of *T*'s assets immediately after the merger as part of the plan of reorganization. *P* does not continue *T*'s farm machinery manufacturing business. Continuity of business enterprise is lacking.

This Treasury Decision is issued under the authority contained in section 7805 of the Internal Revenue Code of 1954 (68A Stat. 917; 26 U.S.C. 7805).

William E. Williams,
Acting Commissioner.

Approved: December 23, 1980.

NOTES

The Massachusetts Consumer Protection Act, Chapter 93A — A Look at Provisions for Double and Treble Damages, the Written Demand for Relief, and Reasonable Attorney's Fees

The Massachusetts Regulation of Business Practice and Consumer Protection Act[1] is "a statute of broad impact"[2] which protects consumers[3] and businessmen[4] from a wide range of "[u]nfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce. . . ."[5] This act resembles the legislative efforts in virtually every state[6] where attempts have been made to oversee "business activities with the view to providing proper disclosure of information and . . . [an] equitable balance in the relationship"[7] of individuals engaged in consumer/business transactions. Generally, these statutes look to the decisions of the Federal Trade Commission (FTC) and federal court interpretations of similar provisions in the Federal Trade Commission Act[8] (FTCA) for guidance as to what is meant by

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1. MASS. GEN. LAWS ANN. ch. 93A, §§ 1-11 (West 1972 and Supp. 1981).
2. Slaney v. Westwood Auto, Inc., 366 Mass. 688, 693, 322 N.E.2d 768, 772 (1975).
3. *See* MASS. GEN. LAWS ANN. ch. 93A, § 9 (West 1972 and Supp. 1981).
4. *See* MASS. GEN. LAWS ANN. ch. 93A § 11 (West Supp. 1981).
5. MASS. GEN. LAWS ANN. ch. 93A, § 2(*a*) (West 1972).
6. *See* 1980 Annot., 12 MASS. GEN. LAWS ANN. 65 (West Supp. 1981). The author states: "Every state has now enacted some form of the Federal Trade Commission Act, usually in the exact language of Section 5(a) of the federal statute and followed by a direction that federal court and agency applications should guide the interpretation of the statute by state courts and agencies." *Id.*
7. Commonwealth v. DeCotis, 336 Mass. 234, 238, 316 N.E.2d 748, 752 (1974). *See also* Purity Supreme, Inc. v. Attorney General, 80 Mass. Adv. Sh. 1349, 1362-65, 407 N.E.2d 297, 306-07 (1980); Lowell Gas Co. v. Attorney General, 79 Mass. Adv. Sh. 49, 65, 385 N.E.2d 240, 249 (1979); Mechanics Nat'l Bank v. Killeen, 79 Mass. Adv. Sh. 129, 139, 384 N.E.2d 1231, 1237 (1979).
8. 15 U.S.C. § 45(a)(1) (1970). *See, e.g.*, MASS. GEN. LAWS ANN. ch. 93A, § 2(*b*) (West Supp. 1981):

> It is the intent of the legislature that in construing paragraph (*a*) of this section in actions brought under sections four, nine and eleven, the courts will be guided by the interpretations given by the Federal Trade Commission and the Federal Courts to section 5(*a*)(1) of the Federal Trade Commission Act (15 U.S.C. 45(*a*)(1)), as from time to time amended.

Id. See also note 6 *supra.*

"unfair and deceptive practices."[9] The "proliferation of 'little' FTC Acts in every state"[10] is an unmistakable declaration of the "immense public policy goals of the [federal] statute"[11] and of the state statutes which emulate it.

Chapter 93A was enacted in 1967 to "stop unfair practices on a State level before they become interstate problems."[12] In conjunction with federal sources, the Massachusetts Legislature provided as a second source of guidance, rules and regulations promulgated by the Attorney General of the Commonwealth not "inconsistent"[13] with the FTC rules and the FTCA interpretations. After a careful review of the circumstances in each case and with reference to all of the state and federal sources, a determination can be made that an act is unfair or deceptive.[14] There are no traditional tort or contract law principles which serve as limitations in making this determination.[15] Furthermore, the characteristics of "deception" are looked upon "not from the viewpoint of the ordinarily prudent person who might . . . take upon himself the task of checking . . . accuracy but from the standpoint of the 'ignorant, unthinking and credulous.' "[16]

The range and implications of chapter 93A have been examined in

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9. "The Massachusetts statute thus incorporates the extensive body of Federal administrative and decisional law under the FTC Act . . . at least in so far as it relates to definitions of 'unfair' and 'deceptive.' " Purity Supreme, Inc. v. Attorney General, 80 Mass. Adv. Sh. 1349, 1353, 407 N.E.2d 297, 301 (1980). *See* note 17 *infra* for further information regarding the words unfair and deceptive.

10. *See* 1980 Annot., *supra* note 6, at 66.

11. *Id.*

12. Purity Supreme, Inc. v. Attorney General, 80 Mass. Adv. Sh. 1349, 1353, 407 N.E.2d 297, 301 (1980).

13. MASS. GEN. LAWS ANN. ch. 93A, § 2(c) (West 1972). The Attorney General's Regulations can be found at 940 CMR 3.00-3.18.

14. *See* Commonwealth v. DeCotis, 366 Mass. 234, 242, 316 N.E.2d 748, 754 (1974), where the court states:

> The existence of unfair acts and practices must be determined from the circumstances of each case. We do not now undertake to establish general rules which may be applied in other situations. The nature of the statute and the development of the law under the comparable Federal statute indicate that such an attempt would be undesirable.

Id.

15. *Id.* at 244 n.8, 316 N.E.2d at 755 n.8. The court states:

> Although G.L. c. 93A admittedly established new procedural devices to aid consumers and others . . . it also created new substantive rights by making conduct unlawful which was not unlawful under the common law or any prior statute. Indeed in another portion of the Attorney General's brief it is stated that the statutory words " '[u]nfair and deceptive practices' are not limited by traditional tort and contract law requirements."

Id.

See also Rice, *New Private Remedies for Consumers: The Amendment of Chapter 93A*, 54 MASS. L. Q. 307, 314-15 (1969).

16. Sullivan v. Dykens, No. 3634, p. 9 (Worcester Super. Ct. May 1977), *citing* Gulf Oil Corp. v. FTC, 150 F.2d 106 (5th Cir. 1945).

both cases and scholarly critiques[17] as have its history and general pro-

17. There are a number of sources available which can provide interpretive information regarding chapter 93A. In FTC v. Sperry & Hutchinson Co., for example, the United States Supreme Court restates the factors the FTC considers in determining whether an act or practice, though not in violation of the antitrust laws or deceptive, is unfair:

> (1) whether the practice, without necessarily having been previously considered unlawful, offends public policy as it has been established by statutes, the common law, or otherwise-whether, in other words, it is within at least the penumbra of some common law, statutory or other established concept of unfairness; (2) whether it is immoral, unethical, oppressive, or unscrupulous; (3) whether it causes substantial injury to consumers (or competitors or other businessmen).

405 U.S. 233, 244-45 n.5 (1972). These criteria appeared originally in the Federal Trade Commission's Statement of Basis and Purpose for Trade Regulation Rule 408, *Unfair and Deceptive Advertising and Labeling of Cigarettes in Relation to Health Hazards of Smoking,* 29 Fed. Reg. 8324, 8355 (1964). *See, e.g.,* P.M.P. Assoc. v. Globe Newspaper Co., 366 Mass. 593, 595-99, 321 N.E.2d 915, 917-19 (1975). In Annot., *supra* note 6, it is stated that:

> [i]n 1978, the FTC explained that: "All three criteria do not need to be satisfied to support a finding of unfairness. A practice may be unfair because of the degree to which it meets one of the criteria or because to a lesser extent, it meet [sic] all three." [See "Disclosure Requirements and Prohibitions Concerning Franchising and Business Opportunity Ventures" (Trade Regulation Rule and Statement of Basis and Purpose) 16 C.F.R. 436, 43 Fed. Reg. No. 246, 59614, 59635 (Dec. 21, 1978). . . .] The FTC thereby resolved the simplistic question as to whether its three criteria were in the conjunctive or disjunctive, holding that neither is a complete answer.

Id. at 66. The author further explains that:

> [t]here is no need to show that the claim or representation was intended to deceive, but only that it had the capacity or tendency or effect of deceiving buyers or potential buyers. [FTC v. Algoma Lumber Co., 291 U.S. 67, 81 (1934) (Cardozo, J.); Charles of the Ritz Distributors Corp. v. FTC, 143 F.2d 676 (2d Cir. 1944).] In the regulations promulgated by the Mass. Attorney General under the "little" FTCA, the identical standard was reiterated. [*See* Reg. of Mass. Atty. Gen'l., No. IV, Sec. A prohibiting any claim "which directly or by implication or by failure to disclose additional relevant information has the capacity or tendency or effect of deceiving buyers or prospective buyers ... in any material respect."

Id. at 68. Further, the author states:

> In 1938, the FTCA was amended to prohibit "unfair or deceptive acts or practices." In the ensuing three and a half decades, the "deceptive" segment has been applied to an ever broadening scope of activity, each of which requires extensive study because of the express provision in the Massachusetts statute requiring the court to construe the act under the guidance of the administrative and federal court decisions. First, "deception" is not limited to common law fraud. It covers not only express representations of fact, but also matters of opinion and prediction. There is an affirmative duty of full disclosure, not only to cover all relevant details, but even to explain their full meaning. For example, the prohibition applies to the sale of all goods and services, to the sale of franchises, to the recruitment of employees, to both real and personal property, and to both ordinary and "capital" goods. As with "fraud," the Commission has wisely declined to formulate a precise definition of deceptive acts or practices, "lest the ingenuity of man be employed to circumvent it."

1975 Annot. 12 MASS. GEN. LAWS ANN. 60, 62 (West Supp. 1981).

For federal case law on the Federal Trade Commission, see, FTC v. Colgate-Palmolive Co., 380 U.S. 374 (1965); FTC v. Standard Educ. Soc'y, 302 U.S. 112 (1937); Beneficial Corp. v. FTC, 542 F.2d 611 (3d Cir. 1976), *cert. denied,* 430 U.S. 983 (1977); Resort Car Rental System, Inc. v. FTC, 518 F.2d 962 (9th Cir.), *cert. denied,* 423 U.S. 827 (1975); and Montgomery Ward & Co. v. FTC, 379 F.2d 666 (7th Cir. 1967); Carter Prod. v. FTC, 186 F.2d 821 (7th Cir. 1951).

A compilation of Massachusetts decisions interpreting the meaning of unfair and/or deceptive act within the meaning of Chapter 93A, § 2(a), can be found in Purity Supreme, Inc. v. Attorney General, 80 Mass. Adv. Sh. 1349, 1364 n.17, 407 N.E.2d 297, 307 n.17 (1980).

For further information on the scope of exceptions of state deceptive trade practice and consumer protection acts, *see* Annot., 89 A.L.R.3d 399 (1979).

cedural requirements.[18] This Note examines the practical aspects of chapter 93A which should be of concern to the practicing attorney who desires to handle litigation in this area efficiently in an effort to attain maximum benefits. Section I reviews the statutory provision for double or treble damages and focuses on the knowledge or willfulness and bad faith requirements of chapter 93A, section 9(3),[19] upon which assessments of damages depend and on the statutory language opening the door for damages for emotional distress.[20] Section II examines the chapter 93A, section 9(3)[21] requirement of a written demand for relief as it relates to damages from practical, evidentiary and tactical perspectives. This section emphasizes the importance and versatility of the demand letter. Section III considers the statutory provision for reasonable attorney's fees.[22] This provision is discussed as an element of a successful plaintiff's total recovery, and it is demonstrated that the fee provision has been inconsistently and inadequately applied by the courts. The traditional factors upon which fee awards have been based are examined relative to chapter 93A litigation and negotiation. The part that fee assessment plays in anticipated recovery, although potentially significant, is currently minimal. The courts' handling of the statutory fee provision is a major influence in undercutting the general purpose of the statute.[23] Section III concludes with a plea to the courts to construct

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18. For an invaluable compendium of information, both procedural and substantive, *see* West & Weissblum, *M.G.L. Chapter 93A — The Consumer and Businessman's Protection Act,* in MASS. ACADEMY OF TRIAL ATTORNEYS PREPARATION AND TRIAL OF A C. 93A CASE (1979). For more information regarding this source, write to Suite 804, 18 Tremont St., Boston, MA 02105. The reader can become familiar with the historical, procedural, and substantive aspects of chapter 93A by consulting: Pirozzolo, *Chapter 93A: The Massachusetts Little FTC Act — A Potent Unexplored Remedy in Business Disputes,* 62 MASS. L.Q. 77 (Summer, 1977); Spangenberg & Tyrrell, *Recent Developments in Consumer Law,* 60 MASS. L.Q. 289 (1975); Comras, *Consumer Protection,* 1969 ANN. SURVEY MASS. LAW 157 (1969); Norstrand, *Treble Damage Actions for Victims of Unfair and Deceptive Trade Practices: A New Approach,* 4 NEW ENGLAND L. REV. 171 (1969); Rice, *supra* note 15.

In addition, Slaney v. Westwood Auto, Inc., 366 Mass. 688, 322 N.E.2d 768 (1975) is an invaluable source because it was the first opportunity the Massachusetts Supreme Judicial Court had to consider the procedural and substantive scope of chapter 93A. For a comprehensive discussion of *Slaney, see* Zabin, *Practice and Procedure — Chapter 93A Actions,* 60 MASS. L.Q. 219 (1975). *See also* notes 2 and 17 *supra;* notes 23, 43, 49, 50, 94, 99, 120 and accompanying text *infra* for information drawn from *Slaney.*

19. *See* MASS. GEN. LAWS ANN. ch. 93A, § 9(3) (West Supp. 1981). For the text of this section of the statute, *see* note 27 *infra.*

20. *See* MASS. GEN. LAWS ANN. ch. 93A, § 9(1) (West Supp. 1981). For the text of this section of the statute, *see* note 38 *infra.*

21. *See* note 19 *supra.*

22. *See* MASS. GEN. LAWS ANN. ch. 93A, § 9(4) (West 1972). For the text of this section of the statute, *see* note 118 *infra.*

23. Many of the cases and much of the literature suggest that consumer legislation is meant to give the individual consumer more than an illusion of assistance. Seeking and, in many cases, forcing redress depends on the clout of the statute, and the inclusion of the provision for

a system of review which would articulate clearly defined standards for determining the allocation of attorney's fees. The formulation of such standards would serve to eliminate the inconsistencies which presently characterize this aspect of the statute.

I. ASSESSMENT OF DAMAGES

Incentive is important in a variety of areas of litigation, but "it is even more crucial in consumer protection law where recoveries are generally expected to be slight."[24] Federal models have illustrated the use Congress has made of financial incentives in the form of treble damages, costs of suit and attorney's fees in an effort to use "private self-interest"[25] to counter violations of its statutes and lessen the burden

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attorney's fees in chapter 93A is a marked effort toward this end. Professor David Rice, principal draftsman of chapter 93A (chs. 690 and 814, 1969 Massachusetts Acts), has written:

> The purpose of the new law is to provide an effective private consumer remedy in order that redress may be obtained in cases where it was heretofore unattainable. In order to accomplish this, the law is designed to overcome two hurdles that previously barred such remedy-seeking, the first being the substantive strictures of the common law action for fraud and deceit and the second the economic limitations to the litigation of an otherwise valid claim. To this end the statute initially establishes a private cause of action for injurious violations of Chapter 93A and then permits the recovery by successful consumers of their attorney's fees and incentive damages.
>
> Although this article describing the workings of the amended Chapter 93A is written out of an interest in the problems of consumers, it is more specifically structured as a memorandum of law to the Bar that is written for the purposes of first informing its members of this latest development in the law and second encouraging its members to assume an active role in the protection of consumers. It is hoped, in other words, that the inclusion ... of the right to recover attorney's fees will supplement the broadening of the substantive cause of action by removing the economic barriers to the vindication of consumers' unfair and deceptive practices complaints.

Rice, *supra* note 15 at 307-308. The Massachusetts Supreme Judicial Court underscored the private remedy/attorney fee issue in *Slaney v. Westwood Auto, Inc.* The court stated:

> Because of the inability of the [Attorney General] to handle all the complaints it was receiving, it became clear that private remedies were needed under c. 93A. Moreover, it was apparent that for these private remedies to be effective, several problems would have to be overcome in the enabling legislation. It is a central premise of our legal system that professional advocates will represent the parties to a dispute. Indeed, the complexities of the machinery of justice are often severe enough to discourage even the seasoned attorney. In sum, "causes for which advocates cannot be obtained are, in effect, not adjudicable. Consumer grievances usually involve small amounts which are substantially less than the fee required to compensate members of the private bar."
>
> ..."Two important amendments to Chapter 93A are pending and favorable action is anticipated. One ... provides the consumer with a private remedy, including a minimum recovery of $25.00, attorney's fees"..."and, in certain cases, treble damages." In substantially the form proposed by the Attorney General, a private remedy bill was enacted.

366 Mass. 688, 699-700, 322 N.E.2d 768, 776-77 (citation and footnotes omitted). It is, therefore, apparent that the courts' failure to articulate a clear set of standards for attorney's fees assessment hampers the original intent behind the statute's enactment.

24. Rice, *Exemplary Damages in Private Consumer Actions*, 5 IOWA L. REV. 307, 339 (1969).

25. Bruce's Juices, Inc. v. American Can Co., 330 U.S. 743 (1974). The Court states:

> Where the interests of individuals or private groups or those who bear a special relation to the prohibition of a statute are identical with the public interest in having a statute

on governmental agencies. Like its federal predecessors, chapter 93A motivates litigants with its double or treble damages and attorney's fees provisions. One commentator anticipated that the chapter 93A damage provision might serve as an equalizer in transactions between vendor and purchaser, and that a sense of security and confidence on the part of the heretofore helpless consumer would be an asset to the marketplace.[26] Certainly, the provision[27] was formulated with this goal in mind.[28] Whether Chapter 93A is applied as an additional remedy expanding the scope of recovery in transactions traditionally covered by other statutes[29] or whether it is applied in a situation that involves a

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enforced, it is not uncommon to permit them to invoke sanctions. This stimulates one set of private interest to combat transgressions by another without resort to governmental enforcement agencies. Such remedies have the advantage of putting back of such statutes a strong and reliable motive for enforcement, which relieves the Government of cost of enforcement. Such private remedies lose, of course, whatever advantage there may be in the presumed disinterested, public interest standards and expertness of a governmental agency which has the initiative control of retributory measures. It is clear Congress intended to use private self-interest as a means of enforcement and to arm injured persons with private means to retribution when it gave to any injured party a private cause of action in which his damages are to be made good threefold, with costs of suit and reasonable attorney's fee.

Id. at 751-52.

26. Norstrand, *supra* note 18. The author states:

Finally, in an age of conglomerate sprawl, franchising and the glut of gigantic shopping malls, the individual consumer has lost the leverage he once had in the marketplace. The disgruntled buyer can no longer hash out differences with his shopkeeper-neighbor; he is now confronted by impersonal bigness where responsibility and liability forever lie just one department away.

The treble-damage provision hopefully will restore the balance of power that once existed between merchant and buyer. Even if rarely invoked, awareness by the consumer that he need not be helpless when victimized by fraud can only improve the commercial climate. If this means "*caveat vendor,*" then so be it.

Id. at 175.

27. The Massachusetts statute provides:

At least thirty days prior to the filing of any such action, a written demand for relief, identifying the claimant and reasonably describing the unfair or deceptive act or practice relied upon and the injury suffered, shall be mailed or delivered to any prospective respondent. Any person receiving such a demand for relief who, within thirty days of the mailing or delivery of the demand for relief, makes a written tender of settlement which is rejected by the claimant may, in any subsequent action, file the written tender and an affidavit concerning its rejection and thereby limit any recovery to the relief tendered if the court finds that the relief tendered was reasonable in relation to the injury actually suffered by the petitioner. In all other cases, if the court finds for the petitioner, recovery shall be in the amount of actual damages or twenty-five dollars, whichever is greater; or up to three but not less than two times such amount if the court finds that the use or employment of the act or practice was a willful or knowing violation of said section two or that the refusal to grant relief upon demand was made in bad faith with knowledge or reason to know that the act or practice complained of violated said section two.

MASS. GEN. LAWS ANN. ch. 93A, § 9(3) (West Supp. 1981).

28. *See* note 23 *supra*. *See also* Rice, *supra* note 15 at 317-18.

29. *See* West & Weissblum, *supra* note 18, at 4-6. The authors state:

Other statutes provide that violations of them are also violations of c. 93A, *e.g.*, M.G.L. c. 140C, § 12 (violations of truth in lending); M.G.L. c. 140, § 32L(7) (violations of mobile home industry regulations); and M.G.L. c. 93 § 49 (unfair debt collection practices). Where other statutes bar unfair acts or practice and they are silent as to c. 93A, violations of the former probably give rise to actions under the latter, *e.g.*, M.G.L. c.

transaction not covered by any other legislation,[30] the statutory provision for double or treble damages is its primary deterrent.[31]

A consumer who commences an action under section 9 of the statute and demonstrates that he was injured by the defendant is entitled to recover for each violation "actual damages or twenty-five dollars,

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93E(5) (barring unfair or deceptive practices in dealer agreements for sale of gasoline); M.G.L. c. 176D, § 3 (banning insurance industry unfair or deceptive practices).

. . . .

St. 1979, c. 406 amended Sec. 9 of c. 93A, by making a violation of M.G.L. c. 176D, § 3 (cl. 9) (dealing with the failure of insurance companies to fairly settle claims) also a violation of c. 93A.

Violations of regulatory statutes in which there is no specific mention of unfair or deceptive acts may give rise to c. 93A claims. The case of J. & J. Enterprises, Inc. v. Martignetti, (Mass., 1976), 341 N.E.2d 645, suggests that conduct violating the Alcoholic Beverages Control Act, M.G.L. c. 138, may give rise to a cause of action under c. 93A, § 11.

However, where a statute is "self-contained," refers to a specific industry, provides specific rights and remedies and is without provisions which make violation of it a violation of other laws, a party will be restricted to the remedies of that statute although it may overlap c. 93A. Reiter Oldsmobile, Inc. v. General Motors Corporation, Mass. Adv. Sh. 2091, 2094-2098 (August 7, 1979) (affirming the dismissal of a complaint seeking injunctive relief under c. 93A for an alleged violation of c. 93B — an automobile dealers act prohibiting unfair or deceptive practices between manufacturers, distributors and dealers which did not provide for injunctive relief at the time that the action was commenced).

. . . .

A violation of any statute, rule or regulation promulgated by the Commonwealth intended to provide consumers protection (now tenants also) is probably also a violation of M.G.L. Chapter 93A.

Id.

30. The fluid nature of the application of the term "unfair or deceptive act or practice" was intentional in the drafting of chapter 93A. The guidelines provided by the Federal Trade Commission are not exhaustive. *See* note 17 *supra.* The standards may be altered as the times and circumstances demand; thus, what is important are "those unexpressed standards of fair dealing which the conscience of the community may progressively develop." 29 Fed. Reg. 8324, 8355 (1964). *See also* PMP Assoc. v. Globe Newspaper Co., 366 Mass. 593, 596, 321 N.E.2d 915, 917 (1965).

Furthermore, a practice which is expressly permitted by state law may, nevertheless, constitute an unfair practice in some circumstances. This issue is the focus of Schubach v. Household Finance Corp., 78 Mass. Adv. Sh. 1153, 376 N.E.2d 140 (1978). The Supreme Judicial Court stated:

> We reject the argument that an act or practice which is authorized by statute can never be an unfair or deceptive act or practice under § 2(*a*) of G.L. c. 93A. The circumstances of each case must be analyzed, and unfairness is to be measured not simply by determining whether particular conduct is lawful apart from G.L. c. 93A but also by analyzing the effect of the conduct on the public.

Id. at 1159, 376 N.E.2d at 142. *See also* Commonwealth v. DeCotis, 366 Mass. 234, 316 N.E.2d 748 (1974). The court stated that chapter 93A "created new substantive rights by making conduct unlawful which was not unlawful under the common law or any prior statute." *Id.* at 244 n.8, 316 N.E.2d at 755 n.8.

31. The multiple damages provision of chapter 93A, § 9 was an "innovation in Massachusetts trial practice." 35 H. ALPERIN & R. CHASE, 35 MASS. PRACTICE: CONSUMER RIGHTS AND REMEDIES § 136, at 300 (1979). In regard to the statute's provision for multiple damages for the defendant's willfully or knowingly employing or using an unfair or deceptive practice, Professor Rice has said: "The obvious purpose here is to impose strong sanctions against the callous violation of the law that causes injury to consumers in total disregard of basic tenets of good faith — fair and ethical dealing." Rice, *supra* note 15, at 318.

whichever is greater."[32] If the defendant is found to have committed a "willful or knowing violation"[33] or if he refused in bad faith to grant requested relief,[34] the plaintiff may be awarded double or treble damages.[35]

To recover such damages, chapter 93A originally required that the successful plaintiff [36] show that he suffered a "loss of money or property, real or personal,"[37] as a result of the defendant's unfair or deceptive act or practice. Now, the statute is more far reaching. Any person "who has been injured"[38] by an unfair or deceptive act or practice may bring an action before the court. Prior to this 1979 Amendment to chapter 93A,[39] the defendant was far less vulnerable than he is today. The revised language has opened the door for a broad variety of special damages. Damages for emotional distress, for example, have already been awarded.[40] As a result of the new scope of the statute, its value as a powerful tool for the consumer has increased. A precise understanding and careful application of the elements necessary to optimum recovery

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32. MASS. GEN. LAWS ANN. ch. 93A, § 9(3) (West Supp. 1981).

33. *Id.*

34. *Id.* The requested relief component of the statute, the demand letter, is examined in Section II *infra*.

35. MASS. GEN. LAWS ANN. ch. 93A, § 9(3) (West Supp. 1981).

36. All references and discussion in this note refer to the chapter 93A, § 9 plaintiff, that is the individual consumer. Some statutory language quoted in this article will refer to the § 11 plaintiff, that is the businessman. Section 11 of the statute is beyond the scope of this article; however, for a discussion of § 11 and its use as a remedy for anti-competitive, unfair and other forms of improper business conduct, *see* Pirozzollo, *supra* note 18.

37. MASS. GEN. LAWS ANN. ch. 93A, § 9(1) (West 1972).

38. MASS. GEN. LAWS ANN. ch. 93A, § 9(1) (West Supp. 1981) provides:

> Any person, other than a person entitled to bring action under section eleven of this chapter, who has been injured by another person's use or employment of any method, act or practice declared to be unlawful by section two or any rule or regulation issued thereunder or any person whose rights are affected by another person violating the provisions of clause (9) of section three of chapter one hundred and seventy-six D may bring an action in the superior court, or in the housing court as provided in section three of chapter one hundred and eighty-five C whether by way of original complaint, counterclaim, cross-claim or third party action, for damages and such equitable relief, including an injunction, as the court deems to be necessary and proper.

Compare Baldassari v. Public Fin. Trust, 369 Mass. 33, 337 N.E.2d 701 (1975), *with* the language in the amended statute. The court in *Baldassari* dismissed the claim because plaintiffs alleged no loss of money or property. The only allegation in the complaint was "severe emotional distress." *Id.* at 45, 337 N.E.2d at 708. In Patry v. Harmony Homes, Inc., 80 Mass. App. Ct. Adv. Sh. 1085, 404 N.E.2d 1265 (1980), the court commented that "the judge was correct in ruling that the defendants were entitled to ignore part 2 of the demand as it did not state a claim for damages recoverable under G.L. c. 93A." *Id.* at 1091 n.8, 404 N.E.2d at 1268 n.8. Part 2 of the demand stated: "That damages in the amount of $5,000.00 be paid for the buyers' great inconvenience, expense and emotional distress." *Id.* at 1088, 404 N.E.2d at 1267. *See* notes 85-92 and accompanying text *infra* for discussion of a recent decision which awarded damages for emotional distress.

39. *See* note 38 *supra*.

40. *See* A.C. Williams v. Hart, No. 16328 (Boston Hous. Ct. July 29, 1980) (Assessment of damages).

under the new law can help consumers and attorneys who seek to apply it attain maximum benefits.

A. Knowing, Willful and In Bad Faith with Knowledge or Reason to Know as Necessary Elements for the Recovery of Double or Treble Damages

The requirement of willfulness or knowledge on the defendant's part as a precondition to the plaintiff's recovery of double or treble damages has been addressed by the courts. In *Heller v. Silverbranch Construction Corp.*,[41] the Supreme Judicial Court stated that the words knowing and willful were "directed against callous and intentional violations of the law. . . ."[42] Insofar as bad faith is concerned, the courts have not required an advance definition.[43] However, procedural requirements of chapter 93A provide opportunity for bad faith behavior to be highlighted, particularly by a plaintiff's precise and thoroughly documented demand letter to the defendant.[44] One commentator has stated that "it would seem that 'bad faith' is a redundant term since its existence under a statute designed to promote settlement should be implied from the mischievous putting of a complainant to suit when knowledge or reason to know of the unlawfulness exists."[45] In *Heller,* the knowledge or reason to know was found by the court to be "that which exists after receipt of the complaint and not at the time of the alleged violation."[46] Although this formal notification calls the defendant to account for his actions, in most everyday situations the defendant has notice from the plaintiff before the demand letter stage. A telephone call, a letter of complaint, repeated requests for repairs, for example, give the defend-

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41. 78 Mass. Adv. Sh. 2850, 382 N.E.2d 1065 (1978).

42. *Id.* at 2858, 382 N.E.2d at 1070, *citing* Rice, *supra* note 15.

43. Slaney v. Westwood Auto, Inc., 366 Mass. 688, 705 n.20, 322 N.E.2d 768, 779 n.20 (1975), *citing* Rice, *supra* note 15, at 319. *See also* Rice, *supra* note 15 at 318-19.

44. For a full discussion of the Chapter 93A, § 9(3) demand letter requirement, *see* Section II *infra.*

45. Rice, *supra* note 15, at 319. The court in Heller v. Silverbranch Constr. Co., 78 Mass. Adv. Sh. 2850, 382 N.E.2d 1065 (1978), in reference to the bad faith requirement, stated that it is "an attempt to promote prelitigation settlements by making it unprofitable for the defendant either to ignore the plaintiff's request for relief or to bargain with the plaintiff with respect to such relief in bad faith." *Id.* at 2858, 382 N.E.2d at 1070.

Heller involved a situation where property buyers brought suit against a construction company that sold the property and against real estate broker acting in the transaction. Plaintiffs alleged that the property was defective due to a drainage problem and that they were induced to purchase by misrepresentations. *Id.* at 2850, 382 N.E.2d at 1067-68. The court concluded that the defendant "forced the plaintiff to litigate . . . when it not only had reason to know but had actual knowledge of the unlawfulness of its acts." *Id.* at 2859, 382 N.E.2d at 1071. *See* note 107 *infra* for the court's comment on plaintiff's demand letter.

46. *Id.* at 2858, 382 N.E.2d at 1070.

ant knowledge that the particular transaction is potentially problematic. Ideally, the defendant would look into the matter at this point. The plaintiff's attorney may advance the argument that the defendant be considered to have constructive notice in some situations. For instance, where a practice is common in an industry or trade the defendant in the business should be acquainted with its custom and frequent practices. When an employee of the defendant has been made aware of a situation, it is reasonable in many instances to impart that knowledge to the employer.[47] Although all of these are factors which are left to allegations and proof during the trial,[48] there is one consideration that is not subject to debate. If an alleged act or practice is included in those clearly declared unlawful by the Attorney General's rules and regulations,[49] the Supreme Judicial Court has stated that "there has been an effective allegation that the defendant had at least 'reason to know' that those acts or practices violated [section] 2."[50] Finally, "the requirements of section 9(3) are framed in the disjunctive";[51] it is not necessary to find a willful and knowing violation if it is shown that a defendant refuses in bad faith to settle.[52]

B. Judicial Interpretations of Section 9

The new language of chapter 93A, section 9(1)[53] may be applied to myriad situations. Because of the flexibility associated with the definitions of the words unfair and deceptive,[54] it is not realistic to confine

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47. *But see* Linthicum v. Archambault, 79 Mass. Adv. Sh. 2661, 398 N.E.2d 482 (1979). In plaintiff's suit against defendant roofing company, the court found that the "defendant's breach of the contractual warranties was not wilful, intentional, and deliberate, but essentially was due to inexperienced and unsupervised employees. While it is not a defense to a c. 93A claim that the defendant's conduct was negligent rather than intentional, negligence does not give rise to a multiple damages claim under § 11." *Id.* at 2668, 398 N.E.2d at 487-88.

48. *See* Slaney v. Westwood Auto, Inc., 366 Mass. 688, 705, 322 N.E.2d 768, 779 (1975). The court states:

> This amount [actual damages or $25, whichever is greater] is to be doubled or trebled if the court finds that the addressee's [of the demand letter] failure to grant relief on demand was made in bad faith with knowledge or reason to know that the act or practice complained of violated § 2. These are matters to be left to allegations and proof at trial.

49. 940 CMR § 3.00-3.18.

50. Slaney v. Westwood Auto, Inc., 366 Mass. 688, 705 n.20, 322 N.E.2d 768, 779 n.20 (1975), *citing* Rice, *supra* note 15, at 319.

51. Heller v. Silverbranch Constr. Corp., 78 Mass. Adv. Sh. 2850, 2859, 382 N.E.2d 1065, 1071 (1978).

52. *Id.* For a full discussion of the Chapter 93A, § 9(3) demand letter requirement, *see* Section II *infra*. If a plaintiff has had a reasonable offer of settlement from the defendant, made in accordance with the requirements of § 9(3), and if the plaintiff has rejected that offer, even if the defendant's acts were willful or knowing violations, the plaintiff cannot recover multiple damages. Thus, "even a willful or knowing violator of § 2 may limit his maximum potential damages by making a reasonable offer of settlement." Kohl v. Silver Lake Motors, Inc., 369 Mass. 795, 803, 343 N.E.2d 375, 380 (1976).

53. *See* note 38 and accompanying text *supra*.

54. *See* note 17 *supra*.

chapter 93A causes of action to specific areas or trends. It is practical, however, to examine how the courts have been interpreting the section 9(3) language ("willful or knowing" and "in bad faith with knowledge or reason to know")[55] in various circumstances in order to anticipate the application of these elements in future suits. Even a random selection of cases from one court is useful to attorneys wishing to become familiar with the scope of the statute.

1. *Strauss v. Cooper*

In *Strauss v. Cooper,*[56] a 1976 Boston Housing Court decision, the court found for the plaintiff in a suit where the landlord had refused to return the first month's rent of a tenancy which was terminated after four days. Plaintiff had been assaulted in a racial attack while moving into the apartment, and subsequently, the apartment was vandalized and became uninhabitable.[57] The landlord's retention of the rent was found to be in violation of chapter 93A, section 2(a), but, although he had not filed a written tender of settlement and an accompanying affidavit of its rejection, and had "not technically limited plaintiff's right to recovery,"[58] the landlord had made an oral offer to return half of the rent money. The offer was made prior to the plaintiff's demand letter[59] and it indicated to the court that the act complained of was "not a willful or knowing violation . . . or that the refusal to grant relief upon demand was made in bad faith."[60]

One of the factors the court considered along with the oral offer in determining whether the landlord's actions were in violation of section 2(a) was whether he had knowledge of the racial violence in the neighborhood. The court noted the "fine line"[61] that existed in determining the landlord's obligation to inform the tenant of the possibility of racial violence (plaintiff was a caucasian married to a black man). Although he may have had a duty to inform plaintiff if he knew of the racial violence, there was the possibility that his imparting a warning may have been considered by the plaintiff thinly disguised intimidation or racial discrimination. Similarly, if the landlord had been aware of the racial violence and anticipated that the apartments might be destroyed and the focus of litigation, and if he had chosen not to rent to minorities, he would also "subject himself to a charge of discrimina-

55. For the text of § 9(3), *see* note 27 *supra.*
56. Strauss v. Cooper, No. 03121 (Boston Hous. Ct. April 27, 1976) (Finding).
57. *Id.* at 1.
58. *Id.* at 5.
59. *Id.*
60. *Id.*
61. *Id.* at 3.

tion."[62] There was no evidence that the defendant had knowledge of the racial violence in the neighborhood or of "attitudes prevalent"[63] there.

The language in the opinion suggests that the court found the defendant's oral offer prior to the demand letter comparable to the statutory requirement of a reasonable offer of settlement made in good faith.[64] Absent a willful or knowing violation, a bad faith refusal to grant relief when there is knowledge or reason to know that the act complained of was unfair is the remaining element triggering multiple damages.[65] Finding no reason to award multiple damages, the court awarded the plaintiff not the half month's rent that the defendant had offered, but actual damages, or $108.36 (that is, her month's rent minus $16.64 for the four days she was able to occupy the apartment).[66] However, "predicated on the failure of the defendant to file a written offer of settlement," plaintiff was awarded $125.00 in attorney's fees and costs.[67]

Common sense dictates that complying with the statute to the letter makes the task of showing a good faith effort much easier. Defendants' attorneys who fail to respond to plaintiffs' demands for relief are not only taking an unnecessary risk but are acting irresponsibily in the face of the potential harm facing the defendants who find themselves subject to liability.[68]

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62. *Id.*

63. *Id.*

64. *Id.* at 5. The court stated:

> There is in evidence, the fact that the landlord did offer orally to return half of the rent money, and this offer was made shortly after the plaintiff found herself unable to move into the premises. While this offer does not satisfy the techical requirement of the law to limit recovery, it does indicate to the court that the use or employment of the act was not a willful or knowing violation of Mass. Gen. Laws, ch. 93A § 2, or that the refusal to grant relief upon demand was made in bad faith.

Id.

65. *See* note 27 *supra.*

66. Strauss v. Cooper, No. 03121 (Boston Hous. Ct. April 27, 1976) (Finding at 5).

67. *Id.* at 6. Technically, if the defendant makes a reasonable offer of settlement pursuant to chapter 93A, § 9(3) which the plaintiff refuses, the plaintiff is not entitled to attorney's fees beyond the date of refusal of the reasonable offer. *See* Kohl v. Silver Lake Motors, Inc., 369 Mass. 795, 801, 343 N.E.2d 375, 379 (1976). In Strauss v. Cooper, No. 03121 (Boston Hous. Ct. April 27, 1976), the court offered no time breakdown of the fee award so we cannot be sure what factors entered into the court's determination of the amount of the fee. For a full discussion of the Chapter 93A provision for attorney's fees, *see* Section III *infra.*

In *Kohl,* decided one month prior to *Strauss,* the Supreme Judicial Court commented on the offer of settlement requirement. In *Kohl,* the defendant had made an offer which was refused. The court stated: "Of course, the provision for multiple damages creates a strong incentive for a willful or knowing violator of § 2 to make a particularly generous settlement offer, hoping thereby to have limited his potential liability and perhaps to have avoided costly litigation." 369 Mass. at 803 n.7, 343 N.E.2d at 380 n.7.

68. York v. Sullivan, 369 Mass. 157, 338 N.E.2d 341 (1975), was similar to Strauss v. Cooper, No. 03121 (Boston Hous. Ct. April 27, 1976), insofar as the substitute for the response to the demand letter. However, it produced the opposite result. In the tenants' action against the landlord, the defendants made no written offer of relief. The trial judge ruled that defendants' agreement at a preliminary hearing (regarding cancellation of lease, rent payment, eviction pro-

2. *Schiff v. Capodilupo and Capco Realty*

In *Schiff v. Capodilupo and Capco Realty,*[69] plaintiff's rent was subject to rent control and limited to $104.00 and later $118.00 per month; she was never informed of this and she was charged $160.00 per month throughout her tenancy.[70] When the plaintiff received information from the Boston Rent Control Administration regarding her legal maximum rent adjustment and discovered the discrepency, she adjusted her rent payment to the $118.00 amount and cancelled a prior check.[71] Defendants' attorney communicated with plaintiff after she adjusted her payment. He offered to answer any questions regarding the matter.[72] A little more than two weeks later, defendants' attorney again communicated with plaintiff, this time stating that her stopping payment on her $160.00 rent check in an effort to substitute the $118.00 check was "a criminal offense constituting larceny."[73] He also wrote that he would seek a criminal complaint for her arrest.[74]

Plaintiff submitted a second check for $118.00 which was accepted as payment of the following month's rent. At about the same time, she received a notice to vacate because of nonpayment of rent in the amount of $42.00 for the month of March, 1977. Pursuant to the terms of her lease, plaintiff gave defendant written notice of her intention to leave the premises and terminate her lease at the end of May, 1977.[75] Plaintiff received a response to her demand letter wherein defendant's attorney stated he would make no offer of settlement. At the time of trial, plaintiff still had not received her security deposit.[76]

There was a question in the case regarding the statute of limitations

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cedures) "was 'reasonably calculated to relieve the tenants of any substantial actual damages,' [and] that it had 'the practical effect of giving' them 'the opportunity to mitigate their damages,' and that it should 'be sufficient to limit recovery to the relief offered, if' they 'were otherwise entitled to prevail.' " *Id.* at 165, 338 N.E.2d at 347. The Supreme Judicial Court disagreed. The defendants' offer, the court said, besides being unreasonable in relation to the injury complained of, "utterly failed to comply with the formal requirements of § 9(3)." *Id.*

For a full discussion of the chapter 93A, § 9(3) demand letter requirement, *see* Section II *infra.*

69. No. 06660 (Boston Hous. Ct. May 20, 1980) (Finding and Order). The complaint was brought pursuant to MASS. GEN. LAWS ANN., ch. 185A, §§ 2 and 3; ch. 186, § 15B; ch. 231A, § 1; ch. 93, § 49; ch. 93A, §§ 1-11; ch. 108, and to ch. 842 of the Acts of 1970, ch. 19 of the Ordinances of 1972 of the City of Boston, and ch. 15 of the Ordinances of 1975 of the City of Boston, and ch. 15 of the Ordinances of 1975 of Boston. Schiff v. Capodilupo and Capco Realty, No. 06660, (Boston Hous. Ct. May 20, 1980) (Finding and Order, at 1).

70. *Id.* at 2-4.

71. *Id.* at 4.

72. *Id.*

73. *Id.* at 5.

74. *Id.*

75. *Id.*

76. *Id.*

connected with a city ordinance.[77] A strict interpretation of the statute of limitations limited the period of time for which the plaintiff could recover for the retention or demand of overcharge.[78] However, the court found that there was an avenue of relief for the plaintiff in chapter 93A.[79] The defendants had not advanced an affirmative defense that their actions were not willful, nor did they prove this at trial.[80] Thus, they did not limit their liability under chapter 93A. The court stated: *"And if the Defendants sought safety in the protection of the Statute of Limitation, the [Massachusetts] Consumer Protection Act, in these circumstances, will not allow the Defendants that safe haven."*[81] In addition, the defendants' threat of criminal action was found to be in blatant violation of the collection practices proscribed in chapter 93, section 49, a violation of which constitutes an unfair and deceptive practice under chapter 93A.[82] The court found that this threat was

77. *Id.* at 10-19.

78. *Id.* at 19. The Ordinances of 1975, ch. 15, § 9(c) provides that any action brought for liquidated damages under the section's provisions "shall not be brought later than one year after the date of violation." Schiff v. Capodilupo and Capco Realty, No. 06660, (Boston Hous. Ct. May 20, 1980) (Finding and Order, at 10). Plaintiff's complaint was filed on October 18, 1977, thus limiting the period of recovery for overcharges to October 18, 1976. However, the landlord first became aware of the overcharge in March of 1977. From that point on, he could no longer claim mistake. *Id.* at 19.

79. *Id.* at 19-20. The court found that from June 1, 1976, through December 31, 1976, plaintiff had been overcharged at a total of $392. From January 1, 1977, to April 14, 1977, she was overcharged $168. Damages were trebled for a total of $1,680. *Id.* at 21-22.

80. *Id.* at 7.

81. *Id.* at 20 (emphasis in original). Plaintiff's recovery also included double the amount of the retained security deposit ($320) and three months' rent ($480) as a result of defendant's threat of eviction for plaintiff's alleged non-payment of rent. *Id.* at 22, 24-25.

82. *Id.* at 23. MASS. GEN. LAWS ANN. ch. 93, § 49 (West Supp. 1981) provides:

> No one who is a creditor or an attorney for a creditor, or an assignee of a creditor, of a natural person present or residing in Massachusetts who has incurred a debt primarily for personal, family or household purposes shall collect or attempt to collect such debt in an unfair, deceptive or unreasonable manner.
>
> For the purposes of this section, such collection or attempt to collect shall be deemed unfair, deceptive or unreasonable if:
>
> (*a*) The creditor communicates, threatens to communicate, or implies the fact of such debt or alleged debt to a person other than the person who might reasonably be expected to be liable therefor,... except with the written permission of the alleged debtor. The provisions of this paragraph shall not prohibit a creditor from notifying a debtor of the fact that the creditor may report a debt or alleged debt to a credit bureau or engage an agent or an attorney for the purpose of collecting the debt or alleged debt. For the purposes of this paragraph, the use of language on envelopes indicating that the communication relates to the collection of a debt shall be deemed a communication of such debt or alleged debt.
>
> (*b*) The creditor communicates directly with the alleged debtor after notification from an attorney representing such debtor that all further communications relative to the debt should be addressed to him.
>
> (*c*) The creditor communicates with the alleged debtor in such a manner as to harass or embarrass the alleged debtor, including, but not limited to communication at an unreasonable hour, with unreasonable frequency, by threats of violence, by use of offensive language, or by threats of any action which the creditor in the usual course of business does not in fact take.
>
> (*d*) The creditor communicates with alleged debtors through the use of forms or instruments that simulate the form and appearance of judicial process.
>
> Failure to comply with the provisions of this section shall constitute an unfair or deceptive act or practice under the provisions of chapter ninety-three A.

willful under chapter 93A, and even though there were no actual damages, plaintiff was awarded seventy-five dollars. In making this award, the court noted that "loss of money or property is no longer a prerequisite for G.L., c. 93A, section 9 action."[83]

This case illustrates the flexibility of chapter 93A alone and when applied in conjunction with another statute. Besides attorney's fees, plaintiff's total award was $2,555.00, plus interest and costs.[84]

3. *A.C. Williams v. Hart*

Just as in *Schiff,* another recent Boston Housing Court decision illustrates the potential power of the new statutory language of the 1979 amendment to chapter 93A, section 9 (1).[85] In *A.C. Williams v. Hart,*[86] the court awarded defendant a total of $23,788.56[87] for plaintiff's violation which included failure to return a security deposit, retaliatory eviction, wrongful eviction, unlawful conditions in apartment, physical and emotional distress and miscellaneous violations including wrongful entry and commencing summary process without notice to vacate.[88] All damages were trebled because the plaintiff's conduct was found not only to be willful, but to represent "a cruel disregard for the basic rights and human needs of his tenants ... [and] a lack of respect for the orders of this Court. . . ."[89] Under the new amendment, the court noted, " 'any person who has been injured' by a violation of § 2 may

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83. Schiff v. Capodilupo and Capco Realty, No. 06660 (Boston Hous. Ct. May 20, 1980) (Finding and Order, at 23-24). The court's language regarding this violation is particularly interesting:

> When considered in the light that this letter was in response to a *disputed* debt, it becomes an even more serious act and must be considered willful under C.93A. The Court though finds no actual damages, even though it was alleged. But loss of money or property is no longer a prerequisite for a G.L. c. 93A, § 9 action. The court will award the Plaintiff, for Count 8, $75 (seventy-five dollars).

Id. (emphasis in original). *See* note 38 and accompanying text *supra.*

84. *Id.* at 25. Plaintiff was awarded attorney's fees of $2,000. *See* Section III *infra* for a discussion of fee allocations in this and other Chapter 93A actions.

85. *See* note 38 and accompanying text *supra.*

86. No. 16328 (Boston Hous. Ct. July 29, 1980) (Assessment of Damages).

87. *Id.* at 21. This action was before the court after plaintiff defaulted on defendant's counter claims. *Id.* at 1. The court stated:

> Under § 9(1) of the Act [Chapter 93A], a person who has been injured by any act or practice violating § 2 may bring an action in Housing Court for damages, and under § 9(3), when such an action is brought by way of Counterclaim, there is no need to send a thirty (30) day demand letter as a prerequisite to bringing the claim.

Id. at 11.

88. *Id.* at 20-21.

89. *Id.* at 18. Defendant did not provide heat in plaintiff's apartment, neglected plumbing repairs, failed to rid the building of rats, entered plaintiff's apartment on several occassions when she was not at home, emptied plaintiff's apartment of some of her goods and valuables despite a temporary restraining order, forced plaintiff out of her apartment in the middle of winter, caused some of her possessions to be put into storage, and items were missing upon plaintiff's removal of her goods. *Id.* at 3-11.

bring an action for damages . . ., and the clear implication is that 'actual damages' must now be read to include all types of injury."[90]

Regarding emotional distress, the court noted that it has been recognized as compensable in the Commonwealth even when it is the only element of damage, "when inflicted intentionally by conduct that exceeds all bounds of decency."[91] The court found that there was nothing preventing mental distress of a similar nature from being compensable, and allowed damages for this element even though there was no medical evidence to support the claim.[92]

Just as the statute of limitations offered little shelter in *Schiff* in the face of chapter 93A, the defendant's behavior in *A.C. Williams* led the court to liberally interpret the section 9(1) language of the statute because the defendant had so blatantly ignored the type of behavior the statute was designed to encourage.

These cases indicate the human ingenuity that chapter 93A and its predecessor, the Federal Trade Commission Act, attempt to limit. Additionally, they reveal the power of the Massachusetts statute and the impact the double or treble damages provision can have in the hands of a knowledgeable litigator.

II. THE WRITTEN DEMAND FOR RELIEF

Another aspect of chapter 93A is the written demand for relief.[93] Once the attorney has assessed the client's information regarding an alleged violation and determined that he or she will proceed, a carefully drawn demand letter becomes the *sine qua non* of the chapter 93A action.

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90. *Id.* at 13.

91. *Id.* at 16 (citation omitted).

92. *Id.* The court's breakdown of damages included $6,000 ($2,000 actual x 3) for physical and emotional distress resulting from wrongful eviction. *Id.* at 21. The court's language regarding emotional distress is worthy of note:

> Finally, "actual" or compensatory damages must include the emotional distress suffered by Valerie Hart as a result of being suddenly stripped of her home and all her belongings. . . . Such damages have traditionally been included under the term "actual damages," and to exclude them in this case would be inconsistent with the remedial purposes of the Consumer Protection Act, as amended. The Courts of this Commonwealth have for some time recognized that emotional distress is compensable, even without any other element of damage, when inflicted intentionally by conduct that exceeds all bounds of decency. *Agis v. Howard Johnson Co.*, 371 Mass. 140 (1976). There is no reason why mental distress caused by C. 93A violations of a willful and outrageous nature, as here, should not also be compensable.
>
> The extent of Ms. Hart's emotional distress can hardly be adequately described in the affidavits of lay persons, and she did not obtain any professional evaluation. But where circumstances of the case compel an inference that the injured party was subjected to great mental strain, and where the evidence of an independent lay witness confirms this inference, the absence of medical evidence should not bar recovery for this element of damages.

Id. at 15-16.

93. MASS. GEN. LAWS ANN. ch. 93A, § 9(3) (West Supp. 1981). For the text of § 9(3), see note 27 *supra*. "A demand letter listing the specific deceptive practices claimed [to be in violation of Chapter 93A] is a prerequisite to suit and as a special element must be alleged and proved." Entrialgo v. Twin City Dodge, Inc., 368 Mass. 812, 813, 333 N.E.2d 202, 202 (1975).

The Supreme Judicial Court stated in *Slaney v. Westwood Auto, Inc.*[94] that this letter serves two functions. First, it notifies the potential defendant of claims alleging unlawful conduct and it encourages negotiation and settlement.[95] This protects the "innocent violator."[96] The alleged wrongdoer may take the opportunity to investigate his liability, determine his position in the light of the allegations and compromise in an effort to avoid double or treble damages and attorney's fees.[97] Once a reasonable offer of settlement is made and accepted, the action ceases.[98] The second role of the letter is to "operate as a control on the amount of damages which the complainant can ultimately recover if he proves his case."[99] Should the potential defendant make a reasonable offer that is refused, he is "entitled by affidavit and other evidence to prove the tender and refusal of the offer of settlement."[100] If the court later finds that the offer was reasonable, the successful

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94. 366 Mass. 688, 704, 322 N.E.2d 768, 779 (1975).

95. *Id.*

96. Annot., 12 MASS. GEN. LAWS ANN. 57, 59 (West Supp. 1981). The author states: "[T]he innocent violator is provided with an opportunity to eliminate penal damages and attorneys' fees by making a bona fide compromise offer or refund during the thirty-day demand period by a consumer or in answer to a businessman's suit." *Id.*

97. In order to encourage settlements and discourage litigation, section 9 (3) requires as a condition to filing a bill in equity that the petitioner mail or deliver a written complaint to the potential respondent at least thirty days prior to the filing of the bill. During this period, the complainee has the opportunity to investigate and consider both the facts of the case and the applicable law, including the precedents that are relevant, and to decide whether or not to make an offer of settlement to the complainant.

Rice, *New Private Remedies for Consumers: The Amendment of Chapter 93A*, 54 MASS. L.Q. 307, 318 (1969). The requirement of the written demand for relief forces a decision out of the defendant. Since it is impossible to negotiate if there is not some familiarity with the facts of the case, the imposition of this burden of investigation on the defendant makes it easier for both parties. The defendant, through his response can illustrate his good faith, make a reasonable inquiry, an effort to work with the plaintiff, or finally, if the circumstances call for it, a reasonable offer of settlement. The plaintiff has the opportunity to illustrate what he considers the bases for settlement. He can reduce his demands to a monetary amount or he can simply identify the applicable law, identify categories of alleged infractions and negotiate a settlement with the defendant based on their mutual assessment of damages. In either case, should a settlement not be reached, both the plaintiff and the defendant who make effective use of the demand letter have eased their future evidentiary problems. Therefore, the demand letter requirement becomes important not only because it is mandated, but it eases the burden of the practitioner who carefully drafts the initial demand or the response.

98. A defendant who realizes that he has violated the statute has a strong incentive to settle at the demand letter stage. Not only does he risk double and treble damages, but because the statute provides for reasonable attorney's fees, the recalcitrant defendant assumes a potentially heavy burden. The Massachusetts Supreme Judicial Court has declared that the judge "should not treat attorney's fees as part of the 'injury actually suffered by the petitioner.' " Kohl v. Silver Lake Motors, Inc., 369 Mass. 795, 801, 343 N.E.2d 375, 379 (1976). Although the attorney's fees provision has not been as effective a catalyst as the threat of double or treble damages, it should not be overlooked by the defendant. A defendant who has received a clearly drafted and thorough demand for relief, and who has shown a bad faith refusal to negotiate or who has made an unreasonable offer of settlement, will be in a very poor position in court. At the litigation stage, it is he alone who has forced the procedure and caused the additional attorney's fees.

99. Slaney v. Westwood Auto, Inc., 366 Mass. 688, 704, 322 N.E.2d 768, 779 (1975).

100. Rice, *supra* note 97, at 318.

plaintiff is thereby "limited to the amount of the offer."[101] In addition, the plaintiff who refuses a reasonable offer of settlement is denied attorney's fees and costs incurred after the refusal.[102]

In *Kohl v. Silver Lake Motors, Inc.*,[103] the Supreme Judicial Court found a reasonable offer of settlement had been made.[104] Consequently, the plaintiff/automobile buyer's recovery was limited to "the relief tendered (plus attorney's fees incurred prior to the date of the buyer's rejection of the tender. . .)."[105] The court stated that this would be so "even if the seller's conduct was a willful or knowing violation of the act."[106] Thus, it is apparent that both parties must be reasonable at the demand letter stage and deal honestly in an effort to settle.

Just as there are effective[107] and ineffective[108] demand letters, the

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101. *Id. See also* MASS. GEN. LAWS ANN. ch. 93A, § 9(3) (West Supp. 1981).

102. *See* MASS. GEN. LAWS ANN. ch. 93A, § 9(4) (West 1972).

103. 369 Mass. 795, 343 N.E.2d 373 (1976).

104. *Id.* at 797, 343 N.E.2d at 377.

105. *Id.*

106. *Id.* There was no question in *Kohl* as to the adequacy of the plaintiff's demand letter. The demand letter

> asserted that the substitution of vehicles was in violation of G.L. c. 93A, § 2; that the vehicle had needed extensive repairs; and that it lacked optional features which were on or represented to be on the original vehicle. The letter demanded refund of the entire purchase price and further damages of $1934.38. Although not itemized, the further damages were attributed to the rental cost of vehicles used while the buyer's vehicle was being repaired; the cost of the missing optional items; the sales and excise taxes paid on the vehicle; the registration and title fees; insurance premiums; "the loss of time at work and the potential effect of such absence upon his continued employment;" "extreme frustration, discomfort and inconvenience" caused to the buyer and his family; and his attorney's fees to date.

369 Mass. at 798 n.2, 343 N.E.2d at 377 n.2. Silver Lake's response was clearly reasonable; the court provided the following excerpt:

> Silver Lake Dodge is willing to replace your 1973 Dodge car at no cost to you with any automobile that we have in stock with comparable equipment, crediting or debiting you with any equipment that is more or less than you had purchased on your present 1973 Dodge car.
>
> Silver Lake Dodge also agrees to allow you to purchase a new 1974 Dodge of your choice allowing you the full amount of money paid to Silver Lake Dodge on your 1973 Dodge Dart in trade.
>
> Silver Lake Dodge also offers a third option of the return of the 1973 Dodge Dart in undamaged condition for which we will return all monies received by Silver Lake Dodge in payment of the 1973 Dodge Dart . . . by you.

Id. at 798 n.3. 343 N.E.2d at 377-78 n.3. *Cf.* Entrialgo v. Twin City Dodge, Inc., 368 Mass. 812, 333 N.E.2d 202 (1975). For discussion of the demand letter in *Entrialgo,* see note 108 *infra.*

107. *See, e.g.,* Heller v. Silverbranch Constr. Corp., 80 Mass. Adv. Sh. 2850, 2858-59, 382 N.E.2d 1065, 1071 (1978) where the demand letter

> specifically set out the text of § 2 and par. XV of the Attorney General's Rules and Regulations. Moreover, the plaintiffs explained in great detail exactly how the defendant corporation, through the actions of its president, violated those provisions. In light of the judge's findings of fact, findings which we as an appellate court are not inclined to disturb, we conclude that Silverbranch forced the plaintiffs to litigate their claim when it not only had reason to know, but had actual knowledge of the unlawfulness of its acts. Such conduct is precisely the type that § 9(3) was designed to deter, and the judge's award of multiple damages was the appropriate punishment.

See also York v. Sullivan, 369 Mass. 157, 161-62, 338 N.E.2d 341, 346 (1975) (demand letter "sufficient to give the defendants 'an opportunity to review the facts and the law involved to see if the requested relief should be granted or denied' and to enable them to make 'a reasonable tender of settlement' in order to limit the recoverable damages.").

108. *See, e.g.,* Entrialgo v. Twin City Dodge, Inc., 368 Mass. 812, 333 N.E.2d 202 (1975).

same can be said for offers of settlement.[109] Thoroughness and clarity are important to both documents. In the response, the value of the offer should be obvious.[110]

Because the statute does not require a response to the demand letter,[111] potential defendants do not always respond. Although this is not always fatal,[112] the individual who chooses to ignore the demand is

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Plaintiff purchased a used car from defendant. The retail installment contract signed by plaintiff but not by defendant failed to disclose the annual percentage rate of the finance charge. Plaintiff sent a demand letter alleging that the car was defective and that plaintiff had been "deceptively influenced" to purchase the car by defendant's representations. The matter was tried before a master who found violations regarding the retail installment contract but no evidence of fraud or misrepresentation. Upon plaintiff's motion to recommit the report to the master for the taking of further evidence, the superior court refused, confirmed the master's report and dismissed the bill of complaint. In a rescript opinion, the court said:

> First, with respect to the credit disclosure violations, no relief is available under G.L. c. 93A *because of the failure to complain of this practice in the c. 93A*, § 9(3), *demand letter.* A demand letter listing the specific deceptive practices claimed is a prerequisite to suit and as a special element must be alleged and proved.

Id. at 812, 333 N.E.2d at 202 (emphasis added).

109. *Compare* Kohl v. Silver Lake Motors, 369 Mass. 795, 343 N.E.2d 375 (1976), *with* Patry v. Harmony Homes, Inc., 80 Mass. App. Ct. Adv. Sh. 1085, 1088, 404 N.E.2d 1265, 1268 (1980). In *Patry,* plaintiffs purchased a mobile home and agreed to lease a certain lot from defendants. Defendants had sought permission from the Chicopee board of health to expand its rental operation to land adjacent to its mobile home park. However, defendants did not have certain knowledge when plaintiffs selected a lot in the new expansion area that it had a permit to use the home's intended lot. The permit was not forthcoming, and plaintiffs could not install their mobile home on the lot on the agreed-upon date. Several months passed before a lot suitable to the plaintiffs became available. The trial judge found the defendants' settlement offer reasonable and sufficient to limit plaintiffs' recovery. On appeal, however, the Massachusetts Appeals Court disagreed:

> We construe the settlement tendered as an essentially bare offer to sell the mobile home for the account of the plaintiffs. The offer to return "the purchase price which was paid out of the proceeds of such a sale" indicates to us that the amount offered by the defendants was intended to be limited to the return of so much of the purchase price as might be realized upon a resale of the mobile home. Such an offer is too indefinite as to the minimum recovery to be regarded as reasonable. We do not suggest that an offer must be made in a specific dollar amount to be reasonable, but it should be in a form that would allow its value to be ascertained.

Id. at 1090, 404 N.E.2d at 1268 (footnote omitted).

110. *Id.*

111. *See* note 27 *supra.*

112. Sullivan v. Dykens, No. 3634 (Worcester Super. Ct. May 1977) (Findings and Order). The court stated:

> The plaintiffs did properly notify the broker of their claim in writing as required by c. 93A, § 9, and the broker did not respond to the demand letter. However, there has not been a showing to the Court's satisfaction that in failing to respond the broker was intentionally seeking to avoid her responsibility in bad faith, knowing that she committed a deceptive practice. In this regard the statute requires the recipient of such demand letter to make a searching inquiry of all of the facts and to arrive at a conclusion as to whether or not liability may exist. In this case the broker made such an inquiry and concluded that she was not responsible because she felt that she did not in fact make the statement or, if she did, that it was a good faith statement based on what the seller had told her. There was no showing of a bad faith refusal to respond to the demand, and absence (sic) such a showing there can be no multiplication of damages on this "prong" of the statute. . . . The plaintiffs argue that the broker's denial in court of ever having made the statement found actionable should require a finding that multiplication of damages is appropriate. In some circumstances this may be so, but I find here that the basic thrust of the broker's position is her reliance on what she was told by the seller at the time of the listing. If she maintains, as she did, a position of good faith reliance on what she was told by a third

well advised to be sure that he is liability free. At the very minimum, he puts himself in a weaker position at the outset of litigation.[113] From a purely strategic perspective, the defendant who is convinced that he has not violated any statutory provisions should at least make a good faith effort to reply, state his rationale for not offering to settle, and thereby minimize future liability if his assessment proves wrong. The availability of the demand/offer component in chapter 93A provides a great deal of "justification for the fullest interpretation of the 'unfairness' mandate."[114] A juxtaposition of the broad range of interpretations given the words "unfair"[115] and "deceptive"[116] with the informing capacity of a well-executed demand letter can leave a potential defendant quite well informed. Given this and a thirty day period in which to investigate allegations, the defendant whose acts or practices are found to be unfair and/or deceptive will be hard pressed to disclaim "reason to know"[117] and avoid substantial financial sanctions.

III. ATTORNEY'S FEES

Chapter 93A, section 9(4) confers power on the courts to award attorney's fees to the successful litigant.[118] The rationale behind this provision is that private parties acting as private attorneys general can pur-

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person, I do not think additional damages should be assessed, *noting, however, that her failure to respond to the plaintiffs' demand letter was far from prudent.*

Id. at 11-12 (emphasis added).

113. *See* note 97 and accompanying text *supra.*

114. Annot., *supra* note 96, at 59.

115. *See* note 17 *supra.*

116. *Id.*

117. *See* Rice, *supra* note 97, at 319.

118. MASS. GEN. LAWS ANN. ch. 93A, § 9(4) (West 1972).

The statute states:

> If the court finds in any action commenced hereunder that there has been a violation of section two, the petitioner shall, in addition to other relief provided for by this section and irrespective of the amount in controversy, be awarded reasonable attorney's fees and costs incurred in connection with said action; provided, however, the court shall deny recovery of attorney's fees and costs which are incurred after the rejection of a reasonable written offer of settlement made within thirty days of the mailing or delivery of the written demand for relief required by this section.

Id. This provision is in accord with the "American rule" that fees are not ordinarily recoverable by the prevailing litigant in the absence of statutory authorization. *See* Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240, 247-68 & nn.18-43 (1975). Even though in England there has been statutory authorization to award counsel fees and costs since 1278 (*Id.* at 247 n.18), in the United States the tradition has been to disallow fees to the prevailing party unless they are expressly provided for by statute. *Id.* at 268-69. The United States Supreme Court strongly reaffirmed this tradition in *Alyeska.* The Court stated:

> It [American rule] has been criticized in recent years, and the courts have been urged to find exceptions to it. It is also apparent from our national experience that the encouragement of private action to implement public policy has been viewed as desirable in a variety of circumstances. But the rule followed in our courts with respect to attorney's fees has survived. It is deeply rooted in our history and in congressional policy; and it is not for us

sue protection of their rights and should not face "diminution of their award by payment of fees."[119] The Supreme Judicial Court observed in *Slaney v. Westwood Auto, Inc.*[120] that "the complexities of the machinery of justice are often severe enough to discourage even the seasoned attorney,"[121] and because "[i]t is a central premise of our legal system that professional advocates will represent the parties to a dispute,"[122] an attorney's fee provision was selected as an element to ensure that the general remedy be effective. Chapter 93A and the federal statutes which provide for attorney's fees present an identical formulation of the amount of the award where one is appropriate.[123] All of the statutes mandate that "reasonable" fees should be awarded.[124] However, with few exceptions, "they almost never attempt to define 'reasonable'."[125] Consequently, the bulk of attention given to fee allocations has produced redundant, vague guidelines subject to a broad range of interpretation. As a result, the state of the law regarding attorneys' fees is contradictory, confused and haphazard. "[T]here are

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to invade the legislature's province by redistributing litigation costs in the manner suggested by respondents and followed by the Court of Appeals.

Id. at 270-71 (footnotes omitted). *Aleyska* presents a thoroughly detailed history of this tradition. *See also* Kohl v. Silver Lake Motors, Inc., 369 Mass. 795, 801, 343 N.E.2d 375, 379 (1976); Oakes, *Introduction: A Brief Glance at Attorneys' Fees After Aleyska,* 2 W. NEW ENGLAND L. REV. 169 (1979); Comment, *Court Awarded Attorneys' Fees in Massachusetts,* 2 W. NEW ENGLAND L. REV. 361 (1979).

119. Sullivan v. Dykens, No. 3634, at 13 (Worcester Super. Ct. May 1977) (Findings). *See also* Derfner, *The True "American Rule": Drafting Fee Legislation in the Public Interest,* 2 W. NEW ENGLAND L. REV. 251 (1979). *See also* note 118 and accompanying text *supra.*

120. 366 Mass. 688, 322 N.E.2d 768 (1975).

121. *Id.* at 699, 322 N.E.2d at 776.

122. *Id.* "Because of the inability of the [Consumer Protection] Division [of the Attorney General's Office] to handle all the complaints it was receiving, it became clear that private remedies were needed under c. 93A. Moreover, it was apparent that for these private remedies to be effective, several problems would have to be overcome in the enabling legislation." *Id.*

123. *See* Berger, *Court Awarded Attorneys' Fees: What Is "Reasonable"?,* 126 U. PENN. L. REV. 281 (1977). The author states: "Although these statutory attorneys' fee provisions vary somewhat in their entitlement standards (the circumstances under which a party is eligible for a fee award), they are virtually identical in their language pertaining to the amount of the award where one is appropriate." *Id.* at 305.

124. *Id.* Berger provides a list of seventy-five federal statutes which confer authority upon the federal courts to award attorneys' fees. *Id.* at 304 n.104.

125. *Id.* at 305. One of the exceptions is the Consumer Product Safety Commission Improvement Act of 1976, ch. 164, 90 Stat. 503 (codified in scattered sections of 15 U.S.C.). Another is the Natural Gas Pipeline Safety Act Amendments of 1976, § 8, 49 U.S.C. § 1686(e) (1976). The Consumer Product Safety Commission Improvement Act of 1976 states:

> [A] reasonable attorney's fee is a fee (A) which is based upon (i) actual time expended by an attorney in providing advice and other legal services in connection with representing a person in an action brought under this subsection, and (ii) such reasonable expenses as may be incurred by the attorney in the provision of such services, and (B) which is computed at the rate prevailing for the provision of similar services with respect to actions brought in the court which is awarding such fee.

15 U.S.C. § 2059(e)(4) (1976). *See* Berger, *supra* note 123, at 305-06 n.114. Berger offers this text of the Consumer Product Safety Commission Improvement Act of 1976 as a source of guidance to the courts which are confronted with the task of interpreting other statutes which provide for fees.

nearly as many approaches to the issue as there are judges."[126] The problem arises from the courts' failure to state with precision how they are using various standards, what weight they are assigning to particular factors and why, and the basis for their consideration of certain factors and their elimination of others.[127]

A. Chapter 93A Attorney's Fees Awards

A thoroughly prepared, precisely documented chapter 93A case is not complete with the determination of damages and costs. What awaits the successful plaintiff's counsel is the fee determination, and what confronts him is the same lack of objectivity and consistency that is found in fee allocations at the federal level.[128] The implementation of the chapter 93A fee allocation provision is perhaps one of the most significant weaknesses of an otherwise efficient package. A review of various court decisions will illustrate the problem and highlight the disparities that can result.

1. *Hannon v. Original Gunite Aquatech Pools, Inc.*

Hannon v. Original Gunite Aquatech Pools, Inc.[129] involved the allegation of unfair and deceptive practices arising out of a contract with defendant to construct a swimming pool. Additional allegations of

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126. Berger, *supra* note 123, at 284. This article is a comprehensive presentation of the fee issue. It deals with the chaotic state of the law on how a reasonable fee is determined, the sources — equitable and statutory — of judicial power to award fees, the presentation of what a reasonable fee is in either context. It also suggests a framework for determining a reasonable fee. It is an invaluable source for one who is unfamiliar with the variables that contribute to fee determination and it crystallizes the monumental problem that confronts legislators, judges and attorneys at all levels.

One indication of the contradictions Berger highlights is the discrepancy between fee awards in private antitrust actions under section 4 of the Clayton Act (15 U.S.C. § 15 (1976)) and awards in employment discrimination suits under Title VII of the 1964 Civil Rights Act (42 U.S.C. § 2000e-5(k) (1976)). Both provisions are designed to "encourage private enforcement of the underlying statutory policies." Berger, *supra* note 123, at 293. However, the antitrust actions bring far greater awards. *Id.*

Certainly, Congress has not mandated that one statute be favored insofar as large fee awards are concerned, yet a look at the results suggests such favoritism on the part of the courts. *Id. See also* Brown, *Calculation of Attorneys' Fees: Franchise and Antitrust Relief*, 2 W. NEW ENGLAND L. Rev. 297 (1979); Dunlap, *Attorney's Fees Against Government Defendants: Economics Requires a New Proposal*, 2 W. NEW ENGLAND L. REV. 311 (1979); Thome, *The Courts' Discretion in Assessing Fees Under the Civil Rights Attorney's Fees Awards Act of 1976*, 2 W. NEW ENGLAND L. REV. 283 (1979); Wolf, *Pendent Jurisdiction, Multi-Claim Litigation, and the 1976 Civil Rights Attorney's Fees Awards Act*, 2 W. NEW ENGLAND L. REV. 193 (1979). These articles are part of a Fall 1979 Symposium issue on attorneys' fees published by the WESTERN NEW ENGLAND LAW REVIEW.

127. "Many courts have done little more than give lip service to their consideration of such factors. . . . Other courts have discussed some or all of the factors *seriatim* and then jumped to a no less conclusory judgment." Berger, *supra* note 123, at 286. *See also* Annot., 21 A.L.R. Fed. 750 (1974); Annot., 57 A.L.R.3d 475 (1974).

128. *See* notes 125-127 and accompanying text *supra*.

129. No. 75-5474 (Middlesex Super. Ct. July 24, 1980) (Order).

commercial bribery and misrepresentation were included. Defendant counterclaimed for alleged money owed on the contract and applied for arbitration. The Better Business Bureau of Eastern Massachusetts made an award in which defendant was ordered to remedy certain defects in the pool (which he had offered to do on two prior occasions) and found that plaintiff owed defendant $1,483.25 for extra excavation costs and the balance of the contract price. Shortly thereafter, a motion by defendant to confirm the arbitration award was allowed by the Middlesex Superior Court. Plaintiff's motion to vacate the award was denied. Defendant's counterclaim included a count for attorney's fees and expenses and defendant considered this count open after the arbitration. Plaintiff considered all of the chapter 93A issues open. He contended that these were issues that could not be determined by arbitration, but only by the court.[130]

The court found that the arbitration award as confirmed precluded it from addressing plaintiff's claims and defendant's counterclaims, except for the matter of attorney's fees.[131] Nevertheless, because the issue was novel, the court made certain findings of fact to avoid future trial time and found: that the defendant had committed no unfair or deceptive practice; that the contract provision for arbitration did not preclude a chapter 93A action and was not unfair or deceptive; even though no offer of a specific financial settlement was made, defendant had acted reasonably in efforts to settle the dispute; plaintiff was not eligible for attorney's fees and defendant's claim for attorney's fees arose out of the contract.[132] Thus, the award was not a chapter 93A fees award; however, the court indicated that the plaintiff would have been entitled to "substantial"[133] fees had he been successful. We can reasonably assume that had the plaintiff been successful under chapter 93A, the court would have reached the fee assessment in the same manner.[134]

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130. *Id.* at 1-2.

131. *Id.* at 2-3. The court stated: "I rule that the arbitration award as confirmed forecloses the Court from making any different judgment on plaintiff's claims and the defendant's counterclaim, except for the matter of attorney's fees." *Id.* at 2.

132. *Id.* at 7-8. In referring to the contract involved, the court stated:

> [T]he plaintiffs are not entitled to attorney's fees under Chapter 93A. The defendant's claims for attorney's fees arise out of the contract language and present a different problem. That language appears in paragraph 4.1. Under the first sentence, the defendant is the "prevailing party" in Hannon's action to enforce rights under the contract, both in arbitration and in this action. Under the second sentence, the defendant is entitled to a fee for collecting the balance found by the arbitrator ($848.25 + $635.00 = $1,483.25). As an independent proposition, I would conclude that attorney's fees expended to collect money owed are unreasonable if the fees exceed the balance owed. Alternatively, if the fees were limited to the arbitration, I find that $750.00 would be a reasonable fee.

Id. at 8.

133. *Id.* at 9.

134. *Id.* at 8-9. The court states:

> Because of the Chapter 93A aspects and the class action issues, this case was not a simple collection case. Both counsel have submitted affidavits concerning the time ex-

What is noteworthy about the court's assessment of attorney's fees is that, based upon a statement of time spent, hourly rates and reasonable disbursements, the fees awarded to defendant were $19,118.00.[135] The court commented that the case was not a "limited" one and that it was plaintiff who was responsible for its complexity,[136] but beyond a few general remarks,[137] the assessment of fees can be reduced to a simple mathematical calculation.

2. *Hanner v. Classic Auto Body, Inc.*

In *Hanner v. Classic Auto Body, Inc.*,[138] the trial court awarded the successful plaintiff's attorney $25.00 in attorney's fees.[139] The dispute involved automobile repairs. Plaintiff was dissatisfied and stopped payment on her check. Defendant found plaintiff's car and towed it to Classic's garage. "The plaintiff filed suit in Superior Court alleging conversion and ... 'severe emotional distress.' "[140] Through a restraining order issued on her complaint, she recovered her car. Defendant filed suit for the amount of its bill, and the plaintiff responded by amending her complaint to add a chapter 93A, section 2 claim based on the assertion that the towing of the car was an unfair attempt to collect the bill.[141]

At trial, plaintiff waived all claims except the alleged chapter 93A

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pended, their hourly charges and expenses. I find that the time expended by each attorney was reasonable to "determine or enforce the rights" of their clients.

The plaintiffs' attorney has devoted 329.45 hours at a rate of $65.00 per hour — this totals $21,414.25. He also incurred reasonable expenses in the amount of $1,068.50 for a total of $22,482.75.

Id. at 8.

135. *Id.* at 9. The court reasoned:

The defendant's attorneys devoted the following hours:

Mr. Rosenberg — 228.6 hours at $75.00 per hour	$17,145.00
Mr. Schwartz — 32.1 hours at $25.00 per hour	802.50
	$17,947.50
Reasonable disbursements	1,170.50
Total	$19,118.00

I find these charges are fair and reasonable for the time expended. If the matter were limited to the matter of alleged defects in workmanship in a $7,000 swimming pool the fees would be wholly out of proportion. But the matter was not so limited. It was the plaintiffs who injected class action issues and sought relief under c. 93A, including multiple damages and attorney's fees. *Had the plaintiffs prevailed they would have been entitled to substantial attorney's fees.* I find that the defendant, as "prevailing party" [under contract provisions] is entitled to $19,118.00.

Id. (emphasis added).

136. *Id.*

137. *See* notes 134 and 135 *supra*. A similar approach was used in A.C. Williams v. Hart, No. 16328 (Boston Hous. Ct. July 29, 1980); to the $23,788.56 damages award, a $4,720 fee was added.

138. 80 Mass. App. Ct. Adv. Sh. 1219, 406 N.E.2d 686 (1980).

139. *Id.* at 1220, 406 N.E.2d at 687.

140. *Id.*

141. *Id.*

violation.[142] Defendant was awarded the full amount of its repair bill ($414.25),[143] and plaintiff was awarded the twenty-five dollar statutory minimum in damages without costs.[144] Upon a motion to amend judgment, the court granted plaintiff attorney's fees in the amount of twenty-five dollars and costs.[145] Ruling on the motion, the court found that the attorney's contribution had been "minimal."[146]

On review, the Massachusetts Appeals Court, noting that a successful plaintiff in a chapter 93A, section 2 action is entitled to reasonable fees "irrespective of the amount in controversy"[147] and listing certain factors that should be taken into account,[148] increased the award to $250.00.[149] The court found the original amount "clearly incommensurate with an objective evaluation of the services performed."[150] The court's language is particularly illustrative of the broader problem that exists when a fee allocation is appealed. The court remarked that "[i]n awarding fees in this case the [trial] judge *could have* considered" a variety of factors.[151] There is no breakdown by the trial court — with

142. *See* Brief for the Plaintiff-Appellant at 5, Hanner v. Classic Auto Body, Inc., 80 Mass. App. Ct. Adv. Sh. 1219, 406 N.E.2d 686 (1980).

143. Classic Auto Body, Inc. v. Hanner and Hanner v. Classic Auto Body, Inc., Nos. 8115, 8163, Findings and Rulings, at 3 (Essex Cty. Super. Ct. Nov. 1978) (the actions were consolidated for trial).

144. The court stated: "This court in its discretion denies recovery of any attorneys for costs which have been incurred." *Id.* at 4.

145. Brief for the Plaintiff-Appellant, *supra* note 142, at 6.

146. Motion to Amend Judgment Under Rule 59(e) of M.R.C.P., at 1, Classic Auto Body, Inc. v. Hanner and Hanner v. Classic Auto Body, Inc., Nos. 8115, 8163 (Essex Cty. Super. Ct. Dec. 5, 1978).

> The court finds "the reasonable attorney's fees and costs incurred in connection with said action" as that phrase is used in G.L. Chap. 93A sec. 9(4) to be in the amount of $25.00. The court is aware of the underlying strong public policy which is articulated by this statute providing for the assessment of reasonable attorney fees. It is noted however that in the resolution of this matter considering the totality of circumstances, the contribution of counsel for the consumer was, to understate the matter, minimal.

Id.

147. 80 Mass. App. Ct. Adv. Sh. at 1221, 406 N.E.2d at 688.

148. The court, *citing* Heller v. Silverbranch Constr. Corp., 78 Mass. Adv. Sh. 2850, 382 N.E.2d 1065 (1978) and Linthicum v. Archambault, 79 Mass. Adv. Sh. 2661, 398 N.E.2d 482 (1979), said:

> The amount of the fee is "largely discretionary" . . . and is to be based "not on what the attorney usually charges but, rather, on what his services were objectively worth. . . ." Factors in making such a determination are "(1) how long the trial lasted, (2) the difficulty of the legal and factual issues involved, and (3) the degree of competence demonstrated by the attorney." . . . "[T]he judge . . . [passing on the award] should [also] consider . . . the result obtained, the experience, reputation and ability of the attorney, the usual price charged for similar services by other attorneys in the same area, and the amount of awards in similar cases."

80 Mass. App. Ct. Adv. Sh. at 1221, 406 N.E.2d at 688.

149. *Id.* at 1222, 406 N.E.2d at 689.

150. *Id.* at 1222, 406 N.E.2d at 688, *citing* Heller v. Silverbranch Constr. Corp., 78 Mass. Adv. Sh. at 2861, 382 N.E.2d at 1071.

151. *Id.* at 1221, 406 N.E.2d at 688 (emphasis added). The court listed the following factors that the trial court might have considered:

> that much of the legal work was rendered in connection with the conversion claim in

the exception of the general assessment of the attorney's contribution — of the specific reasoning used in determining the fee allocation. On appeal, the same information presented to the trial court regarding the attorney's claim for reasonable fees was available.[152] The appeals court was more specific in its reasoning than the trial court, but its language offers little guidance to those looking for real clarification of the issue.[153]

B. The Dilemma of Fee Awards

In *Hanner v. Classic Auto Body, Inc.*[154] and *Hannon v. Original Gunite Aquatech Pools, Inc.*,[155] the determinations of attorney's fees are in striking contrast. These cases exemplify the inconsistencies and illustrate the inadequacy of typical approaches and their lack of predictive quality.[156]

> securing the restraining order, that the c. 93A claim was added after the car had been recovered and concerned fairly pedestrian legal issues, that the repair bill was a legitimate debt of the plaintiff, and that the potent artillery of c. 93A was used to dispose of a dispute which could have been better adjusted under the conversion action.

Id. at 1221-22, 406 N.E.2d at 688. Plaintiff's attorney filed the conversion claim and secured the restraining order in an effort to effect the return of plaintiff's car without delay. He added the chapter 93A claim subsequent to his compliance with the demand letter requirement and the thirty day period following the demand letter. Interview with Gerald L. Goodstein, Attorney for Bayla Hanner (Sept. 24, 1980).

152. The Plaintiff's Appellate Brief stated:

> The attorney for BAYLA HANNER presented into evidence his sworn affidavit of services rendered together with an itemized time sheet and a statement of his customary hourly rate. . . . Appellant's attorney also took the stand and was cross-examined by counsel for appellee's [sic] and had the full opportunity to delve into the question as to whether the services rendered listed in the affidavit were actually performed and whether services performed were reasonable. In fact counsel for Appellees did cross-examine Appellant's counsel. . . .

Brief for the Plaintiff/Appellant at 13-14, Hanner v. Classic Auto Body, Inc., 80 Mass. App. Ct. Adv. Sh. 1219, 406 N.E.2d 686 (1980). The plaintiff's attorney submitted in his Affidavit of Services a request for $1912 in fees for 38 1/4 hours expended.

153. The court stated:

> On a sufficiently informative record, we have considered that at the time the original action was amended, jurisdiction over c. 93A claims was vested exclusively in the Superior Court, that the claim appears to have been competently prepared, and that the trial (which lasted less than one day) resulted in a finding for the consumer. We have factored out of the award the considerable amount of time spent on the conversion claim as well as time spent on work which appears to be unnecessary or duplicitous. With due weight accorded to the variables that are within the personal observation of the judge, we think, even at journeyman's rates, that a reasonable award, including costs in this case, is $250. Anything less would require of counsel a heroic sacrifice out of spirit with the provisions of G.L. c. 93A.

80 Mass. App. Ct. Adv. Sh. at 1222, 406 N.E.2d at 688. Some of this language is particularly disturbing. Chapter 93A may be considered an additional remedy. *See* note 29 *supra*. As a result, there is inherent in its mandate the possibility of a parallel claim which will demand time that will overlap with time spent on the chapter 93A aspect of the case.

154. 80 Mass. App. Ct. Adv. Sh. 1219, 406 N.E.2d 686 (1980).

155. No. 75-5474 (Middlesex Super. Ct. July 24, 1980) (Memorandum Order).

156. Heller v. Silverbranch Constr. Corp., 78 Mass. Adv. Sh. 2850, 382 N.E.2d 1065 (1978), is often cited as the source for guidelines or determinative factors in fee assessment (even though

Successful plaintiffs' attorneys and attorneys considering taking on chapter 93A actions face a quagmire when it comes to fee determination. The problem does not exist because courts are without guidelines. There are factors that the courts consider in making fee allocations. The list most often cited or drawn from is based upon the guidelines provided by the American Bar Association's CODE OF PROFESSIONAL RESPONSIBILITY[157] and was set out in *Johnson v. Georgia Highway Ex-*

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other factors relevant to the specific case may be mentioned). *See* note 151 *supra*. *See, e.g.*, Goes v. Feldman, 79 Mass. App. Ct. Adv. Sh. 1456, 391 N.E.2d 943 (1979), where the court states: "The judgment included a substantial component on account of a legal fee awarded pursuant to G.L. c. 93A, § 9(4). The plaintiffs' brief attacks the evidentiary basis for fixing this fee. Determination of what was appropriate compensation for the plaintiffs' counsel was within the experience and expertise of the judge." *Id.* at 1466, 391 N.E.2d at 948 (citation omitted). In Darmetko v. Boston Hous. Auth., 79 Mass. Adv. Sh. 2159, 393 N.E.2d 395 (1979), the court, citing *Heller* and other state and federal cases, including Johnson v. Georgia Highway Express, Inc., 488 F.2d 714 (5th Cir. 1974), *infra* note 158, and DR 2-106(B), *infra* note 157, said that the amount was largely "in the discretion of the judge." Darmetko v. Boston Hous. Auth., 79 Mass. Adv. Sh. 2159, 2166, 393 N.E.2d 395, 400 (1979). Plaintiff had argued that the degree of success was a factor to be considered; however, because the court did not know how much weight the judge had given this factor ("The judge gave no explanation as to how he arrived at the amount of the fee." *Id.* at 2167, 393 N.E.2d at 400), the matter was remanded for a new determination of fees, "which may include attorney's fees on this appeal." *Id. See* Geller v. Matta and Kesser, No. 78-2499 Finding and Order, at 6 (Middlesex Super. Ct. January 31, 1980), where the court stated: "Based on the factors set out in *Heller* . . ., and with particular reference to the non-complexity of the factual and legal aspects of the matter, the Judgment shall include an attorney's fee of $1,000." *See also* Schiff v. Capodilupo and Capco Realty, No. 06660 Finding and Order, at 25 (Boston Hous. Ct. May 20, 1980), where the court states: "The Court will . . . award the Plaintiff reasonable attorney fees pursuant to *Heller* . . . and *Darmetko* . . . in the amount of $2,000.00." (citations omitted).

The language in *Heller* to which the above cases refer us is as follows:

> [W]here the award is provided for by statute and is assessed against the party having no contractual relationship with the attorney involved, the standard of reasonableness depends not on what the attorney usually charges but, rather, on what his services were objectively worth. . . . Absent specific direction from the Legislature, the crucial factors in making such a determination are (1) how long the trial lasted, (2) the difficulty of the legal and factual issues involved, and (3) the degree of competence demonstrated by the attorney. . . . A judge presiding over the action for which the plaintiff seeks reasonable attorney's fees has ample opportunity to acquire firsthand knowledge of all these factors. He thus can discern from his own experience as a judge and expertise as a lawyer, the amount that the attorney should be paid.

78 Mass. Adv. Sh. at 2860-61, 382 N.E.2d at 1071 (citations omitted); and

> In directing the judge to award reasonable attorney's fees in a c. 93A, § 9 action, the Legislature listed no specific facts requiring independent proof. From this, we conclude that the judge is to rely on his firsthand knowledge of the services performed before him.

Id. at 2862, 382 N.E.2d at 1072 (footnote omitted). *See* Berger, *supra* note 123, at 294, wherein the author states:

> Grading the quality of attorneys' work in setting their compensation creates an uneasy tension between the attorneys' duty to press their clients' interests vigorously and at times even contentiously before the court, and the fear of the attorneys that, in so doing, they may literally pay the price at the close of the lawsuit. While most lawyers will not pull their punches, nor will most courts arbitrarily punish overassertive attorneys or reward favored ones, those suspicions inevitably will undermine the confidence of the bar and the public in the integrity of the judicial fee-setting function.

157. ABA CODE OF PROFESSIONAL RESPONSIBILITY, DR 2-106(B) (1979).

press, Inc.[158] However, it is anyone's guess which of the variety of factors the courts will select, which special factors they may be inclined to consider,[159] how specific the courts' reasoning will be in offering explanations for their determinations so that attorneys may have some concrete guidance in future actions.[160]

In chapter 93A cases, it is common to present a sworn affidavit of hours spent at a certain hourly rate accompanied by a carefully detailed time sheet specifying all activities involved in the particular action. Attorneys may also present supporting witnesses to bolster or decry fee requests.[161] There has been discussion of the use of separate evidentiary hearings to determine the basis of a fee,[162] and in certain instances this has been done.[163] But these procedural variations do little to allay the

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158. 488 F.2d 714 (5th Cir. 1974). The court listed the following factors:

> 1) the time and labor required; 2) the novelty and difficulty of the questions; 3) the skill requisite to perform the legal service properly; 4) the preclusion of other employment by the attorney due to acceptance of the case; 5) the customary fee; 6) whether the fee is fixed or contingent; 7) time limitations imposed by the client or the circumstances; 8) the amount involved and the results obtained; 9) the experience, reputation, and ability of the attorneys; 10) the "undesirability" of the case; 11) the nature and length of the professional relationship with the client; and 12) awards in similar cases.

Id. at 717-19. Various other courts have listed factors as well, but have failed to apply them consistently. *See* Berger, *supra* note 123, at 285-86. *See also* notes 148 and 156 *supra.*

159. In the list provided in Johnson v. Georgia Highway Express, Inc., 488 F.2d 714 (5th Cir. 1974), for example, many of the factors mentioned may not be immediately relevant to a routine chapter 93A case.

One factor that is unique to a chapter 93A action and which courts have taken into consideration is the defendant's reasonableness or willingness to settle at the point of the demand letter. In Kohl v. Silver Lake Motors, Inc., 369 Mass. 795, 343 N.E.2d 375 (1976), the Supreme Judicial Court affirmed the trial court's award of fees up to the date of the defendant's offer of settlement (which was found to be reasonable and was rejected), and not "as he should have, to the date of rejection of the offer." *Id.* at 802 n.6, 343 N.E.2d at 379 n.6. However, the Supreme Judicial Court found the lower court's fee award of $250 adequate based on the "record as containing adequate evidence of the legal services rendered and of the charges incurred. . . ." *Id.* In Strauss v. Cooper, No. 03121 (Boston Hous. Ct. April 27, 1976) (Finding), the court awarded actual damages ($108.36) because it found no willfull or knowing violation, but it awarded a $125 fee, "said fee and costs being predicated on the failure of defendant to file a written offer of settlement." *Id.* at 6. *See* note 67 *supra* for a discussion of the defendant's posture regarding settlement. Although consideration of this element may ultimately not be any less subjective than the consideration of other factors, there is justification in looking to the statute to assess what efforts the plaintiff and defendant made to adhere to the statutory provisions.

160. *See* note 156 *supra.*

161. Interview with Harvey Chopp, Law Clerk for Judge E. George Daher, Boston Housing Court (September 22, 1980).

162. *See* Heller v. Silverbranch Constr. Corp., 78 Mass. Adv. Sh. 2850, 2863, 382 N.E.2d 1065, 1072 (1978).

163. If the parties involved are looking to a contract to support a fee allotment, the terms of the contract might have to be received in a separate hearing. In addition, a judge who had no involvement in the initial action for which fees are being requested may require a hearing. Heller v. Silverbranch Constr. Corp., 78 Mass. Adv. Sh. 2850, 2861, 382 N.E.2d 1065, 1072 (1978). In Sullivan v. Dykens, No. 3634 (Worcester Super. Ct. May 1977) (Findings, at 13), for example, the parties agreed that the court's *in camera* examination of an affidavit submitted by plaintiff's attorney in conjunction with whatever counteraffidavits the defendant's attorney might offer would serve the fee allotment process best.

problem that exists. If attorneys do not know what to anticipate, a particular procedure may expedite one proceeding, but it will do nothing for attorneys who follow who are unaware of what occurred.

What is needed is a commitment by either the judiciary or the legislature to define, clarify and articulate guidelines for fee determinations. Such a commitment should apply to all fee situations, but chapter 93A offers one vehicle for this process. Massachusetts is not the only state which experiences the difficulty,[164] but it has the opportunity to be in the forefront of reform endeavors.

Federal courts are aware of the problem, and one laudable effort to address it can be found in *Northcross v. Board of Education of the Memphis City Schools,*[165] a case involving a fee award in a school desegregation matter. The United States Court of Appeals for the Sixth Circuit carefully detailed all of its reasoning relevant to the appropriate award in an effort to supply some of the sorely needed guidance for

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164. *See, e.g.,* Mt. Vernon Memorial Estates, Inc. v. Wood, 88 Ill. App.3d 666, 410 N.E.2d 995 (1980). The case involved a retail installment contract and alleged violations of the Truth in Lending Act. Section 1640(a)(3) of TILA, 15 U.S.C. § 1640(a)(3) (1976), provides that a "reasonable attorney's fee" be awarded to a successful litigant. Attorney's fees had been awarded by the lower court. The lower court, however, applied the fee schedule of the Clerk of the Circuit Court and permitted no proof as to the reasonableness of fees. On appeal, the Appellate Court of Illinois stated that use of such a fee schedule could "effectively preclude the filing of many TILA actions, which of course would be contrary to its spirit and policy." *Id.* at 670, 410 N.E.2d at 998. The court quoted from Merchandise Nat'l Bank v. Scanlon, 86 Ill. App.3d 719, 408 N.E.2d 248 (1980):

> The [Truth in Lending] Act embodies the national policy that economic stabilization and competition will be enhanced if consumers are given accurate and meaningful disclosure of credit. (15 U.S.C. 1601). Enforcement of this policy was placed primarily on the private sector through suits for civil penalties. A provision for attorney's fees helps assure that enforcement will take place. But such a provision is rendered meaningless unless attorneys for successful parties are given reasonably adequate compensation for their services.

86 Ill. App.3d at 730, 408 N.E.2d at 256. The matter was remanded for a hearing to determine fees. Although a list of factors similar to those in note 158 *supra* was provided for consideration on remand, a more specific direction was applied by the appellate court's citation of the federal rule as expressed in Northcross v. Board of Educ., 611 F.2d 624 (6th Cir. 1979):

> We conclude that an analytical approach, grounded in the number of hours expended on the case, will take into account all the relevant factors, and will lead to a reasonable result. The number of hours of work will automatically reflect the "time and labor involved," "the novelty and difficulty of the question," and "preclusion of other employment." The attorney's normal hourly billing rate will reflect "the skill requisite to perform the legal service properly," "the customary fee," and the "experience, reputation and ability of the attorney." Adjustments upward may be made to reflect the contingency of the fee, unusual time limitations and the "undesirability" of the case. Thus, applying the approach used in this decision will result in an award reflecting those considerations traditionally looked to in making fee awards, but will also provide a logical, analytical framework which should largely eliminate arbitrary awards based solely on a judge's predispositions or instincts.

Id. at 642-43. An analytical approach is, it seems, the thing sought after in every instance.

165. 611 F.2d 624 (6th Cir. 1979). *See* note 164 *supra.* Appeals challenged the fee awards made by the United States District Court for the Western District of Tennessee under the Civil Rights Attorney's Fees Awards Act, 42 U.S.C. § 1988 (1976).

federal district courts.[166] The court expressed a concern for adequate appellate review and the entitlements of the plaintiffs.[167] Actually, these concerns, juxtaposed with the entitlements of the attorneys, underly every court action where fee assessment is involved. The *Northcross* court underscored the necessity for a specific formulation of standards for attorney's fees:

> This Court has been disturbed by the extraordinary variations in fee awards that have come before it on review, and by a marked failure on the part of the district courts to explain their reasoning, make necessary findings of fact, or demonstrate the calculations used to arrive at a fee. Such awards may well constitute an abuse of discretion while rendering the award virtually unreviewable. We therefore conclude that a uniform approach to awarding fees, with a requirement that the district court make clear and adequate findings of fact on the record, is necessary in order that we may discharge our statutory duty to award a "reasonable" fee. That which is arbitrary or conclusory is not reasonable, and is not fair to either of the parties involved.[168]

Northcross provides an excellent starting point. The decision articulates the problem with clarity and directness and illustrates how the familiar factors in *Johnson v. Georgia Highway Express, Inc.*[169] can be applied with precision.[170] The substance and procedure set out in *Northcross*

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166. In attempting to provide guidance, the Sixth Circuit used the federal district court's own awards to illustrate the information that should be included in every record concerned with fee assessment. *Id.* at 632-44.

167. The court stated:

> We understand that the findings of fact which are required to substantiate a court's exercise of its discretion in making a fee award are frequently very complicated. Nevertheless, both the court's findings and its mode of analysis must be clear to enable an appellate court to intelligently review the award. The plaintiffs are entitled to some explanation of the reasoning used to exclude those hours which were cut, and some description of the findings which were relied upon to find that expenses and billing rates were excessive. Any review of the court's awards in this case would require substantial amounts of sheer conjecture on our part, as we speculate as to reasons why the court might have cut documented hours. In fact, it is impossible to tell whether the district judge might not have simply overlooked certain services provided by plaintiff's attorneys. Certainly no more substantial reason appears in this record.

611 F.2d at 632.

168. *Id.* at 636.

169. *See* notes 158 and 164 *supra*.

170. Under "Hours of service provided," for example, the court states:

> We conclude that a fee calculated in terms of hours of service provided is the fairest and most manageable approach. The district court should indicate on the record the number of hours it finds the plaintiffs' attorneys have expended on the case. This finding must first take into account the affidavits of counsel. The hours claimed need not be automatically accepted by the district court, but to the extent that hours are rejected, the court must indicate some reason for its action, so that we may determine whether the court properly exercised its discretion or made an error of law in its conclusion. Hours may be cut for duplication, padding or frivolous claims. In complicated cases, involving many lawyers, we have approved the arbitrary but essentially fair approach of simply deducting a small percentage of the total hours to eliminate duplication of services. . . .

and the mandate of the Consumer Product Safety Commission Improvement Act of 1976[171] should be carefully studied by the Massachusetts courts. Both advocate the number of hours expended on a case as the basic consideration, followed by the acceptable market rate per hour.[172] Any variations, so long as they are thoroughly documented, lie within the courts' discretion.[173]

The chapter 93A attorney's fees provision, if refined, (either by judicial interpretation or legislative amendment) would serve to enhance the statute's effectiveness. Although fees may not be a primary concern of the statute's thrust through the demand letter and negotiation stages,[174] the threat of possible liability for attorney's fees can be as strong a motivating factor as is the threat of double or treble damages. Thus, the mandate of chapter 93A[175] will most effectively be fulfilled if the attorney's fee provision is given more careful attention. Ultimately, a clear look at chapter 93A, section 9(4)[176] might result in a change in this section's language that would parallel that of the Consumer Product Safety Commission Improvement Act of 1976,[177] and the application of that language might parallel the articulation provided in *Northcross.*

CONCLUSION

Massachusetts General Laws chapter 93A[178] is a provision which reinforces its value with each successful application. Mastering its procedural requirements ensures the optimum benefits of the statute. Careful record-keeping and presentation of documents is vital for both plaintiff and defendant. The broad protection provided to the consumer is balanced by the statute's provision which gives the defendant a fair opportunity to correct errors and provide the plaintiff with an equitable settlement. The scope of the statute's language in section 2 ("unfair and deceptive acts or practices")[179] the procedures encouraging negotiation and settlement (the written demand for relief and the response),[180] and the successful plaintiff's reward upon a showing of a

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Such an approach seems preferable to an attempt to pick out, here and there, the hours which were duplicative.

611 F.2d at 636-37 (citation omitted).

171. *See* note 125 *supra.*
172. *See* note 125 *supra* and 611 F.2d at 644.
173. *See* note 170 *supra.*
174. *But see* note 159 *supra.*
175. *See* note 23 *supra.*
176. MASS. GEN. LAWS ANN. ch. 93A, § 9(4) (West 1972).
177. 15 U.S.C. § 2059(e)(4) (Supp. I 1977).
178. MASS. GEN. LAWS ANN. ch. 93A, §§ 1-11 (West 1972 and Supp. 1981).
179. *See* notes 5 and 8 and accompanying text *supra.*
180. *See* note 27 *supra.*

willful, knowing or bad faith violation (double or treble damages)[181] operate to reflect carefully drawn legislation tailored to addressing the concerns of consumers.

The one weak element in the utilization of the statute is the implementation of its attorney's fees provision, providing reasonable fees to the successful plaintiff's attorney.[182] To date there has been only vague and inconsistent articulation of the reasoning underlying these awards offering virtually no predictive guidance. This weakness is one that can be corrected with a commitment to the spirit of the statute and to the refinement of the reasoning and the language applied in determining fees. Once this commitment is effectuated, it should result in the selection of particular factors relevant to chapter 93A awards upon which judges and attorneys agree, and utilization of these factors may ultimately be incorporated into the statutory language. Clarification of this provision of the statute will not only benefit litigants and attorneys, but will serve to educate courts throughout the country which have yet to face the task of delineating what factors make up a reasonable fee. Once this task is undertaken and accomplished, chapter 93A will be honed to the precision instrument it was meant to be.

GLORIA ANN ALUISE

181. *Id.*
182. *See* note 118 *supra.*

Judicial Immunity for Criminal Defense Witnesses: A Safeguard for the Defendant's Sixth Amendment Right to Compulsory Process

The fifth amendment to the United States Constitution[1] guarantees witnesses the privilege not to incriminate themselves and is the constitutional right which has been honored by the courts as a symbol of the "American accusatorial system of justice."[2] The sixth amendment right to compulsory process has also been considered significant as a representation of the belief that all defendants must have full opportunity to present a thorough defense.[3] Although there are situations in the criminal system where conflict may arise between these two constitutional provisions,[4] the United States Supreme Court has declared it "intolerable that one constitutional right should have to be surrendered

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1. "No person shall ... be compelled in any criminal case to be a witness against himself." U.S. CONST. amend. V.

2. Mykkeltvelt, *To Supplant the Fifth Amendment's Right Against Compulsory Self-Incrimination: The Supreme Court and Federal Grants of Witness Immunity,* 30 MERCER L. REV. 633, 635 (1979). The fifth amendment has been described as signifying the "fundamental values and ... aspirations" of the citizens of the United States. These fundamental values and considerations include: the belief that a person should not be subjected to the "trilemma of self-accusation, perjury or contempt;" the belief that self-incrimination will lead to abuse by others; and the belief that a sense of fair play requires the government to bear the burden of proving that an individual is guilty of a crime and should be prosecuted. Murphy v. Waterfront Comm'n, 378 U.S. 52, 55 (1964). For a historical background of the fifth amendment, *see generally* Mykkeltvelt, *supra,* at 634-36.

3. "In all criminal prosecutions, the accused shall enjoy the right ... to have compulsory process for obtaining witnesess in his favor." U.S. CONST. amend. VI.

The right to compulsory process is the "right to offer the testimony of witnesses, and to compel their attendance, if necessary, [and] is in plain terms the right to present a defense. . . . This right is a fundamental element of due process of law." Washington v. Texas, 388 U.S. 14, 19 (1967). *See* Chambers v. Mississippi, 410 U.S. 284, 302-03 (1973); (the due process right of compulsory testimony was violated when the defendant was precluded, according to the laws of evidence of Texas, from cross-examining a witness who had previously confessed to the crime for which the defendant was found guilty). *See* Kastigar v. United States, 406 U.S. 441, 443-44 (1972) (compelling witnesses and the duty to testify are rights included in the sixth amendment and are entrenched in the American system of justice). It must be recognized that courts have qualified this right to compulsory process to so as not to include the constitutional right of the defendant to demand a conferral of immunity upon criminal defense witnesses. *See* United States v. Turkish, 623 F.2d 769, 773-74 (2d Cir. 1980); United States v. Herman, 589 F.2d 1191, 1200 (3d Cir.1978), *cert. denied,* 441 U.S. 913 (1979).

4. This situation is apparent in the case where a criminal defendant finds its necessary to have a certain witness testify but the witness claims the fifth amendment privilege against self-incrimination.

in order to assert another."[5] Therefore, in situations involving a conflict between the fifth and sixth amendments, procedures have been created in order to reduce the possibility of the infringement of either constitutional right. The main vehicle which has been used to overcome this conflict has been the conferral of witness immunity which protects the witness from self-incrimination when he is compelled to testify.[6]

Traditionally, the Judicial Branch has deferred to the Executive Branch as being the only party which may institute a proceeding for immunity.[7] However, in recent years, an argument has been formulated which states that the defense must have the right to have their witnesses immunized as an integral facet of the defendant's sixth amendment right to compulsory process.[8] Consequently, the courts have recently been exploring the potential role of the judiciary, as supervisor of the prosecution, in its exercise of the authority to confer immunity.[9]

This judicial exploration has led to a head-on confrontation between the Second and Third Circuit Courts of Appeal. In *United States v. Turkish,*[10] the Second Circuit declared that the trial judge should reject any claim for defense witness immunity if the witness is presently, or may possibly, be a subject for prosecution.[11] However, the Third Cir-

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5. Simmons v. United States, 390 U.S. 377, 394 (1968) (testimony elicited in a suppression hearing, and subsequently admitted in a later trial, was found unconstitutional because a fourth amendment right of complaint against an unlawful search and seizure would not supplant a fifth amendment right against self-incrimination). *See In re* Grand Jury Investigation, 587 F.2d 589 (3d Cir. 1978) (testimony of a legislator promoting a speech and debate clause constitutional claim may not be utilized in subsequent prosecution); United States v. Inmon, 568 F.2d 326 (3d Cir. 1977) (constitutional claim against double jeopardy should not be sacrificed for a claim of the fifth amendment self-incrimination privilege).

6. United States v. Tramunti, 500 F.2d 1334, 1342 (2d Cir. 1974) (theory behind an immunity statute is that the immunized witness will not be prosecuted for inculpatory statements in the testimony). *See* Hale v. Henkel, 201 U.S. 43, 67 (1906), where the Supreme Court explained that the fifth amendment may only be used in situations where a witness is compelled to incriminate himself. Therefore, it was decided that immunity was a sufficient substitute for the fifth amendment privilege because "if the criminality has already been taken away, the Amendment ceases to apply." *Id.*

Through the years, immunity has been bestowed in various degrees. *Transactional* immunity precludes any future prosection in connection with any of the subjects included within the immunized testimony. *See* notes 20-29 and accompanying text *infra.* In contrast, *use immunity* does not preclude future prosecution of the witness but does prohibit the use of any information included within the testimony. *See* notes 37-49 and accompanying text *infra.*

7. *See, e.g.,* United States v. Alessio, 528 F.2d 1079, 1081 (9th Cir.), *cert. denied,* 426 U.S. 948 (1976); United States v. Allstate Mortgage Corp., 507 F.2d 492, 495 (7th Cir. 1974), *cert. denied,* 421 U.S. 999 (1975). Originally, immunity was conferred at the complete discretion of the prosecution. *See* notes 50-57 and accompanying text *infra.*

8. *See* Johnson v. Johnson, 375 F. Supp. 872, 875-76 (W.D. Mich. 1974) (the wording of the sixth amendment places affirmative duties upon the state to secure witnesses on the defendant's behalf).

9. *See* notes 57-73 and accompanying text *infra.*

10. 623 F.2d 769 (2d Cir. 1980).

11. *Id.* at 778.

cuit, in *Government of Virgin Islands v. Smith,*[12] considered the compulsory process claim and held that (a) there may be situations in which a court may analyze the constitutionality of the prosecution's conferral or withholding of immunity,[13] and (b) in certain limited circumstances the judiciary itself may confer immunity upon criminal defense witnesses.[14] Despite this serious conflict, the United States Supreme Court has not yet determined the constitutionality of immunization of criminal defense witnesses and, consequently, has not declared what the role of the judiciary should be in the conferral of this immunity.

This Note will discuss the status of witness immunity and the role of the courts concerning that privilege. Section I will address the historical background of the conferral of immunity tracing its development to the present day.[15] In section II, the authority of the prosecution to grant immunity will be examined and the potential role of the courts to supervise that discretion will be considered.[16] The main focus of the Note will be directed towards the expansion in the law of witness immunity and the authority of the courts to confer this immunity.[17] This issue will be discussed in section III with reference to the two theories which have developed in this area, as characterized by the contrasting opinions of the Second and Third Circuits.[18] Finally, section IV will discuss the advantages and disadvantages of immunization of criminal defense witnesses. This discussion will illustrate the need for judicially conferred immunity and present the reasons why this need outweighs the prosecution's fear that extension of the authority to confer immunity will infringe upon the traditional authority of the government to confer immunity.[19]

I. A Historical Look at the Growth and Development of Witness Immunity

Originally, transactional immunity[20] was thought to be the only adequate substitute for the loss of the fifth amendment right against self-

12. 615 F.2d 964 (3d Cir. 1980).

13. *Id.* at 968-69. *See* notes 57-73 and accompanying text *infra.*

14. Government of the Virgin Islands v. Smith, 615 F.2d at 974. *See* notes 75-86 and accompanying text *infra.*

15. *See* notes 20-49 and accompanying text *infra.*

16. *See* notes 50-73 and accompanying text *infra.*

17. *See* notes 74-93 and accompanying text *infra.*

18. *Id.*

19. *See* notes 94-149 and accompanying text *infra.*

20. Transactional immunity precluded future prosecution of the immunized witness concerning any subject discussed within the testimony. Kastigar v. United States, 406 U.S. 441, 453 (1972). *See* note 6 *supra.*

incrimination. In *Counselman v. Hitchcock,*[21] a witness was being questioned concerning violations of the Interstate Commerce Commission regulations.[22] The United States Supreme Court was called upon to decide the constitutionality of use immunity as provided for in Immunity Act of 1878.[23] The act declared that, once immunity was conferred upon the witness, "no ... evidence ... [elicited during the grand jury investigation] shall be in any manner used against him or his property or estate, in any court of the United States, in any criminal proceeding. . . ."[24] The Court invalidated this "use immunity" statute stating that the Legislature "cannot abridge a constitutional privilege, and that it cannot replace or supply one, at least unless it is so broad as to have the same extent in scope and effect."[25] The *Counselman* Court concluded that absolute immunity was the only adequate substitute for the forfeiture of the fifth amendment right.[26]

In *Brown v. Walker,*[27] the Supreme Court relied upon the *Counselman* decision and sustained the constitutionality of the Compulsory Testimony Act of 1896.[28] This federal immunity statute removed the privilege against self-incrimination in hearings before the Interstate Commerce Commission. It provided that "no person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing, concerning which he may testify, or produce evidence, documentary or otherwise. . . ."[29]

The grant of transactional immunity as mandated in *Counselman* and

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21. 142 U.S. 547 (1892).

22. *Id.* at 559-61.

23. Immunity Act of 1878, ch. 17, § 860, 18 Stat. 163 (1878). Section 860 is a re-enactment of the Immunity Act of 1868, ch. 13, § 1, 15 Stat. 37 (1868). Section 860 provides as follows:

> No pleading of a party, nor any discovery or evidence obtained from a party or witness by means of a judicial proceeding in this or any foreign country, shall be given in evidence, or in any manner used against him or his property or estate, in any court of the United States, in any criminal proceeding, or for the enforcement of any penalty or forfeiture: *Provided,* That this section shall not exempt any party or witness from prosecution and punishment for perjury committed in discovering or testifying as aforesaid.

24. *Id.*

25. Counselman v. Hitchcock, 142 U.S. at 585. *But see In re* Grand Jury Proceedings, 626 F.2d 1051, 1058 (1st Cir. 1980) (immunity granted under Federal Use Immunity Statute of 1970, 18 U.S.C. §§ 6001-6005 (1976 & Supp. III 1979), needs only be co-extensive with the privilege of the party implementing it).

26. Counselman v. Hitchcock, 142 U.S. at 586. The *Counselman* Court stated that "no statute which leaves the party or witness subject to prosecution after he answers the criminating question put to him, can have the effect of supplanting the privilege conferred by the Constitution of the United States." *Id.* at 585.

27. 161 U.S. 591 (1896).

28. Compulsory Testimony Act of 1893, ch. 83, 27 Stat. 443 (1893).

29. *Id.* at 444. The Compulsory Testimony Act of 1893 and the conferral of transactional immunity was the basic model for federal immunity statutes until 1970. In 1970, Congress enacted the Federal Use Immunity Statute of 1970, 18 U.S.C. §§ 6001-6005 (1976 & Supp. III 1979). *See* note 44 and accompanying text *infra.*

Brown was basically an intra-jurisdictional mandate.[30] In time an argument arose protesting the inapplicability of the federal immunity statute to the state courts.[31] This argument claimed that the inapplicability of the conferral of immunity in both federal and state courts caused the conferral to be an inadequate substitute for the forfeiture of the fifth amendment privilege protecting individuals from self-incrimination.[32]

A solution to this problem was formulated in *Murphy v. Waterfront Commission.*[33] The *Murphy* Court addressed the issue of inadequate protection of the fifth amendment right against self-incrimination and held that a conferral of immunity must be honored in all courts.[34] The Court explained its decision, reiterating the *Counselman* rationale that the fifth amendment privilege is to be given great deference[35] and if the absence of simultaneous immunity in the federal and state courts undermines that privilege, corrective measures must be taken.[36]

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30. *See* Hale v. Henkel, 201 U.S. 43, 68-69 (1906) where the Court stated:

> the fact that an immunity granted to a witness under a state statute would not prevent a prosecution of such witness for a violation of a Federal statute, did not invalidate such statute under the Fourteenth Amendment. It [has been] held . . . by this court . . . that the possibility that information given by the witness might be used under the Federal act did not operate as a reason for permitting the witness to refuse to answer. . . .

See also Knapp v. Schweitzer, 357 U.S. 371 (1958) (the testimony of a witness which was compelled by the state government may incriminate him under federal law); Feldman v. United States, 322 U.S. 487 (1944) (testimony of a witness which was compelled by the state may be introduced into evidence in the federal system); United States v. Murdock, 284 U.S. 141 (1931) (the testimony of a witness which was compelled by the federal government may incriminate him under state law).

The Court in Murphy v. Waterfront Comm'n, 378 U.S. 52, 63 (1964), stated that, originally, the Court in Brown v. Walker, 161 U.S. 591 (1896), construed the Compulsory Testimony Act of 1893 as preventing prosecutions in state and federal courts simultaneously. However, over the years the Court limited this interpretation and found the immunity statutes did not encompass both the federal and state systems. Murphy v. Waterfront Comm'n, 378 U.S. at 64-77.

31. *See* Murphy v. Waterfront Comm'n, 378 U.S. at 53-54; Ullman v. United States, 350 U.S. 422, 434 (1956). *See also* Malloy v. Hogan, 378 U.S. 1 (1964) (fifth amendment privilege against self-incrimination made applicable to the states through the due process clause of the fourteenth amendment).

32. This argument regarded the omission as unconstitutional for it avoided the direct mandate of Counselman v. Hitchcock , 142 U.S. 547, 585 (1892). *See* note 26 *supra.*

33. 378 U.S. 52 (1964). In *Murphy,* the petitioners were subpoenaed to testify at a hearing of the Waterfront Harbor Commission concerning a work stoppage at the piers in Hoboken, New Jersey. The petitioners claimed the privilege against self-incrimination. Thereafter the petitioners were granted immunity under the laws of New York and New Jersey. However, the petitioners still refused to answer because their testimony might incriminate them under federal law. *Id.* at 53-54. *See* note 30 and accompanying text *supra.*

34. 378 U.S. at 77-78. The *Murphy* Court held "that the constitutional privilege against self-incrimination protects a state witness against incrimination under federal as well as state law and a federal witness against incrimination under state as well as federal law." *Id.*

35. *See* note 2 and accompanying text *supra.*

36. In the course of the discussion concerning the fundamental policies and reasons for the honored status of the fifth amendment, the Court stated "[m]ost, if not all, of these policies and purposes are defeated when a witness 'can be whipsawed into incriminating himself under both state and federal law even though' the constitutional privilege against self-incrimination is applicable to each." 378 U.S. at 55.

However, the *Murphy* Court did not hold that absolute immunity was to be applied in both federal and state court systems. Rather, this decision introduced use/derivative use immunity.[37] The Court, in explaining the parameters of use immunity, stated that "the constitutional rule [is] to be that a state witness may not be compelled to give testimony which may be incriminating under federal law unless the compelled testimony and its fruits cannot be used in any manner by federal officials in connection with a criminal prosecution against him."[38] Although for years there had been a grant of transactional immunity, the *Murphy* Court felt that use immunity was sufficient as a substitute for the forfeiture of the fifth amendment privilege because this immunity still "leaves the witness and the Federal Government in substantially the same position as if the witness had claimed his privilege in the absence of a state grant of immunity."[39]

The introduction of use immunity, while allowing future prosecution of immunized witnesses,[40] placed a burden of proof upon the government in those future prosecutions. In *Murphy,* the Court held that once a defendant proves that he had previously given immunized testimony concerning the subject matter of the present suit, the government must show that the evidence was not "tainted" by that previous testimony.[41] Furthermore, the government must prove that the evidence it is relying upon was derived from an "independent, legitimate source."[42]

Following the recognition of use immunity[43] in *Murphy,* Congress created the Federal Use Immunity Statute of 1970,[44] which stated that the "fruits" of any immunized testimony may not be used in subse-

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37. Murpy v. Waterfront Comm'n, 378 U.S. at 79. *See also* note 6 *supra.* Use/derivative use immunity will hereinafter be cited as "use immunity."

38. Murphy v. Waterfront Comm'n, 378 U.S. at 79.

39. *Id. See In re* Kilgo, 484 F.2d 1215, 1220 (4th Cir. 1973).

40. The ability to bring prosecution was an answer to the government's argument since Counselman v. Hitchcock, 142 U.S. 547 (1892), that transactional immunity was a complete bar to future prosecution concerning any subject which had been discussed in the testimony. For a discussion of the *Counselman* decision, *see* notes 21-26 and accompanying text *supra.*

41. Murphy v. Waterfront Comm'n, 378 U.S. at 79 n.18.

42. *Id.;* United States v. Meyers, 339 F. Supp. 1154, 1158-60 (E.D.Pa. 1972). *See* United States v. Wilmington Chem. Corp., 254 F. Supp. 92, 93 (N.D. Ill. 1966), where the court stated that "the compelled testimony given in the prior hearing must relate in a 'substantial way' to the subject matter of the indictment." Note, *Standards for Exclusion in Immunity Cases after* Kastigar *and* Zicarelli, 82 YALE L.J. 171, 175-81 (1972). *See also* Albertson v. Subversive Activities Control Bd., 382 U.S. 70, 80 (1965) (the prohibition against the use of immunized testimony includes using any of the information as an "investigatory lead" or commencing an investigation of the witness as a result of the testimony).

43. For a discussion of use immunity, *see* notes 37-42 and accompanying text *supra.*

44. 18 U.S.C. §§ 6001-6005 (1976 & Supp. III 1979). Section 6002 relates to immunity in general:

> Whenever a witness refuses, on the basis of his privilege against self-incrimination, to testify or provide other information in a proceeding ... and the person presiding over the proceeding communicates to the witness an order issued under this part, the witness may not refuse to comply with the order on the basis of his privilege against self-

quent prosecutions against the witness.[45] The statute was given judicial recognition by the Supreme Court in *Kastigar v. United States,*[46] where the Court found that the "use immunity" provided for in the federal statute was adequate to compensate for the forfeiture of the fifth amendment privilege.[47] The Supreme Court agreed with the holding in *Murphy* which stated that the grant of use immunity leaves the government and the witness in "substantially the same position" as if the witness claimed the fifth amendment privilege against self-incrimination.[48]

Today, the law follows the mandate of the Supreme Court in *Kastigar* and recognizes that use immunity is co-extensive with the "scope and extent" of the fifth amendment privilege against self-incrimination.[49] However, this is not the final word on the conflict between the fifth and sixth amendments. There is still much confusion concerning the exclusive authority of the government to request immunity for witnesses and the role of the courts in the supervision of this prosecutorial power.

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incrimination; but no testimony or other information compelled under the order (or any information directly or indirectly derived from such testimony or other information) may be used against the witness in any criminal case, except a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order.

45. *Id.* The Federal Use Immunity Statute of 1970 was the first departure from the transaction format of the federal immunity statutes which was formulated in the Compulsory Testimony Act of 1893.

46. 406 U.S. 441 (1972). In *Kastigar,* the petitioners were subpoenaed to apppear and testify before a United States grand jury. Prior to the hearing, the government believed that the petitioners would assert their fifth amendment privilege against self-incrimination. Therefore, the government applied to the district court to compel the witnesses to testify under a grant of immunity pursuant to the Federal Use Immunity Statute of 1970. The petitioners opposed the order and objected to the conferral of immunity on the basis that use immunity was not an adequate substitute for the forfeiture of the fifth amendment privilege. *Id.* at 442.

The Court decided that the immunity statute, as created by Congress, adhered to the "conceptual basis" of the *Counselman* decision, *i.e.* the conferral of use immunity. *Id.* at 453. The Supreme Court distinguished the present statute from the one in Counselman v. Hitchcock, 142 U.S. 547 (1892), by explaining that the *Counselman* statute did not protect the witness from use by the Government of the immunized testimony in future prosecutions. Kastigar v. United States, 406 U.S. at 453-54. *See also* United States v. Apfelbaum, 584 F.2d 1264, 1270 (3d Cir. 1978), *rev'd on other grounds,* 445 U.S. 115 (1980). Unlike the statute in Counselman v. Hitchcock, 142 U.S. 547 (1892), the *Apfelbaum* court stated that according to the Federal Immunity Statute of 1970, "introduction of immunized testimony in any subsequent proceeding is . . . severely restricted. . . . [T]he Government may not use immunized testimony as substantive evidence." United States v. Apfelbaum, 584 F.2d at 1270.

47. Kastigar v. United States, 406 U.S. at 442. As a result of the decision of the Supreme Court, the petitioners were held in contempt of court for not testifying after having been immunized. *Id. But see* McCarthy v. Arndstein, 266 U.S. 34, 42 (1924) (if the immunity granted is not an adequate substitute for the forfeiture of the fifth amendment protection, the petitioners are justified in refusing to answer); Brown v. Walker, 161 U.S. 591, 610 (1896) (if refusal to testify based upon the inadequacy of the immunity grant is justified, judgments of contempt are improper).

48. Murphy v. Waterfront Comm'n, 378 U.S. 52, 79 (1964).

49. This language was used in Counselman v. Hitchcock, 142 U.S. 547, 585 (1892), as expressing the conditions which must be met before an immunity provision is adequate to protect the witness from the forfeiture of the self-incrimination privilege. *See* notes 25 & 26 and accompanying text *supra.*

II. GOVERNMENTAL POWER TO GRANT OR DENY IMMUNITY AND THE JUDICIAL SUPERVISION OF THAT POWER

The Constitution of the United States confers upon the Executive Branch of government the duty to enforce the "laws of the land."[50] In exercising this constitutional mandate, the Executive is the only branch which "has the exclusive authority and absolute discretion to decide whether to prosecute a case."[51] Therefore, since immunity may bar the right to prosecute, it has long been recognized that the government is the only party which may request immunity in cases where a witness, if compelled to testify, may claim the fifth amendment privilege.[52]

As a result, immunization of criminal defense witnesses is not a constitutionally protected right.[53] Therefore, the sixth amendment right to compulsory process may only be exercised if it is consistent with the exclusive authority of the government to seek immunity.[54] Consequently, it has traditionally been held that a trial court may not grant,[55] nor compel the government to grant,[56] immunity to defense witnesses who may refuse to testify.

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50. U.S. CONST. art. I, § 8, cl. 18.

51. United States v. Nixon, 418 U.S. 683, 693 (1974). *See, e.g.*, United States v. Rocco, 587 F.2d 144, 147 (3d Cir. 1978); United States v. Alessio, 528 F.2d 1079, 1081 (9th Cir.), *cert. denied*, 426 U.S 948 (1976); Smith v. United States, 375 F.2d 243, 247 (5th Cir.), *cert. denied*, 389 U.S. 841 (1967).

52. *See* United States v. Allstate Mortgage Corp., 507 F.2d 492, 495 (7th Cir. 1974), *cert. denied*, 421 U.S. 999 (1975) (in all federal cases involving transactional or use immunity, only the United States Attorney may seek an order granting immunity to witnesses). In several cases where defendants sought to obtain immunity for their witnesses, the court claimed that it was necessary that the request originate with the government. *See, e.g.*, United States v. Davis, 623 F.2d 188, 192 (1st Cir. 1980); United State v. Graham, 548 F.2d 1302, 1315 (8th Cir. 1977); United States v. Morrison, 535 F.2d 223, 228-29 (3d Cir. 1976); United States v. Kozell, 468 F. Supp. 746, 749 (E.D.Pa. 1979). *See also* 18 U.S.C. § 6003 (1976) which states that "the United States district court for the judicial district in which the proceeding is or may be held shall issue,. . . upon the request of the United States attorney for such district, an order requiring such individual to give testimony or provide other information. . . ."

53. *See, e.g.*, United States v. Barham, 625 F.2d 1221, 1226 (5th Cir. 1980); United States v. Allstate Mortgage Corp., 507 F.2d 492, 495 (7th Cir. 1974), *cert. denied*, 421 U.S. 999 (1975).

54. United States v. Alessio, 528 F.2d 1079, 1081-82 (9th Cir.), *cert. denied*, 426 U.S. 948 (1976).

55. *See* United States v. Davis, 623 F.2d 188, 192 (1st Cir. 1980); United States v. Lenz, 616 F.2d 960, 962 (6th Cir. 1980); United States v. Klauber, 611 F.2d 512, 517 (4th Cir. 1979); United States v. Housand, 550 F.2d 818, 824 (2d Cir. 1977); Thompson v. Garrison, 516 F.2d 986, 988 (4th Cir.), *cert. denied*, 423 U.S. 933 (1975); United States v. Smith, 436 F.2d 787, 790 (5th Cir. 1971); United States v. Kozell, 468 F. Supp. 746, 749 (E.D.Pa. 1979); United States v. La Duca, 447 F. Supp. 779, 786 (D.N.J. 1978). *See also* Ullman v. United States, 350 U.S. 422, 431-34 (1956) (the Immunity Statute of 1954 required that the district court do nothing more than determine that the United States Attorney and the Justice Department are in agreement that the grant was in the public interest).

56. *See* United States v. Davis, 623 F.2d 188, 192 (1st Cir. 1980); United States v. Lenz, 616 F.2d 960, 962 (6th Cir. 1980); United States v. Rocco, 587 F.2d 144, 147 (3d Cir. 1978); United States v. Bautista, 509 F.2d 675, 677 (9th Cir. 1975); United States v. Berrigan, 482 F.2d 171, 190 (3d Cir. 1973). The government is not required to immunize a co-defendant who may be called to testify. Earl v. United States, 361 F.2d 531, 533-34 (D.C.Cir. 1966), *cert. denied*, 388 U.S. 921-22 (1967).

However, there has recently been an indication that the courts may become involved with the conferral of immunity in a supervisory capacity.[57] This expansion of the role of the courts is evidenced in situations where there has been a deprivation of the sixth amendment right to compulsory process. This deprivation may occur through abuse of the governmental discretion to grant immunity. Abuse may arise through either a denial of criminal defense witness immunization or prosecutorial misconduct in the granting of immunity.

In the first instance, the judiciary may become involved with the conferral of immunity where the government immunizes its own witnesses and does not grant immunization to the defense witnesses. In *United States v. DePalma,*[58] the defendant claimed he was denied due process because the government had conferred broad immunity upon its own witnesses but denied conferral of limited immunity upon the criminal defense witnesses because they were "subject[s] of a continuing investigation."[59] The *DePalma* court agreed with the defendant and held that

> [w]hile the government need not in every circumstance grant immunity to potential defense witnesses,... where the foundation of the government's case ... was built by means of a far-reaching immunity grant, and where the evidence sought by the defense is affected by the government's continuing investigation of the potential defense witnesses, the denial of limited use immunity resulted in an unfair trial.[60]

Although the *DePalma* court has been the only court which has presently dealt with this question, a number of courts have recognized the possibility of such a situation.[61] In hypothesizing such a situation, the courts have suggested several reasons why prosecutorial refusal to confer immunity would be a denial of due process. For example, in *Earl v. United States,*[62] the Court of Appeals for the District of Columbia suggested that in the event the government immunizes any of its

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57. *See* Government of Virgin Islands v. Smith, 615 F.2d 964, 968-70 (3d Cir. 1980); United States v. Herman, 589 F.2d 1191, 1203-04 (3d Cir. 1978), *cert. denied,* 441 U.S. 913 (1979). *See also* State v. Broady, 41 Ohio App.2d 17, 24, 321 N.E.2d 890, 896 (1974) (the court may grant use immunity to a witness of the defendant).

58. 476 F. Supp. 775 (S.D.N.Y. 1979). The *DePalma* decision was remanded in United States v. Horwitz, 622 F.2d 1101 (2d Cir. 1980) in order to see if the decision complied with the mandate of United States v. Turkish, 623 F.2d 769 (2d Cir. 1980). The *Horwitz* court seemed to limit the decision of United States v. DePalma, 476 F. Supp. 775 (S.D.N.Y. 1979), by implying that there must be an explicit showing of prosecutorial bad faith in order to show that the government had abused its discretion by not conferring immunity upon the defense witnesses. United States v. Horwitz, 622 F.2d 1101 (2d Cir. 1980).

59. United States v. DePalma, 476 F. Supp. at 777.

60. *Id.* at 781.

61. *See, e.g.,* United States v. Gleason, 616 F.2d 2, 28 (2d Cir. 1979), *cert. denied,* 444 U.S. 1082 (1980); United States v. Lang, 589 F.2d 92, 96-97 (2d Cir. 1978).

62. 361 F.2d 531 (D.C.Cir. 1966), *cert. denied,* 388 U.S. 921 (1967).

witnesses, "fundamental fairness" may require that immunization be granted to some defense witnesses.[63] Thus, it is apparent that the courts are beginning to question the fairness of immunization of governmental witnesses when there is a denial of immunization of criminal defense witnesses.[64] Although recognition of this argument has grown, the Supreme Court has not had an opportunity to make a final decision.

The judiciary may also become involved with the conferral of use immunity where there has been an abuse of discretion through governmental misconduct. In these situations the courts, in a supervisory capacity, must guard against and remedy these abuses. An example of such a situation involves prosecutorial intimidation of a prospective defense witness. In *United States v. Morrison,*[65] the jury found the defendant guilty of conspiracy to distribute, and distribution of, hashish. The defendant claimed that he had a witness who was prepared to swear that she was guilty of the crime and, thereby, exonerate him. Although the witness had previously agreed to testify, she did not as a result of intimidation by the continual harassment of the prosecution.[66] The defendant claimed that the intimidation by the prosecution which caused the witness not to testify denied him a fair trial.[67] The Third Circuit Court of Appeals agreed with the contentions of the defendant and held that under certain circumstances, the government may be compelled to grant use immunity to criminal defense witnesses in order to uphold the defendant's due process rights.[68] The *Morrison* court felt

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63. The *Earl* court stated:

> [w]e might have quite different, and more difficult, problems had the Government in this case secured testimony from one eyewitness by granting him immunity while declining to seek an immunity for [the criminal defense witness] to free him from possible incrimination. . . . That situation would vividly dramatize an argument on behalf of [the defendant], that the statute *as applied* denied him due process. Arguments could be advanced that in the particular case the Government could not use the immunity statute for its advantage unless Congress made that same mechanism available to the accused. . . .

Id. at 534 n.1 (emphasis in original). The discussion of the *Earl* court has been quoted in many cases. However, there has never been a decision concerning this issue because, in many cases, the facts were not present to raise the question. *See, e.g.,* United States v. Lang, 589 F.2d 92, 96 n.1 (2d Cir. 1978) (the government did not offer immunity to any of its witnesses); United States v. Wright, 588 F.2d 31, 36 (2d Cir. 1978), *cert. denied,* 440 U.S. 917 (1979) (the defendant did not subpoena any witness and pose the need for use immunity). *See also* United States v. Gleason, 616 F.2d 2, 28 (2d Cir. 1979), *cert. denied,* 444 U.S. 1082 (1980).

64. For example, several courts have explicitly left open the possibility that defense witness immunity may be required if grants of immunity to witnesses for the prosecution resulted in unfair advantage. *See, e.g.,* United States v. Gleason, 616 F.2d 2, 28 (2d Cir. 1979), *cert. denied,* 444 U.S. 1082 (1980); United States v. Lang, 589 F.2d 92, 96-97 (2d Cir. 1978).

65. 535 F.2d 223 (3d Cir. 1976).

66. The prosecution repeatedly warned the criminal defense witness that if she testified falsely she would be charged with perjury. The prosecutor relayed this message through indirect warnings, messages sent through the attorney for the defense, and a personal interview. *Id.* at 225.

67. *Id.* at 224.

68. *Id.* at 229. *See also* United States v. Leonard, 494 F.2d 955, 985 n.79 (D.C.Cir. 1974) (Bazelon, C.J., concurring in part and dissenting in part); Earl v. United States, 361 F.2d 531, 534 n.1 (D.C.Cir. 1966), *cert. denied,* 388 U.S. 921 (1967).

that situations involving prosecutorial intimidation was such a circumstance.[69]

Although the *Morrison* decision indicated that courts may intervene in situations where there is abuse of governmental authority, the court in *United States v. Herman*[70] stated that there must be a substantial evidentiary showing to prove abuse.[71] The *Herman* court explained that the standard which would have to be fulfilled in order to receive judicial intervention demands that the defendant show that the decision of the government not to confer immunity upon the criminal defense witnesses was made "with the deliberate intention of distorting the judicial fact finding process."[72] Thereafter, the judiciary has the "inherent remedial power" to command dismissal of the entire case if immunity is not granted.[73] *Herman* is representative of the belief that the conferral of immunity is primarily a function of the Executive Branch, notwithstanding the ability of the courts to intervene and supervise in situations involving prosecutorial misconduct.

III. NEW DEVELOPMENTS — THE BATTLE IN THE COURTS CONCERNING COURT-DECREED USE IMMUNITY UPON CRIMINAL DEFENSE WITNESSES

Recently there has been a trend toward allowing the judiciary to confer immunity in limited situations other than those concerning pros-

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69. United States v. Morrison, 535 F.2d at 229.

The court held that at the new trial, if the witness once again claimed the fifth amendment privilege, there must be an acquittal if there is not a grant of immunity. *Id. See also* Webb v. Texas, 409 U.S. 95, 98 (1972) (the defendant has the right to compulsory process and was denied this right when the trial judge "singled out" the criminal defense witness to warn of the implications of perjury). *Accord,* United States v. Thomas, 488 F.2d 334, 336 (6th Cir. 1973).

70. 589 F.2d 1191 (3d Cir. 1978), *cert. denied,* 441 U.S. 913 (1979). In *Herman,* the defendants were former state court magistrates who were convicted of conspiring to accept bribes in exchange for favorable behavior in exercise of their authority to fix bails. On appeal, defendant Herman contended that he was denied his sixth amendment right to compulsory process. This contention was based upon the fact that several constables were to testify that Herman had not received any bribe money. However, the constables asserted the fifth amendment privilege against self-incrimination and these claims were sustained. *Id.* at 1199.

71. *Id.* at 1204. The *Herman* court found there had been no threat or intimidation of the witnesses. *Id.* at 1200. This evidentiary showing was found to be necessary in order to sustain the judicial tradition of deferring to the prosecutorial discretion. *Id.* at 1203.

72. *Id.* at 1204.

73. *Id.* In addition to addressing the role of the court in preventing abuse of the discretionary powers of the government to immunize (*i.e.* statutory immunity), the *Herman* court also addressed the issue concerning the inherent power of the judiciary to authorize immunity for defense witnesses when their testimony is "essential" to the defendant's case. *Id.* The court did recognize the criticisms of judicial immunity but justified the power as arising from "a due process right to have clearly exculpatory evidence presented to the jury, at least when there is no strong countervailing system interest which justifies its exclusion. . . ." *Id.* However, although the *Herman* court did verbalize their recognition of the judicial power of immunity, the court did not implement this recognition because the mandate must wait until a case arises with this exact issue. *Id.* at 1204-05.

ecutorial misconduct. This battle of the courts is portrayed by the conflicting decisions recently handed down by the Second and Third Circuits.[74]

The Third Circuit Court of Appeals in *Government of Virgin Islands v. Smith,*[75] upheld the validity of court-decreed immunity in limited situations. The *Smith* court specifically discussed two situations in which the judiciary may become involved in the conferral of immunity.[76] First, the court reiterated the holding in *United States v. Herman,*[77] which stated that the judiciary should order statutory immunity or acquittal in cases where there is a finding of prosecutorial misconduct "with the deliberate intention of distorting the judicial fact finding process."[78] Second, the court held that judicial immunity may be granted in order to vindicate the defendant's constitutional right to a

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74. *See* notes 75-93 and accompanying text *infra.*

75. 615 F.2d 964 (3d Cir. 1980). In *Smith,* a victim was assaulted in a housing project in Saint Thomas, Virgin Islands. During the trial, three of the four defendants sought the testimony of Ernesto Sanchez who had previously admitted to the police that he had been part of the crime and therefore his testimony exculpated the three defendants. When Sanchez was called to testify, he claimed the fifth amendment privilege against self-incrimination. Consequently, the defense tried to get permission for witness immunity. However, Sanchez was under sixteen years of age and, therefore, under the jurisdiction of the juvenile authorities in the office of the Attorney General of the Virgin Islands. Sanchez's circumstance made it mandatory that this office approve of the conferral of immunity.

Although there is evidence that the office of the Attorney General of the Virgin Islands was willing to approve the conferral of immunity, this office conditioned its response upon the assent of the United States Attorney. The consent was never given and immunity was denied. Without the benefit of Sanchez's testimony, all four defendants were convicted.

There is evidence from the record which reveals that the motive for withholding approval of immunity may have been connected with the strategy of the prosecution's case. The prosecution's case was weak and the introduction of the witness's testimony would have had a devastating effect. This motive coupled with the fact that the United States Attorney gave no reason for denying immunity suggests the prosecution "deliberately intended to keep this highly relevant, and possibly exculpatory, evidence from the jury." *Id.* at 969.

76. The *Smith* court explained that the justification for court-decreed immunity arose from the "due process right to have clearly exculpatory evidence presented to the jury, at least when there is no strong countervailing systemic interest which justifies its exclusion. . . ." *Id.* at 970, *citing* United States v. Herman, 589 F.2d 1191, 1204 (3d Cir. 1978).

77. 589 F.2d 1191, 1204 (3d Cir. 1978), *cert. denied,* 441 U.S. 913 (1979).

78. *Id. See* notes 72 & 73 and accompanying text *supra.* The *Herman* court held that there would be a violation of due process if there was a deliberate distortion of the fact finding process. Therefore, the court held that immunity may be required if realistic meaning is to be given to the defendant's due process right to have exculpatory evidence presented to the jury. *Id.* Another situation which expressed the importance of the due process right and judicial intervention when that right is violated appeared in Chambers v. Mississippi, 410 U.S. 284 (1973). In *Chambers,* the defendant sought to cross-examine a witness who had testified to the same crime for which the defendant was being prosecuted. However, the state's evidentiary rule stated that a party may not impeach its own witness. The government would not call the witness and therefore the exculpatory testimony was not heard. The Court held that rigid application of the state's evidentiary rule violated the defendant's sixth amendment right to present an effective defense. *See also* Brady v. Maryland, 373 U.S. 83 (1963) (government suppression of exculpatory evidence not known to the defense is a violation of due process); Gideon v. Wainwright, 372 U.S. 335 (1963) (the indigent

fair trial when the testimony is "essential" and "exculpatory" and the government has no strong interest in withholding use immunity.[79]

In its opinion, the *Smith* court found two differences between the court-decreed immunity and statutory immunity.[80] The Third Circuit held that court-decreed immunity was triggered "by the fact that the defendant is prevented from presenting exculpatory evidence which is crucial to his case."[81] Therefore, the court distinguished judicial immunity as not being exercised only upon the contingency that there be a showing of "prosecutorial misconduct or intentional distortion of the trial process."[82] In addition, it was declared that the court-decreed immunity is conferred directly from the judiciary and does not involve the Executive Branch.[83]

The *Smith* court recognized the need, in the interest of separation of powers, for safeguards to be placed upon the ability to grant court-decreed immunity.[84] Therefore, the court held that before immunity was to be granted: (a) the defendant must apply to the district court for witness immunity, (b) the witness must be available to testify, (c) the testimony must be "clearly exculpatory" and "essential," and (d) there must be "no strong governmental interests" against the immunity grant.[85] Although the *Smith* court set limitations upon the court-

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defendants in court must have counsel provided in order to insure a fair trial); Roviaro v. United States, 353 U.S. 53 (1957) (the informer privilege accorded to the government must give way if it is relevant or essential to insure a fair trial for the defendant).

In another context, judicial immunity was created in Murphy v. Waterfront Comm'n, 378 U.S. 52 (1964), where the Court declared that immunity was to be honored in all court systems, state and federal. *See* notes 33-42 and accompanying text *supra*. *See also* Simmons v. United States, 390 U.S. 377 (1968) (the testimony of the defendant at a suppression of the evidence hearing was not to be used at trial).

79. Government of the Virgin Islands v. Smith, 615 F.2d at 974. The *Smith* court relied upon *Herman's* inferral of the possible need for judicial immunity where the testimony of the witness is an essential element of an effective defense. *See* United States v. Herman, 589 F.2d 1191, 1204 (3d Cir. 1978).

80. Government of the Virgin Islands v. Smith, 615 F.2d at 969.

81. *Id.*

82. *Id.*

83. *Id.* at 969-70.

84. *Id.* at 971-72. The *Smith* court stated that "[d]ue to the unique and affirmative nature of the immunity remedy and fundamental considerations of separation of powers, grants of immunity to defense witnesses must be bounded by special safeguards and must be made subject to special conditions." *Id. See also* Chambers v. Mississippi, 410 U.S. 284, 302 (1973) (the evidentiary rules of Texas denied the defendant due process when he could not cross-examine a witness with exculpatory evidence).

It seems that the necessity of safeguards to preserve the separation of powers is more imperative in *Smith* than it was in *Chambers*. In *Chambers* the state did not have a legitimate countervailing interest for the enforcement of evidentiary rules. However, in *Smith*, the grant of immunity is a form of affirmative relief which is primarily contained in the power of the government to prosecute cases. Government of the Virgin Islands v. Smith, 615 F.2d at 973.

85. 615 F.2d at 972-73. The *Smith* court held "[i]mmunity will be denied if the proffered testimony is found to be ambiguous, not clearly exculpatory, cumulative or if it is found to relate only to the credibility of the government's witnesses." *Id.* at 972.

decreed conferral of immunity,[86] it nevertheless recognized the ability of the defendant to apply to the court for immunity.

In contrast, the Second Circuit Court of Appeals recently held that the due process clause of the fifth amendment does not require a judicial grant of immunity.[87] In *United States v. Turkish*,[88] the court stated that the sixth amendment does not place upon the government or the court any affirmative duty to immunize defense witnesses.[89] In the course of its discussion, the court explored the advantages and disadvantages of granting immunity to criminal defense witnesses,[90] Stating that "in most situations where defense witness immunity is likely to be sought, some legitimate opposing prosecutorial interest will exist, and constitutional fairness is not a satisfactory standard against which to assess such interests."[91]

Several courts which had discussed the possibility of court-decreed immunity had placed a major emphasis on the need for limitations. These courts denied court-decreed immunity because of the absence of limitations. *See, e.g.*, United States v. Klauber, 611 F.2d 512, 519 (4th Cir. 1979) (the testimony of the witness would have concerned secondary matters and would have been cumulative); United States v. Wright, 588 F.2d 31, 35-36 (2d Cir. 1978), *cert. denied*, 440 U.S. 917 (1979) (there was no showing that the witness would not testify without the conferral of immunity and it was also not shown that failure of the grant of immunity would prejudice the defendant's trial).

86. In addition to the limitations set out in notes 112-115 and accompanying text *infra*, the *Smith* court stated that it would be appropriate to deny a grant of immunity where the government rebuts the essentiality or exculpatory nature of the testimony, or proves that public interest would be disserved by immunity to defense witnesses or the grant would entail great costs to the government. Government of the Virgin Islands v. Smith, 615 F.2d at 973.

87. United States v. Turkish, 623 F.2d 769, 777 (2d Cir. 1980).

88. 623 F.2d 769 (2d Cir. 1980). In *Turkish*, the defendant was convicted for tax evasion, filing false income tax returns, and conspiring to defraud the United States. In the course of the trial, the prosecution called several witnesses to testify. These witnesses had been involved in the same illegal transactions which were the subject of the case at bar. Prior to testifying, these witnesses were either given immunity or received letters from the government stating that if they answered truthfully they would not be subject to prosecution for their criminal involvement.

The defendants also applied for immunization of witnesses. The defense claimed that these witnesses, if granted immunity, would present exculpatory testimony. However, the motion for immunity was denied and the defendant claimed he had been denied a fair trial. The *Turkish* court held that the defendant had not been denied a fair trial. *Id.* at 770-72.

89. *Id.* at 773-74.

90. *Id.* at 774-77. For a discussion of the advantages and disadvantages of a system which allows immunization of criminal defense witnesses, *see* notes 94-115 and accompanying text *infra*.

91. United States v. Turkish, 623 F.2d at 777. The *Turkish* court reasoned that if court-decreed immunity was to be granted, the court must weigh the effect on the Executive Branch. It concluded that the decision of whether the possibility of future prosecution is necessary, should be decided by the government because the court cannot decide the worth of prosecuting the witness. Additionally, in cases in which the court may direct immunization of the witness because the prosecution deliberately distorted the fact finding process, the court held that this inquiry was difficult because it focused upon the intent of the prosecution. In connection with the denial of immunity, the intent of the prosecution may not be to distort the fact finding process but rather to make a decision on whether to prosecute at a later time with more information. *Id.* at 774-80. Also, the court claimed that the decision to find whether there are any strong countervailing interests is an "elusive task." *Id.* at 777.

In recognizing the strong countervailing interests of the prosecution, the *Turkish* court held that courts should reject requests for immunity when the government declares that the witness "sought is an actual or potential target of prosecution."[92] The proof that the prosecution is required to present is minimal for it "need only show that the witness has been indicted or present to the court *in camera* an *ex parte* affidavit setting forth the circumstances that support the prosecutor's suspicion of the witness's criminal activity."[93]

The contradictory decisions of the Second and Third Circuits reflect the serious dilemma with which the judicial system is faced. Although there are valid justifications on both sides of the argument, a decision must be made. In order for the Supreme Court to rule upon the constitutionality of judicially-conferred immunity, there must be an examination of advantages and disadvantages of immunization of criminal defense witnesses.

IV. IMMUNIZATION OF CRIMINAL DEFENSE WITNESSES AND THE NEED FOR COURT-DECREED IMMUNITY TO ENSURE THE DEFENDANT A FAIR TRIAL

"[T]he essential task of a criminal trial is to search for truth, and ... this search is not furthered by rules which turn the trial into a mere 'poker game' to be won by the most skilled tactician."[94] Through an evaluation of the advantages and disadvantages of the conferral of defense witness immunity, it is apparent that immunity is essential in the "search for truth" and that the judiciary must be able to confer immunity in limited situations in order to preserve the defendant's sixth amendment right to compulsory process. The defendant's right to compulsory process outweighs the prosecutorial interest in controlling the grant of witness immunity.

A. Advantages and Disadvantages of Criminal Defense Witness Immunity

1. Advantages of a System which recognizes the Conferral of Immunity upon Criminal Defense Witnesses

92. *Id.* at 778.

93. *Id.*

94. Government of the Virgin Islands v. Smith, 615 F.2d 964, 971 (3d Cir. 1980). The compulsory process clause has been interpreted as an integral facet of the defendant's right to present a defense which is "the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies." Washington v. Texas, 388 U.S. 14, 19 (1967).

Granting immunity to criminal defense witnesses ensures the protection of the defendant's fifth and sixth amendment rights. It allows the defendant to vindicate himself through the testimony of a witness who otherwise would have "hidden" behind his fifth amendment privilege.[95] The conferral of immunity upon criminal defense witnesses permits the defendant to exercise his fifth amendment due process right to present exculpatory evidence[96] and his sixth amendment right to compulsory process. Alternatively, the conferral of use immunity is not injurious to the position of the witness. The witness is shielded from any future prosecution based upon any information exposed during the testimony.[97] Although the witness is compelled to testify, future prosecution must stem from governmental evidence which was derived from a "legitimate and independent source."[98]

Although it may seem that there is adequate protection with the "immunity shield," the immunized witness might argue that it is impossible to prove abuse of the restriction that no information gathered from the immunized testimony is to be used in future prosecution.[99] However, it

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95. It has already been discussed that the fifth amendment privilege against self-incrimination has been accorded "great weight" by the courts because it represents many of the fundamental beliefs of the United States' system of government. *See* note 2 and accompanying text *supra*. It is because of this great deference to the fifth amendment that there has been confusion in the courts concerning the conferral of immunity upon witnesses who have claimed this privilege.

96. The court in Johnson v. Johnson, 375 F. Supp. 872, 875-76 (W.D. Mich. 1974), stated that the right of the defendant to present exculpatory evidence imposes certain obligations upon the government to aid the defendant in obtaining such evidence. However, the court in United States v. Turkish, 623 F.2d 769 (2d Cir. 1980), did not agree with this decision and held that the government is only obligated to disclose exculpatory evidence which it has in its possession. The Second Circuit felt that the government did not have an obligation to aid defendants in obtaining exculpatory evidence through the conferral of immunity because the obligation of disclosure did not extend to aiding in the extraction of evidence from others; *i.e.* the witness. *Id.* at 774.

97. This prohibition on the use of any "fruits" of the immunized testimony is stated in 18 U.S.C. § 6002 (1976):

> ... no testimony or other information compelled under the order (or any information directly or indirectly derived from such testimony or other information) may be used against the witness in any criminal case, except a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order.

See also Murphy v. Waterfront Comm'n, 378 U.S 52, 79 (1964). "[T]he constitutional rule [is] to be that a state witness may not be compelled to give testimony which may be incriminating under federal law unless the compelled testimony and its fruits cannot be used in any manner by federal officials in connection with a criminal prosecution against him."

98. United States v. Jones, 542 F.2d 186, 202 (4th Cir. 1976). The *Jones* court found that the evidence upon which the prosecution of the former immunized witness had been based was derived from a "legitimate and independent source." In *Jones,* the defendants were convicted of violating the narcotics laws of the United States. The court held that information implicating the defendants had derived from a legitimate and independent source because a special strike force, maintained by the state authorities, had kept the immunized information strictly secret.

99. In Kastigar v. United States, 406 U.S. 441, 459 (1972), it was argued that although the prosecution may not use the immunized testimony in any way "[i]t will be difficult and perhaps impossible ... to identify, by testimony or cross-examination, the subtle ways in which the compelled testimony may disadvantage a witness, especially in the jurisdiction granting the immunity."

must be remembered that the government has a burden of showing that the evidence in the future prosecution is not "tainted" by the immunized testimony.[100] In future prosecutions, the defendant need only show he had been given immunity as a witness and then the burden of proof shifts to the government to show that evidence presented at the subsequent trial has not been tainted by the previous testimony.[101]

The conferral of use immunity also offers protection for the government. The government is precluded from using any of the immunized testimony as a base for future prosecution against the witness, however, the government may nevertheless bring future prosecution using independent evidence. This ability to bring future prosecution was not available to the government in actions involving the conferral of transactional immunity.[102]

In addition to the ability to bring future prosecution against the immunized witness, the government may employ immunization as a tool to weaken the credibility of the witness in the eyes of the fact finder.[103] Although use immunity allows a witness to testify with the guarantee that the immunized testimony will not be employed in any future prosecution of the witness,[104] the prosecution may emphasize the fact that the testimony of immunized witnesses must be scrutinized closely, inferring that such testimony may not be trustworthy.[105]

Finally, there is a public interest in the grant of immunity upon criminal defense witnesses. This public interest concerns the assurance that all relevant information, which bears on the guilt or innocence of

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100. Murphy v. Waterfront Comm'n, 378 U.S. 52, 79 n.18 (1964). *See* notes 40-42 and accompanying text *supra*. *See also* Kastigar v. United States, 406 U.S. 441, 460 (1972). "This burden of proof . . . is not limited to a negation of taint; rather, it imposes on the prosecution the affirmative duty to prove that the evidence it proposes to use is derived from a legitimate source wholly independent of the compelled testimony."

101. Murphy v. Waterfront Comm'n, 378 U.S. 52, 79 n.18 (1964). The burden of proof imposed upon the government includes the need to prove that the immunized testimony had not been used as an "investigatory lead," *see* Albertson v. Subversive Activities Control Bd., 382 U.S. 70, 80 (1965). Further, use immunity bars use of any evidence obtained from the testimony as an incentive for the government to begin an investigation on that particular witness as a result of the testimony. *See* Kastigar v. United States, 406 U.S. 441, 460 (1972).

For an example of a case in which the court found that the government did not sustain its burden of proving that the evidence in the subsequent prosecution was not tainted by the previously immunized testimony, *see* United States v. McDaniel, 482 F.2d 305, 312 (8th Cir. 1973) (the United States Attorney could not use the immunized testimony in subsequent prosecution after he had inadvertently read three volumes of the transcript of the immunized testimony).

102. Kastigar v. United States, 406 U.S. 441, 453 (1972). There is no need to discuss transactional immunity, for as indicated in *Kastigar,* use immunity is adequate protection for the forfeiture of the fifth amendment privilege against self-incrimination. *Id. See* notes 46-49 and accompanying text *supra*.

103. Note, *The Sixth Amendment Right to have Use Immunity Granted to Defense Witnesses,* 91 HARV. L. REV. 1266, 1273 n.48 (1978).

104. Murphy v. Waterfront Comm'n, 378 U.S. 52, 79 (1964).

105. *See* United States v. Abrams, 568 F.2d 411, 419-20 (5th Cir. 1978); United States v. Leonard, 494 F.2d 955, 961 (D.C. Cir. 1974). *See also* Note, *supra* note 103, at 1273 n.48.

the defendant, is presented to the fact finder.[106] This interest arises from the belief that the fact finder must evaluate all relevant information in order to make a valid decision. In actions where immunity is not conferred and there is a silencing of potentially useful information, this public interest is defeated.

2. Disadvantages of a System which recognizes the Conferral of Immunity upon Criminal Defense Witnesses

The government has stated that the main disadvantage of a system that permits the conferral of immunity upon criminal defense witnesses is the possibility that a "known criminal," the witness, may be set free. This fear derives from a hypothesis that, although there might be a potential defendant on the stand, the prosecution may not be able to get enough sources, independent of the immunized testimony, to bring suit and obtain a conviction.[107] This argument seems to be strong because of the prohibition stated in the Federal Use Immunity Statute of 1970 concerning the use of the "fruits" of the immunized testimony in subsequent prosecutions.[108] However, there are protections against the distortion of the immunity process.[109]

If there is a lack of independent sources solely because there is not enough evidence against the witness, immunity should be conferred. The prosecution may find it difficult to listen to the testimony of a possible defendant knowing it cannot get enough information, independent of the immunized testimony, to bring prosecution. However, the prosecution is in no worse position than if the witness had claimed the fifth amendment privilege against self-incrimination.[110]

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106. United States v. Gaither, 539 F.2d 753, 754 (D.C. Cir. 1976) (Bazelon, C.J., concurring in the denial of rehearing).

107. *Id.* "[C]ompelling the government to grant use immunity ... may jeopardize future prosecutions of the immunized witness since in any future prosecution the government will have to prove that the immunized testimony was not used." *Id.*

This argument infers the fear that with a possibly guilty witness on the stand, the conferral of immunity would exonerate guilty defendants and bar prosecution of the witness. *In re* Kilgo, 484 F.2d 1215, 1222 (4th Cir. 1973). However, it must be remembered that use immunity safeguards against such an "immunity bath" through the requirements which must be fulfilled before there is a conferral of immunity. The defendant is required to show that the testimony is "clearly exculpatory" and "essential" and not adverse to any "strong governmental interests." Government of the Virgin Islands v. Smith, 615 F.2d 964, 972, 974 (3d Cir. 1980). *See also* United States v. Turkish, 623 F.2d 769, 775 (2d Cir. 1980) (conferral of immunity upon criminal defense witnesses would be "inviting cooperative perjury among law violators"). However, it may not be assumed that all witnesses who testify may be willing to potentially incriminate themselves through perjury in order to obtain the release of the defendant.

108. 18 U.S.C. § 6002 (1976). *See* note 44 *supra.*

109. Use immunity was created so as to ensure the ability of the prosecution to bring suit against the immunized witness. United States v. Herman, 589 F.2d 1191, 1202 (3d Cir. 1978), *cert. denied,* 441 U.S. 913 (1979); *see* notes 111-15 and accompanying text *infra.*

110. Murphy v. Waterfront Comm'n, 378 U.S. 52, 79 (1964).

Furthermore, the government has several options available if it wishes to bring a subsequent criminal action against the immunized witness.[111] One such option is that the government may seek postponement of the time when such testimony is to be given in order to complete its investigation of the defense witness who is the subject of an application for immunity.[112] This would allow the government to continue its investigation before the immunized testimony is to be given and thus avoid a future objection that the evidence is tainted.[113]

Another such option which would safeguard the government's ability to bring future prosecution entails securing the secrecy of the immunized testimony so the government would not have the opportunity to view the testimony and therefore avoid an argument in future prosecution of the witness that the government's case was tainted.[114] This "sterilization" or "isolation" of the testimony would allow defendants their fifth amendment right to have exculpatory evidence presented and their sixth amendment right to compulsory process without any interference with the interest of the government in bringing subsequent prosecution against the witness.[115]

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111. The discussion of options available to the government excludes the situation where the government has already assembled enough evidence against immunized witnesses prior to their testifying. This particular method of preserving the right to bring future prosecution would not be questioned and, therefore, immunization of the criminal defense witness would be "virtually costless" to the government. Government of the Virgin Islands v. Smith, 615 F.2d 964, 973 (3d Cir. 1980).

112. *Id.*

113. However, it must be remembered that the government must not commence the investigation of the immunized witness upon learning of his application for immunity. Kastigar v. United States, 406 U.S. 441, 460 (1972).

114. *See* United States v. Bianco, 534 F.2d 501, 510 (2d Cir. 1976) (court held that there was no taint of evidence by previous immunized testimony because the grand jury testimony had been kept under "lock and key" by the District Attorney and the District Attorney testified that the federal authorities did not make use of such testimony); United States v. Meyers, 339 F. Supp. 1154, 1160 (E.D.Pa. 1972) (federal government made no use of immunized testimony before a county grand jury because the testimony was never made public and there was no indication that the government ever knew of such testimony). *See also* note 98 and accompanying text *supra*. *But see* Piccirillo v. New York, 400 U.S. 548, 568 (1971) (New York sought transactional immunity for all witnesses because there is enormous difficulty in isolating information because all of the relevant testimony is in the hands of the government, and human fallibility may allow information concerning the immunized testimony to be known).

115. The court in United States v. Turkish, 623 F.2d 769, 775 (2d Cir. 1980), raised an additional argument that although the heavy burden of proving an independent and legitimate source "can be met by cataloguing or 'freezing' the evidence known to the government prior to the immunized testimony, that technique is not available when continuing investigations disclose vital evidence after, though not resulting from, the immunized testimony." However, this complaint may be countered with an argument that if the government was not able to get enough information on its own previous to the testimony because no such testimony was available, the sixth amendment right to compulsory process and the fifth amendment right to due process demand that the immunized witness be allowed to testify. *See* note 110 and accompanying text *supra*.

The government also has additional devices which may preclude or invalidate the testimony of an immunized witness. The government has the power to rebut the defendant's showing of the "essential" and "exculpatory" nature of the immunized testimony. Government of the Virgin

There are valid arguments both for and against the conferral of immunity upon criminal defense witnesses. However, it seems that there are several options open for the government in circumstances where there is a forfeiture of the fifth amendment right against self-incrimination. In contrast, if the defendant is deprived of his sixth amendment right to compulsory process, through the refusal to immunize a witness with potentially exculpatory evidence, the defendant is at a substantial loss. Although the government has strong justifications for refusing to grant immunity, it would seem that the decision should be decided in favor of the defendant because the defense is the party with fewer options.

B. The Need for Court-Decreed Immunization of Criminal Defense Witnesses to Safeguard the Defendant's Sixth Amendment Right to Compulsory Process

In *Government of Virgin Islands v. Smith,*[116] it was held that judicial immunity may be conferred in situations other than those involving prosecutorial misconduct.[117] The *Smith* court found that the judiciary may confer immunity when testimony of a criminal defense witness is "essential" and "exculpatory" for the defense.[118] This judicial immunity does not rely at all upon the discretion of the prosecution.[119]

The main objective of court-decreed immunity is to ensure the defendant's sixth amendment right to compulsory process.[120] In this context, the court may destroy any obstacle, which interferes with the right to present witness testimony.[121] One of the justifications for court-decreed immunity is that the prosecution, as a party, may not be able to make an impartial decision on whether or not to confer immunity and that the judiciary would be able to make a more objective decision. In *Smith,* the court affirmed the judicially-decreed immunity of a criminal defense witness for there was evidence that the prosecution's decision

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Islands v. Smith, 615 F.2d 964, 972-73 (3d Cir. 1980). In addition, the government may present "strong governmental countervailing interests" against the grant of immunity or explain how the grant of immunity would entail significant costs to society and therefore "it would be appropriate for the immunity application to be denied." *Id.*

116. 615 F.2d 964 (3d Cir. 1980).

117. *Id.* at 969.

118. *Id.* The idea that the court may confer immunity in situations where the testimony of the witness was "essential" and "exculpatory" for the defense was first introduced in United States v. Herman, 589 F.2d 1191, 1204 (3d Cir. 1978), *cert. denied,* 441 U.S. 913 (1979).

119. Government of the Virgin Islands v. Smith, 615 F.2d at 969-70.

120. State v. Broady, 41 Ohio App.2d 17, 21, 24, 321 N.E.2d 890, 894, 896 (1974). *See* Washington v. Texas, 388 U.S. 14, 23 (1967). "The Framers of the Constitution did not intend to commit the futile act of giving to a defendant the right to secure the attendance of witnesses whose testimony he had no right to use."

121. Government of the Virgin Islands v. Smith, 615 F.2d at 969-70.

not to confer immunity was prejudicial to the defendant. This evidence included allegations that the prosecution's case was inherently weak and the government knew its case would have been hurt if the testimony was admitted.[122] This holding emphasized the need that an impartial party decide whether testimony may be "essential"[123] and "exculpatory" in particular cases.[124]

Another justification is that the judiciary will only confer immunity upon criminal defense witnesses when it is virtually "costless" to the government.[125] The *Smith* court set forth several safeguards which may be employed to ensure that the prosecution would be injured as little as possible from the judicial conferral of immunity. Among the available safeguards are: the "sterilization" of immunized testimony of the defendant[126] and the postponement of trial to gather evidence against the witness.[127] However, the court emphasized that immunity would not be conferred if there was a strong governmental interest which would tend to show that immunization would result in a "large cost" to the government.[128] In addition, there is a bar against granting immunity when the government rebuts the defendant's showing of need for the immunized testimony.[129]

Keeping these justifications for court-decreed immunity in mind, it is clear from the arguments presented by the government in *United States v. Turkish,*[130] that the prosecution has misinterpreted the significance of defense witness immunity and the benefits that the court is trying to achieve through judicially-conferred immunity. In *Turkish,* the Second Circuit Court of Appeals held that immunity was an attempt to equalize the authority between the prosecution and the defense.[131] The court stated that court-decreed immunity, made available to the defendant, represented a power which had originally been reserved for the government. In light of the acquisition of this power, the court suggested that the prosecution would react by claiming that defense counsel would feel entitled to the power to "arrest suspects, search private premises, wiretap telephones, and deploy the investigative resources of large

122. *Id.*
123. *Id., quoting* United States v. Herman, 589 F.2d 1191, 1204 (3d Cir. 1978).
124. *Id.*
125. *Id.* at 973.
126. *Id. See* United States v. Bianco, 534 F.2d 501, 510 (2d Cir. 1976); United States v. Meyers, 339 F. Supp. 1154, 1160 (E.D.Pa. 1972). *See also* notes 114-15 and accompanying text *supra.*
127. Government of the Virgin Islands v. Smith, 615 F.2d at 973. *See* notes 112-13 and accompanying text *supra.*
128. Government of the Virgin Islands v. Smith, 615 F.2d at 974.
129. *Id.* at 973.
130. 623 F.2d 769 (2d Cir. 1980).
131. *Id.* at 774.

public agencies."[132] However, this argument exaggerates the extent of the power of immunity. In the grant of immunity, the court is only trying to preserve the defendant's sixth amendment right to compulsory process — the right to have witnesses testify.[133] The judiciary is not allowing the defendant access to any procedure employed by the prosecution which is not integrally connected with the defendant's constitutional right to a fair trial.[134]

The *Turkish* court argued against immunity because it attempts to "force the equalization of the roles of the prosecution and the defense," and claimed that equalization would not work because the criminal justice system is not symmetrical.[135] The Second Circuit Court of Appeals intimated that the prosecution bears greater burdens and more numerous obligations in its attempt to achieve a conviction[136] than the defense has in its attempt to obtain an acquittal.[137] Therefore, the allowance of judicially-conferred immunity would be an unfair advantage for the defense.

It is conceded that the prosecution and the defense "play different roles" and have different burdens and obligations in the criminal trial. However, it is not conceded that the defense may gain unfair advantage through the ability to obtain immunity for its witnesses. Rather, the defense would be much more disadvantaged through the denial of im-

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132. *Id.* The *Turkish* court stated:

> The system of criminal law administration involves not only this procedural imbalance in favor of the defendant, but also important aspects of the government's law enforcement power that are not available to the defendant. Subject to the constitutional and statutory limits, the government may arrest suspects, search private premises, wiretap telephones, and deploy the investigative resources of large public agencies. Few would seriously argue that the public interest would be well served either by extending all of these powers to those accused of crime or by equalizing the procedural burdens and restrictions of prosecution and defendant at trial. Viewed in isolation, there is a surface appeal to the equal availability of use immunity for prosecution and defense witnesses.

Id.

133. U.S. CONST. amend. VI.

134. Government of the Virgin Islands v. Smith, 615 F.2d at 972 (immunity will be denied if there is no showing that evidence is clearly exculpatory and necessary).

135. United States v. Turkish, 623 F.2d at 774.

136. *Id.* The *Turkish* court stated:

> The prosecution assumes substantial affirmative obligations and accepts numerous restrictions, neither of which are imposed on the defendant. The prosecution must prove the defendant's guilt beyond a reasonable doubt to the satisfaction of all the jurors; it may not obtain the defendant's testimony, suppress exculpatory evidence, nor retry the defendant after acquittal, even though errors prejudicial to the Government occurred.

Id.

137. The *Turkish* court also stated that:

> The defendant, by contrast, may prevail without offering any proof at all; he need not disclose whatever inculpatory evidence he discovers, may avoid conviction by persuading a single juror that reasonable doubt exists, and may challenge a conviction by direct appeal and subsequent collateral attack.

Id.

munity because the "silence [of the witness] could cost the accused everything."[138]

The government has put forth several arguments which characterize the problems that judicial immunity would thrust upon the prosecution. First, the conferral of judicial immunity represents an encroachment upon the constitutional role of the government to bring prosecution against possible criminals.[139] Second, the judiciary "is in no position to weigh the public interest in the comparative worth of prosecuting a defendant or his witness."[140]

In its first argument, the government refers to the traditional notion that the authority to immunize derives from the constitutional mandate that the Executive Branch enforce the "laws of the land."[141] It is true that traditionally the right to immunize has been regarded as within the sole discretion of the prosecution. However, the judiciary has the constitutional obligation to ensure that the defendant receives a fair trial which includes the ability of the defendant to exercise the sixth amendment right to compulsory process.[142] Through judicial immunity, the executive is still the branch of government primarily responsible for the conferral of immunity. Judicial immunity is only granted when there is evidence of prosecutorial misconduct or where there is testimony which contains essential and exculpatory evidence.[143] The judiciary, through the conferral of immunity, is not concerned with encroaching upon the power of the prosecution; but rather, is interested in safeguarding the constitutional rights of the defendant.

In its second contention, the government claims that the Judicial Branch is in "no position to weigh the public interest in the comparative worth of prosecuting the defendant or the witness."[144] It is agreed that the judiciary does not have this ability. However, it must be pointed out that the prosecution has misinterpreted the function of the judiciary, and its purpose, in the conferral of immunity. Perhaps the Judicial Branch does not have the authority to ascertain the advantages of prosecuting a particular individual; but this is not what it attempts to do. Rather, the judiciary must balance the countervailing interests as presented by the prosecution and the defense.[145]

The government seems to imply that even if it expresses countervailing interests, the balancing of those interests with those of the defend-

138. United States v. La Duca, 447 F. Supp. 779, 788 (D.N.J. 1978).
139. United States v. Turkish, 623 F.2d at 774-76.
140. *Id.* at 776.
141. U.S. CONST. art. I, § 8, cl. 18.
142. United States v. Turkish, 623 F.2d at 776.
143. Government of the Virgin Islands v. Smith, 615 F.2d at 969.
144. United States v. Turkish, 623 F.2d at 776.
145. Government of the Virgin Islands v. Smith, 615 F.2d at 974.

ant is an elusive task.[146] However, at this point it must be re-emphasized that the right to compulsory process is a constitutional right[147] and may not be lightly pushed aside.[148] Therefore, although the court may not be in a perfect position to evaluate countervailing interests, it must utilize the method which would best safeguard the interests of the prosecution and the defendant. The courts have a duty to uphold the Constitution and safeguard the rights expressed therein.[149] Therefore, the courts must be given the discretion to determine if the constitutional rights of an individual outweigh the governmental interest against the conferral of immunity.

CONCLUSION

It is apparent that the question of judicially-conferred immunity is extremely sensitive. The conferral of immunity has traditionally been within the sole discretion of the prosecution. However, the discussion of the need for defense witness immunity and the safeguards which have been constructed to preserve the interests of the public and the defendant, indicate that in certain situations judicially-conferred immunity is necessary to ensure the defendant's rights.

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146. United States v. Turkish, 623 F.2d at 777.
147. U.S. CONST. amend. VI.
148. *See* notes 3-5 and accompanying text *supra*.
149. U.S. CONST. art. III. *See* United States v. Turkish, 623 F.2d at 776 (the judiciary has constitutional responsibilities for the fairness of a trial).

Collective Bargaining, Impasse Resolution & Strikes in the Public Sector: A Recommendation to Amend Massachusetts General Laws Chapter 150E

The Commonwealth of Massachusetts prohibits all public employees from engaging in any form of strike activity. This law is enacted in Massachusetts General Laws (G.L.) chapter 150E, section 9A.[1] Under section 9[2] of the same act, the legislature has limited the scope of per-

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1. MASS. GEN. LAWS ANN. ch. 150E (West Supp. 1980), *as enacted by* 1973 Mass. Acts ch. 1078, § 2. Section 9A of this statute states:

> (*a*) No public employee or employee organization shall engage in a strike, and no public employee or employee organization shall induce, encourage or condone any strike, work stoppage, slowdown or withholding of services by such public employees.
>
> (*b*) Whenever a strike occurs or is about to occur, the employer shall petition the commission to make an investigation. If, after investigation, the commission determines that any provision of paragraph (*a*) of this section has been or is about to be violated, it shall immediately set requirements that must be complied with, including, but not limited to, instituting appropriate proceedings in the superior court for the county wherein such violation has occurred or is about to occur for enforcement of such requirements.

2. MASS. GEN. LAWS ANN. ch. 150E, § 9 (West Supp. 1980) states:

> After a reasonable period of negotiation over the terms of a collective bargaining agreement, either party or the parties acting jointly may petition the board for a determination of the existence of an impasse. Upon receipt of such petition, the board shall commence an investigation forthwith to determine if the parties have negotiated for a reasonable period of time and if an impasse exists, within ten days of the receipt of such petition, the board shall notify the parties of the results of its investigation. Failure to notify the parties within ten days shall be taken to mean that an impasse exists.
>
> Within five days after such determination, the board shall appoint a mediator to assist the parties in the resolution of the impasse. In the alternative, the parties may agree upon a person to serve as a mediator and shall notify the board of such agreement and choice of mediator.
>
> After a reasonable period of mediation, not to exceed twenty days from the date of appointment, said mediator shall issue to the board a report indicating the result of his services in resolving the impasse.
>
> If the impasse continues after the conclusion of mediation, either party or the parties acting jointly may petition the board to initiate fact-finding proceedings. Upon receipt of such petition, the board shall appoint a fact-finder, representative of the public, from a list of qualified persons maintained by the board. In the alternative, the parties may agree upon a person to serve as fact-finder and shall notify the board of such agreement and choice of fact-finder. No person shall be named as a fact-finder who has represented an employer or employee organization within the preceding twelve months. The fact-finder shall be subject to the rules of the board and shall, in addition to powers delegated to him by the board, have the power to mediate and to make recommendations for the resolution of the impasse. The fact-finder shall transmit his findings and any recommendations for the resolution of the impasse to the board and to both parties within thirty days after the date of his appointment. If the impasse remains unresolved ten days after the transmittal of such findings and recommendations, the board shall make them public.
>
> The parties by their own agreement may mutually waive the fact-finding provisions contained herein and may petition the board for arbitration pursuant to sections four or four B of chapter one thousand and seventy-eight of the acts of nineteen hundred and

missible union activity during periods of contract negotiation impasse[3] to the procedural remedies of mediation,[4] fact-finding[5] and voluntary interest arbitration.[6] The primary purpose of sections 9 and 9A is to

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seventy-three when applicable. Said waiver shall not constitute a bar to any arbitration award.

Any arbitration award in a proceeding voluntarily agreed to by the parties to resolve an impasse shall be binding on the parties and on the appropriate legislative body and made effective and enforceable pursuant to the provisions of chapter one hundred and fifty C, provided that said arbitration proceeding has been authorized by the appropriate legislative body or in the case of school employees, by the appropriate school committee.

If the impasse continues after the publication of the fact-finder's report, the issues in dispute shall be returned to the parties for further bargaining.

Any time limitations prescribed in this section may be extended by mutual agreement of the parties and the board.

3. The term "impasse" designates a deadlock in bargaining positions between the employer and the employee. *See* School Comm. v. Local 66, Boston Teachers Union, 372 Mass. 605, 606, 363 N.E.2d 485, 486 (1977). A labor impasse arises in two different contexts. Deadlocks may occur during the initial negotiation of a contract. *Id.* at 609, 363 N.E.2d at 487. A stalemate could also occur while interpreting a contract provision already in force. *See, e.g.*, School Comm. v. Korbut, 4 Mass. App. Ct. 743, 358 N.E.2d 831 (1976), *rev'd*, 373 Mass. 788, 396 N.E.2d 1148 (1977). The negotiation of standing contract provisions, as opposed to disputes over contract renegotiation, is relegated to the grievance procedure. *See* School Comm. v. Local 66, Boston Teachers Union, 372 Mass. 605, 606 n.4, 363 N.E.2d 485, 486 n.4 (1977). The grievance procedure is governed by MASS. GEN. LAWS ANN. ch. 150E, § 8 (West Supp. 1980). The scope of this Note will not include grievance impasse resolution. For a discussion of this subject, *see* Note, *Grievance Arbitration in the Public Sector: The New Massachusetts Law*, 9 SUFFOLK L. REV. 721 (1975). Furthermore, this Note will not focus on the particular provisions designed, by statute, for police and firefighters in Massachusetts. *See* 1973 Mass. Act ch. 1078, §§ 4, 4B, *reprinted in* MASS. GEN. LAWS ANN. ch. 150E, § 1, at 147-49, 151-53 (West Supp. 1980). For a comprehensive analysis of this subject, *see* Note, *Final Offer Arbitration in Massachusetts*, 12 NEW ENGLAND L. REV. 693 (1977).

4. Mediation is the friendly intervention of a neutral third party who, during impasse, persuades the disputing parties to adjust or settle the labor dispute in question. *See generally* MASS. GEN. LAWS ANN. ch. 150E, § 9 (West Supp. 1980). *See also* Massachusetts Board of Conciliation and Arbitration [hereinafter referred to as MBCA] Rules 1.02, 1.03, 1.04, 1.05, 1.10, 1 M.L.R.R. 3003-3010 (1974).

5. Fact-finding involves the investigation and report by a neutral third party who intervenes during a contract negotiation impasse. *See, e.g.*, Sharon School Comm. and Sharon Teachers Ass'n, PS 9-79, 7 M.L.R.R. 2005 (8/22/1980); Fall River School Comm. and AFSCME, Council 93, PS 253-2979, 7 M.L.R.R. 2003 (6/25/1980); City of Melrose and Melrose Police Ass'n, PF 82-1979, 7 M.L.R.R. 2002 (5/6/1980); Town of Florida School Comm. and Florida Teachers Ass'n, PS 87-1980, 7 M.L.R.R. 2002 (5/2/1980); Arlington School Comm. and Arlington Ass'n of Educ. Secretaries, PS 83-1980, 7 M.L.R.R. 2001 (5/1/1980); City of Northampton and AFSCME, Council 93, Local 2086, PS 10-1980, 7 M.L.R.R. 2001 (12/28/1979). *See generally* MASS. GEN. LAWS ANN. ch. 150E, § 9 (West Supp. 1980). *See also* MBCA Rules 1.03, 1.06, 1.07, 1.08, 1.09, 1.11, 1.12, 1.14, 1.15, 1 M.L.R.R. 3003-3010 (1977).

6. Voluntary interest arbitration may take place only if both parties agree to submit their dispute before an arbitrator or arbitration panel. *See generally* MASS. GEN. LAWS ANN. ch. 150E, § 9 (West Supp. 1980). The arbitrator or panel is a neutral third party who conducts hearings on a contract dispute at impasse. The arbitrator then makes a final award to which the disputing parties have mutually agreed to be bound in advance. *Id.* § 9. *See* School Comm. v. Local 66, Boston Teachers Union, 372 Mass. 605, 363 N.E.2d 485 (1977). For examples of arbitration awards, *see* City of Chicopee and IAFF Local 1710, PF-38-1977, 6 M.L.R.R. 2049 (6/4/1979) (selecting the union's final offer); Walpole Permanent Firefighters, Local 2464, IAFF and Town of Walpole, PF-98-1977, 5 M.L.R.R. 2007 (7/13/1978) (selecting the town's final offer); IBPO (Yarmouth

prevent labor disruption in the public sector.[7] These laws employ a "carrot and stick" approach to public labor relations by encouraging the peaceful resolution of impasses[8] and by precluding potential strike activity when alternative procedural remedies fail.[9]

Chapter 150E broadened the scope of collective bargaining in the public sector[10] and restructured the avenues available during contract negotiation impasse.[11] These two changes demonstrated an attempt to provide public employees with adequate alternatives to strike actions.[12] However, the statute has presented several practical problems. First, judicial interpretation of the statute's provisions on collective bargaining and arbitration has lacked uniformity.[13] Second, section 9A has not consistently deterred strike activity[14] and it has proven to be inequitable to the public work force.[15] The tensions evident in this piece of legislation mandate a reconsideration of the strike surrogate procedures contained in section 9,[16] a reconsideration of the section 9A strike ban,[17] and a consideration of alternatives to this latter provision.[18]

In Part I, this Note will analyze the relevant sections of chapter 150E regarding the processes of collective bargaining and contract negotiation impasse resolution. Part II will address the dynamics of the no-

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Police Ass'n) and Town of Yarmouth, PF-122, 5 M.L.R.R. 2006 (7/11/1978) (selecting the fact-finder's report on remand); Yarmouth Police Ass'n, IBPO, and Town of Yarmouth, PF-122, 5 M.L.R.R. 2001 (5/30/1978) (selecting no offer).

7. The Supreme Judicial Court gave a lengthy discussion of the legislative intent behind the public labor relations law of Massachusetts in Director of the Div. of Employee Relations v. Labor Relations Comm'n, 370 Mass. 162, 346 N.E.2d 852 (1976).

8. *See* notes 71-94 and accompanying text *infra.*

9. *See* notes 163-68 and accompanying text *infra.*

10. *See* notes 54-58 and accompanying text *infra.*

11. *See* notes 35-43, 71-94 and accompanying text *infra.*

12. *See generally* Wellington & Winter, *The Limits of Collective Bargaining in Public Employment,* 78 YALE L.J. 1107 (1969); Taylor, *Public Employment: Strikes or Procedures?,* 20 INDUS. & LAB. REL. REV. 617 (1967). In 1966, George W. Taylor was the acting chairman of the New York State Governor's Committee on Public Employee Relations. The Committee's final report was adopted in large part by that state's legislature, *codified at* N.Y. CIV. SERV. LAW §§ 200-12 (McKinney Supp. 1980), popularly referred to as the "Taylor Law." This effort of the Taylor Committee became a model followed by many other states in the public labor relations area.

13. Differing interpretations of the statute arise from its imprecise language. *See* notes 107-43 and accompanying text *infra.*

14. *See* notes 176-79 and accompanying text *infra.*

15. *See* notes 182-85 and 201-04 and accompanying text *infra.* The basis for the bargaining advantage of the public employer present in today's public labor relations law was previously incorporated into MASS. GEN. LAWS ANN. ch. 149, §§ 178D,F and G-N (West 1971). For a discussion comparing the prevailing statute with its predecessors, *see* Sherry, 1974 ANN. SURVEY OF MASS. LAW 28 (1974); Grady, *The Interface of Arbitration and the Law,* 18 BOSTON BAR J. 29 (1974).

16. *See* note 2 *supra.*

17. *See* note 1 *supra.*

18. *See* notes 186-204 and accompanying text *infra.*

strike provision. Explored in Part III are the possible options to the strike ban which could be applied to the public labor relations area of Massachusetts. This final section will evaluate the appropriateness of a qualified right to strike[19] in certain public sector services.

I. COLLECTIVE BARGAINING AND CONTRACT NEGOTIATION IMPASSE RESOLUTION IN MASSACHUSETTS

Since the issuance of Executive Order No. 10988 in 1962,[20] federal workers have had the right to unionize and collectively bargain. Confirming the constitutionality of this policy in *United Federation of Postal Workers v. Blount,*[21] the District Court for the District of Columbia (in an opinion affirmed by the United States Supreme Court) stated that the right to organize and to conduct contract negotiations in the public sector is a "fundamental" principle guaranteed by the United States Constitution.[22] Prior to the mid 1960s, however, most states prohibited public employees from unionizing and bargaining collectively.[23] After the 1962 Executive Order,[24] state legislatures began enacting statutes to reverse this historic prohibition.[25] Presently, the vast majority of states have passed laws protecting the right of public employees to form unions and to collectively bargain with their respec-

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19. No grant of the right to strike is absolute. In the private sector, courts have interpreted the right of workers to strike as qualified by the limitation that no labor disruption should substantially jeopardize the public health, safety and welfare. *See* United States v. International Longshoremen's Ass'n, 337 F. Supp. 381 (S.D.N.Y. 1971); United States v. Avco Corp., 270 F. Supp. 665 (D. Conn. 1967); Penello v. UMW, 88 F. Supp. 935 (D.D.C. 1950).

20. Exec. Ord. No. 10988, 27 Fed. Reg. 551 (1962).

21. 325 F. Supp. 879 (D.D.C.), *aff'd* 404 U.S. 802 (1971).

22. *Id.* at 883. However, the court did not specify the pertinent sections of the constitution protecting labor's organizational and bargaining rights. *Id.* The same judicial reasoning has been generally applied to similar labor rights in the private sector. *See, e.g.,* UAWA v. Wisconsin Employment Relations Bd., 336 U.S. 245, 259 (1948). The jurisprudence in labor law has, in part, been premised upon maintaining industrial peace through the democratic participation of unions in all levels of the economy. *See generally* Wellington & Winter, *supra* note 12, at 1112.

23. *See, e.g.,* People *Ex rel* Fursman v. Chicago, 278 Ill. 318, 116 N.E. 158 (1917) (teachers); Local 201, AFSCME v. City of Muskegan, 369 Mich. 384, 120 N.W.2d 197 (1963), *cert. denied* 375 U.S. 833 (1963) (municipal police); King v. Priest, 357 Mo. 68, 206 S.W.2d 547 (1947), *appeal dismissed on other grounds,* 333 U.S. 852 (1948), *reh. denied,* 333 U.S. 878 (1948) (municipal police); Carter v. Thompson, 164 Va. 312, 180 S.E. 410 (1935) (fire fighters).

24. Exec. Ord. No. 10988, 27 Fed. Reg. 551 (1962).

25. A vast majority of the statutes enumerated in note 26 *infra* were enacted after 1962.

tive public employers.[26] These states provide specific statutory remedies for use during contract negotiation impasse.[27]

A. *Massachusetts*

In 1958 the Massachusetts state legislature recognized the right of all public employees, except state police, to unionize and collectively bargain.[28] This was a short, simple act which was in need of further development.[29] Subsequently, in 1964, the labor rights of state workers were elaborated in G.L. chapter 149, section 178F.[30] This law defined

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26. ALA. CODE § 11-43-143 (1975) (firefighters); ALASKA STAT. §§ 23.40.070 - .260 (1972) (all); CAL. GOV'T CODE § 3502 (West 1980) (lower echelon); *id.* § 3526 (West 1980) (upper echelon); CAL. LAB. CODE §§ 1960 - 1963 (West 1971) (firefighters); CONN. GEN. STAT. ANN. § 5-271 (West Supp. 1980) (state); *id.* §§ 7-467 to -479 (West Supp. 1980) (municipal/local); DEL. CODE ANN. tit. 19, § 1309 (1979) (all); FLA. STAT. ANN. § 447.201 (West Supp. 1980) (all); GA. CODE § 54-1304 (1974) (firefighters); HAWAII REV. STAT. § 89-3 (1976) (all); IDAHO CODE § 33-1271 (Supp. 1980) (teachers); IND. CODE § 22-6-4-2 (1980) (all); IOWA CODE § 20.1 (1978) (all; exclusive of employees listed at *id.* § 20.4); KAN. STAT. ANN. § 75-4328 (1977) (all excluding teachers); *id.* § 72-5423 (Supp. 1979) (teachers); KY. REV. STAT. § 78.470 (Supp. 1980) (county police); *id.* § 345.040 (1977) (firefighters); LA. REV. STAT. ANN. § 23.890 (West Supp. 1980) (transit workers); ME. REV. STAT. ANN. tit. 26, § 961 (West 1974) (municipal); *id.* § 979-B (West 1974) (state); MD. ANN. CODE art. 77, § *160A(h) (1975) (teachers); MASS. GEN. LAWS ANN. ch. 150E,* § 2 (West Supp. 1980) (all); MICH. STAT. ANN. § 17.455 (11) (1975) (all); MINN. STAT. ANN. § 179.65 (West Supp. 1979) (all); MO. ANN. STAT. § 105.510 (Vernon Supp. 1980) (all excluding police, teachers, deputy sheriffs, state highway patrol and state national guard); MONT. REV. CODE ANN. § 59-1603 (Supp. 1977) (all); NEB. REV. STAT. § 48-837 (1978) (all excluding state national guard & state militia); NEV. REV. STAT. § 288.140 (1977) (local); N.H. REV. STAT. ANN. § 273-A:3 (1978 & Supp. 1979) (all); N.J. STAT. ANN. § 34:13A-5.3 (West Supp. 1980) (all); N.M. STAT. ANN. § 3-52-14 to -15 (1978) (transit workers); N.Y. CIV. SERV. LAW § 204 (McKinney Supp. 1979) (all); N.D CENT. CODE § 15-38.1 -08 (1971) (teachers); *id.* § 34-11-01 (1980) (all excluding teachers); OKLA. STAT. tit. 11, § 51-103 (1978) (police, firefighters); OR. REV. STAT. § 243.656 (1979) (all); PA. STAT. ANN. tit. 43, § 217.1 (Purdon Supp. 1980) (police, firefighters); *id.* § 1101.101 (Purdon Supp. 1980) (all excluding police and firefighters); R.I. GEN. LAWS § 28-9.1-2 (1979) (firefighters); *id.* § 28-9.2-4 (1979) (municipal police); *id.* § 28-9.3-2 (1979) (teachers); *id.* § 28-9.4-5 (1979) (other municipal); *id.* § 28-9.5-2 (Supp. 1980) (state police); *id.* § 36-11-1 (1979) (other state); S.D. COMP. LAWS ANN. § 3-18-2 (1979) (all); TENN. CODE ANN. § 6-3802 (Supp. 1979) (transit workers); TEX. REV CIV. STAT. ANN. art. 5154-1, § 5 (Vernon Supp. 1979) (police, firefighters); UTAH CODE ANN. § 11-20-31 (1973) (transit workers); *id.* § 34-20a-3 (Supp. 1979) (firefighters); VT. STAT. ANN. tit. 21, § 1503 (1978) (state); *id.* § 1721 (1978) (municipal); WASH. REV. CODE § 41.56.040 (1972) (all); WIS. STAT. ANN. 111.70 (West Supp. 1980) (municipal); *id.* § 111.82 (West 1974) (state); WYO. STAT. § 27-10-102 (1977) (firefighters). Generally, in all the states, public employees do not include elected representatives, appointed or commissioned officials, part-time workers and other managerial positions.

27. Such remedies include mediation, fact-finding and arbitration in assorted combinations, according to an individual state's preference. For a list of states employing these various resolution procedures, *see* REPORT TO THE 24TH INTERNATIONAL CONVENTION, AFSCME [hereinafter cited as AFSCME REPORT] at 106-108 (1980).

28. 1958 Mass. Acts ch. 460, *codified at* MASS. GEN. LAWS ANN. ch. 149, § 178D (West 1971). For a history of the first public labor relations statutes enacted in Massachusetts, *see* Moran, *Collective Bargaining in the Public Service — Massachusetts Style,* 52 MASS. L.Q. 153 (1967); Grady, *Collective Bargaining and Public Employees,* 9 BOSTON BAR J. 9 (1965).

29. *See* note 28 *supra.*

30. 1963 Mass. Acts ch. 637.

the required procedures for union certification,[31] contract negotiation[32] and impasse resolution.[33] In the following year, the state legislature enacted similar provisions, G.L. chapter 149, section 178G-N, to cover municipal employees.[34]

The 1964 and 1965 statutes provided two slightly varied procedures for contract negotiation impasse resolution. On the state level, all deadlocks were referred to the director of personnel and standardization.[35] The director was part of the state's management bureaucracy.[36] Upon investigation, the director issued a report stating whether fact-finding procedures were necessary.[37] Fact-finding was the pivotal remedy available to state employees during contract negotiation impasse.[38]

Under the 1965 statute, fact-finding measures were similarly made available to municipal employees,[39] but they were not confined to fact-finding alone. The fact-finder was also to act as mediator.[40] Furthermore, rather than petition management to commence the fact-finding process as state employees were obligated to do,[41] municipal employees' petitions were referred to an impartial body, the state Board of Conciliation and Arbitration.[42] The statutory bifurcation of public labor relations procedures distinguished state employees from municipal employees without any compelling rationale.[43] While the 1964 and 1965 statutes fleshed out the prior act of 1958, the emerging development of the state's public labor relations law was further refined and consolidated through passage of G.L. chapter 150E.

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31. MASS. GEN. LAWS ANN. ch. 149, § 178F (4) (West 1971).

32. *Id.*

33. *Id.* § 178F (7).

34. 1965 Mass. Acts ch. 763.

35. MASS. GEN. LAWS ANN. ch. 149, § 178F (7) (West 1971).

36. The bureau of personnel and standardization has been since its inception a unit within the Executive Office for Administration and Finance. *See* MASS. GEN. LAWS ANN. ch. 7, § 1 (West 1976), *as amended by* 1962 Mass. Acts ch. 757, § 71.

37. MASS. GEN. LAWS ANN. ch. 149, § 178F (7) (West 1971).

38. *Id.* This section of the law did not mention any other procedural remedy at contract negotiation impasse besides fact-finding.

39. *Id.* § 178J.

40. *Id.* § 178J (f).

41. *Id.* § 178F (7).

42. *Id.* § 178J. The MBCA was established under MASS. GEN. LAWS ANN. ch. 23, § 7 (West 1973). The board's function primarily regulates the processes of mediation, fact-finding and arbitration. *Id. See generally* Town of Arlington v. Board of Conciliation and Arbitration, 370 Mass. 769, 352 N.E.2d 914 (1976); School Comm. v. Korbut, 4 Mass. App. Ct. 743, 358 N.E.2d 831 (1976), *rev'd,* 373 Mass. 788, 396 N.E.2d 1148 (1977).

43. These statutes signified the first steps ever taken by the Massachusetts legislature to codify public labor relations laws. *See generally* Moran, *supra* note 28; Grady, *supra* note 28.

B. *The Public Labor Relations Law of Massachusetts: Chapter 150E*

Beginning in 1969, the Commonwealth's public labor relations laws were reevaluated. The state Senate established the Mendonca Commission[44] to investigate and report on G.L. chapter 149, sections 178D and 178F-N. The state legislature considered six proposals[45] before finally enacting G.L. chapter 150E in 1973.[46] In contrast to its predecessors,[47] the new public labor relations law grouped all public employees under one statute.[48] The procedures of mediation, fact-finding and arbitration were all included as procedural remedies for state and municipal workers during contractual impasse.[49] In fact, there was virtual unanimity in the legislative consideration of these remedies, indicating their firm acceptance in Massachusetts.[50] By refining previously existing procedures[51] and adding the new element of arbitration,[52] the state legislature attempted to provide a more flexible formula for avoiding strikes generated over contract negotiation disputes.[53]

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44. 1969 Mass. Acts ch. 97.

45. H.R. Doc. No. 6194, app. B. (1973) (submitted by the Mendonca Commission); H.R. Doc. No. 7715 (1973); H.R. Doc. No. 7751 (1973); S. Doc. No. 1929 (1973); S. Doc. No. 1935 (1973); S. Doc. No. 1771 (1973).

46. 1973 Mass. Acts ch. 1078, § 2, which in the end most resembled H.R. Doc. No. 7751 (1973). For a discussion concerning the legislative history of the act, *see* Director of the Div. of Employee Relations v. Labor Relations Comm'n, 370 Mass. 162, 346 N.E.2d 852 (1976).

47. Mass. Gen. Laws Ann. ch. 149, § 178F (1) and § 178G (West 1971). *See* notes 30-43 and accompanying text *supra*.

48. Mass. Gen. Laws Ann. ch. 150E, § 1 (West Supp. 1980). The Mendonca Commission noted: "Among the notable features of that legislation are these: (1) It puts all public employees — State, county, city and town — on an equal footing in regard to their collective bargaining rights and procedures." H.R. Doc. No. 6194 (1973), *Letter of Transmittal*, at 6.

49. Mass. Gen. Laws Ann. ch. 150E, § 9 (West Supp. 1980). *See* note 2 *supra*. *But cf.*: Mass. Gen. Laws Ann. ch. 149, § 178F (7) and § 178J-K (West 1971).

50. All resolutions, except S. Doc. No. 1935 (1973) offered a wide range of mediation, fact-finding and voluntary arbitration procedures at impasse. *See* H.R. Doc. No. 6194, app. B, § 9 (1973); H.R. Doc. No. 7715, § 9 (1973); H.R. Doc. No. 7751, § 9 (1973); S. Doc. No. 1929, § 9 (1973); S. Doc. No. 1771, § 9 (1973). Among these five bills, one variance in the prescribed impasse procedures existed in S. Doc. No. 1929, § 9 (1973). This provision did not include voluntary interest arbitration measures. Rather, the section stated: "If impasse continues thirty days after the publication of the fact-finder's report, the commission [the labor relations commission] may take whatever steps it deems appropriate for the peaceful resolution of the impasse." *Id.*

51. *Compare* Mass. Gen. Laws Ann. ch. 150E, § 9 (West Supp. 1980) *with* Mass. Gen. Laws Ann. ch. 149, § 178F (7) and § 178J-K (West 1971).

52. Mass. Gen. Laws Ann. ch. 150E,§ 9 (West Supp. 1980). *See also* 1973 Mass. Acts ch. 1078, § 4 (current version at Mass. Gen. Laws Ann. ch. 150E, § 1 (West Supp. 1980)).

53. As one commentator stated: "Successful avoidance of the strike is brought about substantially through perfecting procedures and policies to provide an effective alternative to conflict." Taylor, *supra* note 12, at 635.

1. The Collective Bargaining Process Before Impasse

Chapter 150E, section 6 is the statutory provision which regulates the collective bargaining process short of impasse.[54] As compared to predecessor statutes,[55] this section broadens the scope of mandatory collective bargaining. Section 6 states that the employer and employee representatives "shall negotiate in good faith with respect to wages, hours, standards of productivity and performance, and any other terms and conditions of employment. . . ."[56] Construing this provision, the Supreme Judicial Court labeled items which would "intrude improperly into an area reserved for the judgment of [a governmental body]"[57] as legally extraneous. Thus, collective bargaining issues which the judiciary deems outside the scope of chapter 150E, section 6 are not subjects which a public employer is compelled to negotiate.

The theoretical rationale underlying this restriction is rooted in the so-called sovereignty doctrine, which advocates that the government is the repository of ultimate authority.[58] Emanating from this tenet, the

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54. MASS. GEN. LAWS ANN. ch. 150E, § 6 (West Supp. 1980), which states:

> The employer and the exclusive representative shall meet at reasonable times, including meetings in advance of the employer's budget-making process and shall negotiate in good faith with respect to wages, hours, standards of productivity and performance, and any other terms and conditions of employment, but such obligation shall not compel either party to agree to a proposal or make a concession.

See generally Boston Teachers Union v. School Comm., 370 Mass. 455, 350 N.E.2d 707 (1976). *See also* Sackman, *Redefining the Scope of Bargaining in Public Employment*, 19 B.C. INDUS. & COM. L. REV. 155 (1977).

55. *See* MASS. GEN. LAWS ANN. ch. 149, § 178F (6) (West 1971) (defining the bargaining scope vaguely as "conditions of employment") *id.* § 1781 (defining the bargaining scope with more specificity as "wages, hours and other conditions of employment"). Compare these two provisions with the broader language in MASS. GEN. LAWS ANN. ch. 150E, § 6 (West Supp. 1980); *see* note 54 *supra*.

56. MASS. GEN. LAWS ANN. ch. 150E, § 6 (West Supp. 1980).

57. Local 66, Boston Teachers Union v. School Comm., 370 Mass. 455, 462, 350 N.E.2d 707, 714 (1976). *See also* School Comm. v. Local 66, Boston Teachers Union, 79 Mass. Adv. Sh. 1238, 1243-45, 389 N.E.2d 970, 973-74 (1979).

58. *See* Zwerdling, *The Liberation of Public Employees: Union Security in the Public Sector*, 17 B.C INDUS. & COM. L. REV. 993, 996 (1976); *"Pickets at City Hall"* — REPORT AND RECOMMENDATIONS OF THE TWENTIETH CENTURY FUND TASK FORCE ON LABOR DISPUTES IN PUBLIC EMPLOYMENT [hereinafter cited as TASK FORCE REPORT], Bureau of National Affairs, GERR 51:151,159 (1970); Anderson, *Strikes and Impasse Resolution in Public Employment*, 67 MICH. L. REV. 943, 953 (1969); Vogel, *What About the Rights of the Public Employee?*, 1 LAB. L.J. 604, 612-13 (1950); and Wellington & Winter, *supra* note 12, at 1108-09.

On the federal level, the sovereignty doctrine predominates in constructing rules of conduct for United States government employees:

> [T]he interests of the national security require that all persons privileged to be employed in the departments and agencies of the Government shall be reliable, trustworthy, of good conduct and character and of complete and unswerving loyalty to the United States. . . .

Exec. Ord. No. 10450, *as amended*, 18 Fed. Reg. 2489 (1953), *reprinted in* 5 U.S.C. § 7311 (1976). Euphemistically phrased, "complete and unswerving loyalty to the United States", the vow not to strike on any level of federal employment, is exchanged for job security — the hallmark of civil service.

scope of permissible bargaining should not extend to the usurpation of discretionary powers entrusted to elected representatives and to publically appointed officials. Once a collective bargaining agreement has been reached, it must be submitted to the appropriate legislative body for approval.[59] Chapter 150E, section 7(b) grants such governmental authorities a veto power over settled contract agreements.[60] If the contract is vetoed, the statute directs the contracting parties back to the bargaining table to renegotiate the cost items in question.[61]

However, the legislative veto power under section 7(b) is not absolute. Chapter 150E, section 7(d) enumerates a limited number of statutes, rules and regulations over which a collective bargaining agreement may prevail.[62] This provision constitutes a radically new addition

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> [T]he American tradition that all persons should receive fair, impartial, and equitable treatment at the hands of the government requires that all persons seeking the privilege of employment or privileged to be employed in the departments and agencies of the Government be adjudged by mutually consistent and no less than minimum standards and procedures among the departments and agencies governing the employment and retention in employment of persons in the Federal Service. . . .

Id.

59. *See* MASS. GEN. LAWS ANN. ch. 150E, § 7(b) (West Supp. 1980), stating in pertinent part:

> The employer . . . shall submit to the appropriate legislative body within thirty days after the date on which the agreement is executed by the parties, a request for an appropriation necessary to fund the cost items contained therein. . . . If the appropriate legistative body duly rejects the request . . . such cost items shall be returned to the parties for further bargaining.

60. *Id. See, e.g.*, Boston Teachers Union v. School Comm., 370 Mass. 455, 474, 350 N.E.2d 707, 720 (1976) (the mayor of Boston does not constitute an "appropriate legislative body" in regard to labor contracts with the school committee); H. WELLINGTON & R. WINTER, THE UNIONS AND THE CITIES 184 (1971).

61. MASS. GEN. LAWS ANN. ch. 150E, § 7(b) (West Supp. 1980); *see* note 59 *supra.*

62. *Id.* § 7(d) states as follows:

> If a collective bargaining agreement reached by the employer and the exclusive representative contains a conflict between matters which are within the scope of negotiations pursuant to section six of this chapter and any municipal personnel ordinance, by-law, rule or regulation; the regulations of a police chief pursuant to section ninety-seven A of chapter forty-one; the regulations of a fire chief or other head of a fire department pursuant to chapter forty-eight; any of the following statutory provisions or rules or regulations made thereunder:
>
> (*a*) the second paragraph of section twenty-eight of chapter seven;
>
> (*a*½) section six E of chapter twenty-one;
>
> (*b*) sections fifty to fifty-six, inclusive, of chapter thirty-five;
>
> (*c*) section twenty-four A, paragraphs (4) and (5) of section forty-five, paragraphs (1), (4) and (10) of section forty-six, section forty-nine, as it applies to allocation appeals, and section fifty-three of chapter thirty;
>
> (*d*) sections twenty-one A and twenty-one B of chapter forty;
>
> (*e*) sections one hundred and eight D to one hundred and eight I, inclusive, and sections one hundred and eleven to one hundred and eleven I, inclusive, of chapter forty-one;
>
> (*f*) section thirty-three A of chapter forty-four;
>
> (*g*) sections fifty-seven to fifty-nine, inclusive, of chapter forty-eight;
>
> (*g*½) section sixty-two of chapter ninety-two;
>
> (*h*) sections fourteen to seventeen E, inclusive, of chapter one hundred and forty seven;
>
> (*p*) sections thirty to forty-two, inclusive, of chapter one hundred and forty-nine;
>
> (*j*) section twenty-eight A of chapter seven;

to the state's public labor relations law not included in prior statutes.[63] In effect, section 7(d) establishes a direct grant of increased flexibility in the collective bargaining process advantageous to the public employee; ultimately, it has served the purpose of inducing public employees to partake in collective bargaining with added confidence.[64]

In summary, section 6 delineates the limits of mandatory bargaining and section 7 defines the role of the legislature as the final arbiter in the collective bargaining process before impasse. To ensure the smooth functioning of section 6, chapter 150E, section 10[65] lists specific prohibited practices which, if committed, shall be subject to the "cease and desist" powers of the state Labor Relations Commission.[66] This section

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(*k*) sections forty-five to fifty inclusive, of chapter thirty;
(*l*) sections thirty, thirty-three and thirty-nine of chapter two hundred and seventeen;
(*m*) sections sixty-one, sixty-three and sixty-eight of chapter two hundred and seventeen;
(*n*) sections sixty-nine to seventy-three, inclusive, and seventy-five, eighty and eighty-nine of chapter two hundred and twenty-one;
(*o*) section fifty-three C of chapter two hundred and sixty-two;
(*p*) sections eighty-four, eighty-five, eighty-nine, and ninety-nine B of chapter two hundred and seventy-six;
(*q*) section eight of chapter two hundred and eleven B, the terms of the collective bargaining agreement shall prevail.

63. *See* MASS. GEN. LAWS ANN. ch. 149, § 178F and § 178G-N (West 1971). None of these statutues contained a provision analogous to MASS. GEN. LAWS ANN. ch. 150E, § 7(d) (West Supp. 1980).

64. *See generally* Sherry, *supra* note 15; *Grady, supra* note 15. *But see* Watertown Firefighters, Local 1347 v. Town of Watertown, 78 Mass. Adv. Sh. 2956, 2964 n.16, 383 N.E.2d 494, 498 n.16 (1978), wherein the court stated that a party may not characterize a contractual agreement as "compensation" or "other terms of employment ... if in substance it defeats a declared legislative purpose." *Id.* at 2964, 383 N.E.2d at 498. This observation indicates a certain tension between MASS. GEN. LAWS ANN. ch. 150E, § 7(d) (West Supp. 1980) and the legal precepts of the sovereignty doctrine. *See* note 58 *supra.*

65. MASS. GEN. LAWS ANN. ch. 150E, § 10 (West Supp. 1980) states in pertinent part:

(a) It shall be a prohibited practice for a public employer or its representative to:
(5) Refuse to bargain collectively in good faith with the exclusive representative as required in section six;
(6) Refuse to participate in good faith in the mediation, fact-finding and arbitration procedures set forth in sections eight and nine;
(b) It shall be a prohibited practice for an employee organization or its designated agent to:
(2) Refuse to bargain collectively in good faith with the public employer, if it is an exclusive representative, as required in section six;
(3) Refuse to participate in good faith in the mediation, fact-finding and arbitration procedures set forth in sections eight and nine.

66. The commission was established under 1938 Mass. Acts ch. 345, § 1 (codified at MASS. GEN. LAWS ANN. ch. 23, § 90 (West 1973)). MASS. GEN. LAWS ANN. ch. 150E, § 11 (West Supp. 1980) indicates the enforcement powers of the commission over any violations of the prohibited tices provision:

If, upon all the testimony, the commission determines that a prohibited practice has been committed, it shall state its findings of fact and shall issue and cause to be served on the party committing the prohibited practice an order requiring it or him to cease and desist from such prohibited practice. . . .

For discussions of the enforcement of the prohibited practices provision, *see* Southern Worcester County Regional Vocational School Dist. v. Labor Relations Comm'n, 79 Mass. Adv.

serves the purpose of preventing or rectifying bad faith bargaining tactics by either the employer or employee. Section 10 did not substantially change the scope of prohibited practices when compared with its predecessor statutes for state[67] and municipal[68] employers and employees. While the prohibitions in section 10 remain virtually the same,[69] the power of the Labor Relations Commission to penalize any violation thereof has been strengthened considerably.[70]

2. Strike Surrogate Procedures at Contractual Impasse

Under chapter 150E, section 9[71] public employees and employers may voluntarily pursue two alternatives to resolve contract negotiation impasse and thereby avoid the need to strike. The primary route concerns the combined procedures of mediation and fact-finding.[72] The other alternative is voluntary interest arbitration.[73]

By their very nature, mediation and fact-finding rely on the collective bargaining initiative of the disputing parties.[74] According to this

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Sh. 1144, 389 N.E.2d 389 (1979) (upholding the commission's cease and desist order directed to the public employer); *accord,* Labor Relations Comm'n v. City of Everett, 79 Mass. App. Ct. Adv. Sh. 1310, 391 N.E.2d 694 (1979). *See also* Cambridge School Comm. and Cambridge Teachers Ass'n, MUP-3319, 7 M.L.C. 1026 (5/27/1980) (school committee's commission of a prohibited practice by attempting to implement a reorganization plan without first submitting the plan to the collective bargaining processs).

67. MASS. GEN. LAWS ANN. ch. 149, § 178F (8) and (9) (West 1971).

68. *Id.* § 178L.

69. *Compare* MASS. GEN. LAWS ANN. ch. 150E, § 10 (West Supp. 1980) *with* MASS. GEN. LAWS ANN. ch. 149, § 178F (8) and (9) (West 1971), *and with* MASS. GEN. LAWS ANN. ch. 149, § 178L (West 1971).

70. MASS. GEN. LAWS ANN. ch. 149, § 180 (West 1971), which allowed for fines of "not more than one hundred dollars." *Compare* this repealed provision *with* the current law which takes its place, MASS. GEN. LAWS ANN. ch. 150E, § 15 (West Supp. 1980), which states:

> Whoever willfully assaults, physically resists, prevents, impedes, or interferes with a mediator, fact-finder, or arbitrator, or any member of the commission or any of the agents or employees of the commission in the performance of duties pursuant to this chapter shall be fined not more than five thousand dollars, or imprisoned not more than one year, or both.

Though not explicit in the present law, the commission may use the contempt powers of the judiciary to enforce its orders. *See* Labor Relations Comm'n v. Local 66, Boston Teachers Union, 374 Mass. 79, 92-93, 371 N.E.2d 761, 770 (1977). The public labor relations laws of Massachusetts have always allowed the commission implicit equitable powers whenever reasonably appropriate. *See* Boston v. Reilly, 362 Mass. 334, 339, 285 N.E.2d 795, 798 (1972).

71. *See* note 2 *supra.*

72. MASS. GEN. LAWS ANN. ch. 150E, § 9 (West Supp. 1980); *see* notes 2, 4 and 5 and accompanying text *supra.*

73. MASS. GEN. LAWS ANN. ch. 150E, § 9 (West Supp. 1980); *See also* 1973 Mass. Acts ch. 1078, § 4 (current version at MASS. GEN. LAWS ANN. ch. 150E § 1 (West Supp. 1980)); notes 2 and 6 and accompanying text *supra;* note 88 *infra.*

74. *See* MASS. GEN. LAWS ANN. ch. 150E, § 9 (West Supp. 1980), which states: "If the impasse continues after the publication of the fact-finder's report, the issues in dispute shall be returned to the parties for further bargaining."

scheme, the state intervenes in an impasse as an aid to the bargaining process, not as a coercive agent.[75] These procedures are activated when either party, or both, petitions the state Board of Conciliation and Arbitration to investigate an ongoing impasse during contract negotiations.[76] If the board determines that an impasse exists, it or the parties themselves may appoint a mediator who sits at the bargaining table.[77] If the impasse continues after a twenty day mediation period, either or both parties may petition the board to commence fact-finding procedures.[78] Once appointed, the fact-finder investigates the dispute and issues recommendations concerning its resolution.[79] However, neither party is bound to comply with the fact-finder's report.[80] If the parties cannot mutually accept the fact-finder's report, the statute directs them back to the bargaining table for further negotiations.[81]

Alternatively, the parties may waive fact-finding procedures and mutually agree to commence voluntary interest arbitration.[82] Under this second option, the "last and best offer" of each party is submitted to the arbitrator or arbitration panel.[83] On the other hand if, in the case of municipal police and firefighters, voluntary interest arbitration is activated following the completion of fact-finding, then the fact-finder's report is included as a third, alternate proposal to the arbitral authority.[84] In any case an award constitutes the adoption of the most reasonable offer from among those presented.[85]

Several commentators have applauded the usefulness of mediation and fact-finding because of the absence of coercion and the flexibility of free choice provided in these procedures. *See generally* TASK FORCE REPORT, *supra* note 58, at 155-56; Anderson, *supra* note 58, at 967-68; Moran, *supra* note 28, at 160.

It has been noted that relatively few strikes occur after the issuance of a fact-finder's report. *See* WELLINGTON & WINTER, *supra* note 60, at 177. "[I]f fact-finding with recommendations is properly utilized, collective bargaining in the public sector can be effective without the right to strike." Anderson, *supra* note 58, at 968.

Most states employ mediation and fact-finding procedures in the public labor relations area. At least thirty-five states utilize mediation. *See* AFSCME REPORT, *supra* note 27, at 105 n.14. Furthermore, approximately thirty-two states use fact-finding techniques. *Id.* at 109 n.15.

75. MASS. GEN. LAWS ANN. ch. 150E, § 9 (West Supp. 1980). For a general discussion of the benefits of the non-coercive character of mediation and fact-finding, *see* H. WELLINGTON & R. WINTER, *supra* note 60, at 171-72, 179.

76. MASS. GEN. LAWS ANN. ch. 150E, § 9 (West Supp. 1980).

77. *Id.*

78. *Id.*

79. *Id.*

80. *Id.*

81. *Id.*

82. *Id.*

83. 1973 Mass Acts ch. 1078, § 4 (current version at MASS. GEN. LAWS ANN. ch. 150E, § 1 (West Supp. 1980)).

84. *Id.*

85. *Id.* Criticizing this procedure, one author stated: "Appropriate salary schedules and suitable grievance procedures cannot be adequately balanced. Similarly, one particular demand might be totally unreasonable while the package as a whole might appear 'more reasonable' than

Unlike mediation and fact-finding procedures which emphasize the parties' own independence and initiative, voluntary interest arbitration places priority on fast and final resolution of contractual impasse.[86] An arbitration award is binding[87] and subject to conformity with statutorily promulgated guidelines.[88] These enumerated guidelines limit the delegation of policy-making authority to the appointed arbitrators.[89] Emphasizing the public trust residing in duly elected representatives, many proponents of the sovereignty doctrine have criticized arbitration as an illegal delegation of legislative power.[90]

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the package of the other party. How could the arbitrator make his decision?", Garber, *Compulsory Arbitration in the Public Sector; A Proposed Alternative,* 26 ARB. J. 226, 232 (1971). The counter proposal discussed in this article called for "issue-by-issue" arbitration. *Id.* at 232, 238. This alternative would require that an arbitrator make awards on a cost item basis, instead of the common procedure whereby offers are judged in their entirety. *Id.* "Issue-by-issue" arbitration would lead, however, to insurmountable administrative difficulties since contract impasses may involve a myriad of unsettled cost item factors. *See, e.g.,* School Comm. v. Local 66, Boston Teachers Union, 372 Mass. 605, 363 N.E.2d 485 (1977) (wherein approximately one hundred contractual issues had not been settled during the collective bargaining process).

86. The arbitration hearing itself may last for only a maximum of forty days. Within ten days after the termination of the hearing, the arbitrator(s) must make a final and binding decision. 1973 Mass Acts ch. 1078, § 4 (current version at MASS. GEN. LAWS ANN. ch. 150E, § 1 (West Supp. 1980)). For examples of arbitration decisions concerning either police or firefighters, *see, e.g.,* City of Quincy and Police Betterment Ass'n, PF-57-79, 7 M.L.R.R. 2003 (6/25/1980) (selecting city's final offer); City of Westfield and IBPO, Local 5625, PF-29-1979, 6 M.L.R.R. 2057 (9/5/1979) (selecting city's final offer); City of Chicopee and IAFF Local 1710, PF-38-1977, 6 M.L.R.R. 2049 (6/4/1979) (selecting union's final offer); Local 1735, IAFF and Town of Dedham, PF-102, 5 M.L.R.R. 2021 (9/8/1978) (selecting union's final offer); Town of Provincetown and Local 1462, AFSCME, PF-16, 5 M.L.R.R. 2013 (8/24/1978) (selecting town's final offer); IBPO (Yarmouth Police Ass'n) and Town of Yarmouth, PF-122, 5 M.L.R.R. 2006 (7/11/1978) (selecting fact-finder's report).

87. MASS. GEN. LAWS ANN. ch. 150E, § 9 (West Supp. 1980).

88. 1973 Mass. Acts ch. 1078, § 4 (current version at MASS. GEN. LAWS ANN. ch. 150E, § 1 (West Supp. 1980)). Policy factors outlined for the arbitrator consist of the following: 1) the financial ability of the government to meet costs, 2) the interests and welfare of the public, 3) the hazards of employment, physical education and mental qualifications, job training and skills involved, 4) comparative wages in the private sector, 5) the factfinder's report, 6) cost of living index, 7) overall compensation received by employees including all fringe benefits, 8) recent changes in the above circumstances during the pendency of the arbitration, 9) stipulation of the parties and 10) other factors normally taken into consideration in determining wages, hours and terms and conditions of employment. *Id.*

89. For a discussion of requisite restrictions placed upon an arbitrator's power, *see* Town of Arlington v. Board of Conciliation and Arbitration, 370 Mass. 769, 352 N.E.2d 914 (1976).

90. "How can the mayor ... or a city council perform their constitutional functions of taxing and budget making if they are bound by what a panel of 'outside experts' decides is necessary to resolve a particular government-labor issue dealt with as an isolated incident?" Taylor, *supra* note 12, at 632. "In one notorious case in Buffalo, N.Y., several years ago, a public employe relations board ordered that hard-pressed city to pay for a settlement by issuing a short-term debt." *Striking the Cities,* Wall St. J., May 23, 1978, at 24, col. 1. *Harrington Blasts Public Unions,* Boston Herald American, Jan. 6, 1977, at 1. *See generally* Kheel, *Strikes and Public Employment,* 67 MICH. L. REV. 931, 939-40 (1969); H. WELLINGTON & R. WINTER, *supra* note 60, at 183-84.

Alternatively a compelling argument may be made in support of arbitration as a legal delegation of power: "[B]y granting to public employees the right to negotiate collectively, the legislature has already relinquished a portion of its sovereignty. There is no turning back." Garber, *supra* note 85, at 233.

In the special case of police and firefighters, the arbitration process is compulsory if mediation and fact-finding remedies prove unsuccessful.[91] Taking every precaution to avoid strikes by these public employees who provide essential services to the public, the legislature mandated compulsory arbitration.[92] Whether voluntary or compulsory, all arbitration awards are enforcible through the courts.[93]

Currently, fifteen other states have incorporated similarly combined procedures of mediation, fact-finding and arbitration into their public labor relations laws.[94] By providing the contracting parties with the full arsenal of impasse resolution techniques, these statutes attempt to serve as an effective inducement not to strike.

The Supreme Judicial Court of Massachusetts has upheld arbitration as a legal delegation of public authority:

> The delegation does not fail in that it was conferred on a "private person." As was stated in *Attorney Gen. v. Drohan,* 169 Mass. 534, 535 (1897), a person may be deemed a public official where he is fulfilling duties which are public in nature, "involving in their performance the exercise of some portion of the sovereign power, whether great or small." ... [D]elegations to private persons are not forbidden so long as proper safeguards are provided.

Town of Arlington v. Board of Conciliation and Arbitration, 370 Mass. 769, 777, 352 N.E.2d 914, 920 (1976). *Accord,* City of Richfield v. Local 1215, Int'l Ass'n of Firefighters, 276 N.W.2d 42 (Minn. 1979); City of Hemiston v. Employment Relations Bd., 280 Or. 291, 570 P.2d 663 (1977); City of Warwick v. Warwick Firemen, 106 R.I. 109, 256 A.2d 206 (1969). *Contra,* Bagley v. City of Manhattan Beach, 132 Cal. 668, 553 P.2d 1140 (1976); Greeley Police Union v. City Council, 553 P.2d 790 (Colo. 1976); City of Sioux Falls v. Sioux Falls Firefighters, 89 S.D 453, 234 N.W.2d 35 (1975); Salt Lake City v. International Ass'n of Firefighters, 563 P.2d 786 (Utah 1977). Overall, approximately twenty-seven states have authorized voluntary and/or compulsory arbitration in the public labor relations area. *see* AFSCME REPORT, *supra* note 27, at 109 n.16.

91. 173 Mass. Acts ch. 1078, § 4 (current version at MASS. GEN. LAWS ANN. ch. 150E, § 1 (West Supp. 1980)). *See* MBCA Rules 2.01 - .15, 1 M.L.R.R. 3013-3021 (1974). In addition to the requirement of cumpulsory arbitration, police and firefighters are more restricted in the scope of mandatory collective bargaining than all other public employees. *Compare* 1973 Mass. Acts ch. 1078, § 4 (current version at MASS. GEN. LAWS ANN. ch. 150E, § 1 (West Supp. 1980)), *with* MASS. GEN. LAWS ANN. ch. 150E, § 6 (West Supp. 1980). For analysis of this heightened restriction, *see* Watertown Firefighters v. Town of Watertown, 78 Mass. Adv. Sh. 2956, 2964, 383 N.E.2d 494, 498 (1978); City of Taunton v. Taunton Branch of Mass. Police Ass'n, 80 Mass. App. Ct. Adv. Sh. 1359, 1364, 406 N.E.2d 1298, 1301-02 (1980).

92. *See* Town of Arlington v. Board of Conciliation and Arbitration, 370 Mass. 769, 352 N.E.2d 914 (1976). Here, the Supreme Judicial Court stated:

> [I]n attempting to strike a balance between protecting the public health and safety and affording recognition to the collective bargaining rights of public employees the Legislature is moving in a difficult and controversial area. [citation omitted]. This particular legislation [1973 Mass. Acts, ch. 1078, § 4] appears to seek to provide an alternative to strikes by key municipal employees. It has been preceded by somewhat similar legislation dealing with authorities but the procedures which this act sets forth have been more carefully and fully framed.

Id. at 780, 352 N.E.2d at 922.

93. *See* MASS. GEN. LAWS ANN. ch. 150C, §§ 10-13 (West 1971).

94. MASS. GEN. LAWS ANN. ch. 150E, § 9 (West Supp. 1980). *Accord,* CONN. GEN. STAT. ANN. § 5-277 (West Supp. 1980) (state); *id.* § 7-473 (b) and (c) (West Supp. 1980) (municipal); HAWAII REV. STAT. § 89-11 (1976) (all); ILL. ANN. STAT. tit. 127, § 43.05 (Smith-Hurd 1967) (state); IOWA CODE §§ 20.20 to .22 (1978) (all; exclusive of employees listed at § 20.4); ME. REV. STAT. ANN. tit. 26, § 965 (West 1974 and West Supp. 1980) (municipal); *id.* § 979-D (1974 and West Supp. 1980) (state); MICH. STAT. ANN. § 17.455 (33) (1975 and Supp. 1980) (municipal police and firefighters);

C. The Problematic Areas of Chapter 150E

Two major deficiencies are manifest in the Massachusetts public labor relations law. First, the law tends to foster a potentially indefinite series of contract negotiations.[95] Second, the statute does not adequately define the scope of mandatory collective bargaining[96] and voluntary interest arbitration.[97]

1. Possibilities of Endless Negotiations

The Massachusetts statute encourages protracted negotiation in two ways. First, if an appropriate legislative body refuses to fund part or all of a settled labor contract, section 7(b) directs the parties to resume bargaining over those items rejected.[98] In addition, the process of review by the appropriate legislative body may be delayed depending upon when that body is in session.[99]

Second, section 9 resurrects further collective bargaining when mediation and fact-finding fail to resolve contractual impasse.[100] In essence, the impact of section 9 parallels that of section 7(b); both may unduly prolong negotiations. While the provision of section 10 prohibiting the practice of bad faith bargaining counteracts efforts to procrastinate,[101] unwarranted delay in the process of resolving bargaining disputes has nonetheless occurred at the expense of the public employees concerned.[102]

NEB. REV. STAT. §§ 48-816 to -819.01 (1978 and Supp. 1979) (all excluding state national guard and state militia); NEV. REV. STAT. §§ 28.190 to .215 (1977) (local); N.H. REV. STAT. ANN. § 273-A:12 (1978 and Supp. 1979) (all); N.J. STAT. ANN. §§ 34:13A-4 to -7 (West 1965 and West Supp. 1980); N.Y. CIV. SERV. LAW § 209 (McKinney Supp. 1979) (all); OR. REV. STAT. §§ 243.706 to .722 (1979) (all excluding police, firefighters, guards of mental and correctional institutions for whom binding arbitration is mandatory: *Id.* §§ 243.742 to .762); PA. STAT. ANN. tit. 43, §§ 1101.801 to .804 (Purdon Supp. 1980) (all excluding police, court personnel, guards of mental and correctional institutions); VT. STAT. ANN. tit. 21, §§ 1731 to 1733 (1978) (municipal); WIS. STAT. ANN. §§ 111.07, .10, .11 (West 1974 and West Supp. 1980) (all).

The laws of Rhode Island are also similar to Mass. Gen. Laws ch. 150E, § 9 (West Supp. 1980), however, mediation and voluntary arbitration are emphasized to the exclusion of fact-finding procedures. *See* R.I. GEN. LAW § 28-9.3-9 to -11 (1979) (teachers); *id.* § 28-9.4-10 to -12 (1979) (municipal); *id.* § 36-11-8 to -10 (Supp. 1979) (state).

95. MASS. GEN. LAWS ANN. ch. 150E, §§ 7(b) and 9 (West Supp. 1980).

96. *Id.* § 6.

97. 1973 Mass. Acts ch. 1078, § 4 (current version at MASS. GEN. LAWS ANN. ch. 150E, § 1 (West Supp. 1980)).

98. *See* note 59 *supra.*

99. *See* note 59 *supra.* Such delay could be prolonged further during periods of legislative transition following state or local elections.

100. MASS. GEN. LAWS ANN. ch. 150E, § 9 (West Supp. 1980); *see* note 74 *supra.*

101. *See* notes 65-66 and accompanying text *supra.*

102. Many bargaining issues are matters of immediacy for the employee. Time is a critical factor. If important bargaining issues are referred to continuous negotiations or the slow-moving judicial process for final resolution, an eventual union victory may easily be converted into a loss merely due to an intervening time period of improper duration. *See* Canton School Comm. and

The threat of protracted negotiations is also an undercurrent within the procedures of voluntary interest arbitration.[103] Arbitration is an appealing — often necessary — procedural remedy for public unions when mediation and fact-finding produce limited results.[104] The expedient and final character of this procedure offers a method of avoiding endless rounds of renegotiation. However, even though a union desires to commence arbitration proceedings, such arbitration will not be activated unless both sides mutually agree (provided that arbitration is not included in the parties' contract).[105] When mutual agreement fails to occur, the parties again return to the bargaining table.[106]

2. Ascertaining the Scope of Mandatory Collective Bargaining

In spite of its increased breadth and specificity as compared to the prior laws,[107] the new definition of mandatory bargaining scope established in section 6[108] remains flawed. Its scope is vague especially in reference to the determination of "any other terms and conditions of employment."[109] In the absence of any exact legislative definition of this phrase, the state courts have had to delineate the precise boundaries of mandatory bargaining scope on a case by case basis.[110]

Canton Teachers Ass'n, MUP-3618, 7 M.L.R.R. 1025 (6/19/1980) (resolution of bargaining issue concerning changes in remedial reading program delayed for one year); City of Springfield and Mass. Nurses Ass'n, MUP-3720, 7 M.L.R.R. 1014 (6/19/1980) (resolution of dispute concerning holiday pay delayed for nine months). *See also* Avon School Comm. and Avon Educ. Ass'n, MUP-3675, 7 M.L.R.R. 1043 (8/13/1980); Quincy City Hospital and Licensed Practical Nurses of Mass. Inc., MUP-3563, 6 M.L.R.R. 1308 (12/13/1979); Cambridge School Comm. and Cambridge Teachers Ass'n, MUP-3319, 6 M.L.R.R. 1306 (12/12/1979); Town of Rockland and Rockland Employees Ass'n, H.L.P.E., MUP-3498, 6 M.L.R.R. 1277 (9/27/1979).

103. MASS. GEN. LAWS ANN. ch. 150E, § 9 (West Supp. 1980). *See* note 2 *supra*.

104. Should mediation and fact-finding fail to resolve contractual impasse, the parties may choose to continue collective bargaining in lieu of arbitration. *See* MASS. GEN. LAWS ANN. ch. 150E, § 9 (West Supp. 1980); *see* note 74 *supra*. Public sector unions have espoused an extensive application of binding arbitration and, therefore, would apparently opt for arbitration whenever possible. *See Resolution No.* 4, 4TH ANNUAL CONVENTION, AFSCME COUNCIL 93, Oct. 3-5, 1980.

105. MASS. GEN. LAWS ANN. ch. 150E, § 9 (West Supp. 1980).

106. *Id.* For a discussion of the prerequisite volition of the parties in order to activate arbitration proceedings, *see* Director of the Div. of Employee Relations v. Labor Relations Comm'n, 370 Mass. 162, 346 N.E.2d 852 (1976).

107. *See* notes 54-55 and accompanying text *supra*.

108. *See* note 54 *supra*.

109. MASS. GEN. LAWS ANN. ch. 150E, § 6 (West Supp. 1980); *see* note 54 *supra*. For the discussion of this provision's ambiguity, *see* notes 110-126 and accompanying text *infra*.

110. *See* note 123 and accompanying text *infra*. A series of cases concerning disputes between teachers and school committees has provided the clearest picture of the contours of the scope of mandatory collective bargaining. For discussions of bargaining issues outside of this scope, *see* Berkshire Hills Regional School Comm. v. Berkshire Hills Educ. Ass'n, 78 Mass. Adv. Sh. 1715, 377 N.E.2d 940 (1978) (the power of the school committee to appoint); School Comm. v. Tyman, 372 Mass. 106, 360 N.E.2d 877 (1977) (power of a school committee to determine tenure); School Comm. v. Raymond, 369 Mass. 686, 343 N.E.2d 145 (1976); and School Comm. v. Curry, 3 Mass. App. 151, 343 N.E.2d 144 (1976) (the power of a school committee to eliminate job categories).

The most noteworthy case concerning the parameters of section 6 is *Boston Teachers Union v. School Committee.*[111] Here, the parties were engaged in grievance arbitration.[112] The issues were whether class size, teaching work load and the number of substitute teachers were mandatory collective bargaining items.[113] Even though the court acknowledged that class size standards and the hiring of substitute teachers constituted matters of educational policy, supposedly within the sole prerogative of the school committee,[114] the court allowed these terms to be included as bargainable items in the contract.[115]

However, in the same year, the Supreme Judicial Court rendered a decision in *School Committee v. Raymond*[116] and held that the power to eliminate certain jobs was an issue reserved for the discretion of the school committee.[117] Thus, in *Boston Teachers Union* the issue of jobs was held to be bargainable while, in *Raymond,* jobs were held not to be bargainable. One may question whether the bargaining item involving hiring[118] is substantially different from the item of job termination.[119]

However, when terms such as tenure, dismissal and appointments are bargained for and included in a negotiated contract for the sole purpose of regulating administrative procedures, the courts of Massachusetts have routinely held that these procedural items lie within the scope of mandatory collective bargaining. *See* School Comm. v. Korbut, 373 Mass. 788, 369 N.E.2d 1148 (1977) (appointment); School Comm. v. West Bridgewater Teachers Ass'n, 372 Mass. 121, 360 N.E.2d 886 (1977) (tenure); Dennis-Yarmouth Regional School Comm. v. Dennis Teachers Ass'n, 372 Mass. 116, 360 N.E.2d 883 (1977) (tenure); School Comm. v. Tyman, 372 Mass. 106, 360 N.E.2d 877 (1977) (rehiring of nontenured teacher).*S ee also* School Comm. v. Labor Relations Comm'n, 79 Mass. App. Ct. Adv. Sh. 1535, 392 N.E.2d 541 (1979) (health and life insurance benefits); *accord,* Brooks v. School Comm., 77 Mass. App. Ct. Adv. Sh. 246, 360 N.E.2d 647 (1977); Local 66, Boston Teachers Union v. School Comm., 370 Mass. 455, 350 N.E.2d 707 (1976).

111. 370 Mass. 455, 350 N.E.2d 707 (1976).

112. The questions of scope are the same whether the subject be grievance arbitration or interest arbitration. *See* School Comm. v. Local 66, Boston Teachers Union, 372 Mass. 605, 611, 363 N.E.2d 485, 488 (1977). Therefore, the analysis applied to a grievance arbitration case is relevant to the topic of contract negotiation impasse resolution. For a brief explanation of grievance arbitration, *see* note 3 *supra.*

113. 370 Mass. 455, 457, 350 N.E.2d 707, 711 (1976).

114. *Id.* at 461, 350 N.E.2d at 713.

115. *Id.* at 457, 350 N.E.2d at 711.

116. 369 Mass. 686, 343 N.E.2d 145 (1976).

117. *Id.* at 689, 343 N.E.2d at 148. Though decided in 1976, this case was governed by the former state public labor relations law, MASS. GEN. LAWS ANN. ch. 149, §§ 178G-N (West 1971). Nonetheless, the court stated that the result would have been the same under MASS. GEN. LAWS ANN. ch. 150E (West Supp. 1980). School Comm. v. Raymond, 369 Mass. 683, 686-87, 343 N.E.2d 145, 147 (1976). In reaching its decision the *Raymond* court referred to precedent interpreting MASS. GEN. LAWS ANN. ch. 71, § 37 (West 1969), which generally defines the powers and duties of the public school committees. *See also* School Comm. v. Curry, 3 Mass. App. 151, 325 N.E.2d 282 (1975), *aff'd,* 369 Mass. 683, 343 N.E.2d 144 (1976).

118. *See* Local 66, Boston Teachers Union v. School Comm., 370 Mass. 455, 350 N.E.2d 707 (1976). *See* notes 111-15 and accomanying text *supra.*

119. *See* School Comm. v. Raymond, 369 Mass. 686, 343 N.E.2d 145 (1976). *See* notes 116-17 and accompanying text *supra.*

The inconsistency of these two holdings arose from the court's interpretation of the imprecise language appearing in the statute: "terms and conditions of employment."[120] The court admitted its own confusion in attempting to maintain clarity while determining which bargaining items are mandatory and which are not when, under the statute, the distinction is unclear.[121] In *Boston Teachers Union*[122] the court admonished the legislature for the statute's ambiguity:

> The Legislature can remove considerable uncertainty concerning which subjects are proper matters for collective bargaining between teachers and school committees. It might define those subjects which can or cannot be incorporated in a binding collective bargaining agreement. It might state that, to the extent certain matters are made a part of a collective bargaining agreement, the school committee has lost its prerogative during the term of the bargaining agreement to exercise its otherwise exclusive control over matters of educational policy, except perhaps in certain circumstances. In the absence of further statutory definition, the subject of the scope of permissible, binding collective bargaining and the enforceability of such agreements will have to be dealt with on a case by case basis.[123]

Other state legislatures have already met the responsibility of precisely defining "terms and conditions of employment."[124] Since the Massa-

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120. *See* MASS. GEN. LAWS ANN. ch. 149, § 178I (West 1971); MASS. GEN. LAWS ANN. ch. 150E, § 6 (West Supp. 1980); notes 54 and 55 *supra.*

121. The *Boston Teachers Union* court expressed, in dicta, the need for an objective standard to help distinguish "conditions of employment" from the sovereign domain of a school committee:

> Obviously, the conditions of employment of school teachers and subjects within the prerogative of a school committee are not mutually exclusive. These conflicting interests, in the context of collective bargaining, have been the subject of litigation in other jurisdictions with differring results. . . . Here, however, we have neither an interpretation by an administrative agency nor a statutory specification of bargainable subjects.

Local 66, Boston Teachers Union v. School Comm. of Boston, 370 Mass. 455, 461-62, 350 N.E.2d 707, 713 (1976) (citations omitted). The court reasoned that permissible bargaining items were equivalent to those issues already bargained for and incorporated in the prevailing contract:

> What we decide in this case should not be construed as a requirement that, in the course of collective bargaining, a school committee must reach an agreement on class size, teaching load, or the use of substitute teachers. A school committee is entitled to maintain its own position on these subjects as matters of fiscal management and educational policy. When, however, an agreement is made on these subjects consistent with the committee's view of fiscal management and educational policy, the terms of that agreement may be enforced where there has been no change in educational policy and funds are available to implement the terms of the agreement.

Id. at 463-64, 350 N.E.2d at 714 (footnotes omitted). Yet, this last statement skirted the real issue: whether the contracting parties were legally empowered to negotiate over these specific terms in the first place.

122. 370 Mass. 455, 350 N.E.2d 707 (1976).

123. *Id.* at 455, 464 n.5, 350 N.E.2d 707, 714 n.5 (1976).

124. *E.g.* CAL. GOV'T CODE § 3543.2 (West 1980); HAWAII REV. STAT. § 89-9(d) (1976). Both of these statutes define in explicit and precise terms the meaning of the phrase "terms and conditions of employment." For example, the former of these statutes states:

chusetts legislature has, by omission, left this task to the judiciary, the impact of section 6 may adversely affect either employer or employee depending upon an individual court's reasoning.[125] Further, the unpredictability inherent in determining the scope of mandatory collective bargaining jeopardizes the certainty and stability necessary to the bargaining process. Unpredictability of the law breeds suspicion. Such a situation is undesirable if the goal of the state's public labor relations law is to promote cooperation and harmony between public employees and the government.[126]

3. Ascertaining the Scope of Voluntary Interest Arbitration

Similarly, ascertaining the legitimate scope of voluntary interest arbitration relies upon an indistinct, arbitrary standard for the regulation of delegable authority.[127] Voluntary arbitration is not restricted to the confines of section 6.[128] The Supreme Judicial Court, in *School Committee v. Boston Teachers Union,*[129] explained why voluntary interest arbitration is necessarily broader in scope than mandatory collective bargaining:

> [T]he draftsmen of § 9, fifth paragraph, omitted any words confining voluntary interest arbitration to the field of mandatory bargaining. That the arbitration should extend more broadly is the result to which the draftsmen would have been led by their practical good sense.[130]

> "Terms and conditions of employment" mean health and welfare benefits ..., leave, transfer and reassignment policies, safety conditions of employment, class size, procedures to be used for the evaluation of employees, organizational security ..., procedures for processing grievances ..., and the layoff of probationary certified school district employees. . . . In addition, the exclusive representative of certificated personnel has the right to consult on the definition of educational objectives, the determination of the content of courses and curriculum, and the selection of textbooks to the extent such matters are within the discretion of the public school employer under law. All matters not specifically enumerated are reserved to the public school employer and may not be a subject of meeting and negotiating, provided that nothing herein may be construed to limit the right of the public school employer to consult with any employees or employee organization on any matter outside the scope of representation.

CAL. GOV'T. CODE § 3543.2 (West 1980) (citations omitted).

125. *See* notes 111-123 and accompanying text *supra.*

126. *See* 1973 H.R. DOC. NO. 6194, *Letter of Transmittal,* at 6.

127. *See* notes 133-43 and accompanying text *infra.*

128. *See* notes 54 and 107-26 and accompanying text *supra.* However, all voluntary "interest" arbitration proceedings must be authorized beforehand by the appropriate legislative body. *See* MASS. GEN. LAWS ANN. ch. 150E, § 9 (West Supp. 1980). This requirement provides the governmental body in question with the opportunity to review the arbitral issues before granting permission to proceed with the arbitration itself. Therefore, issues outside the scope of mandatory collective bargaining, or apparently so, may be allowed within the scope of arbitration given the prior consent of the legislative body.

129. 372 Mass. 605, 363 N.E.2d 485 (1977).

130. *Id.,* at 612, 363 N.E.2d at 489. Two years later, the Supreme Judicial Court reiterated its understanding of the sovereignty doctrine and the consequential limitations surrounding arbitration:

The court later continued:

> In a larger sense, it seems evident that if voluntary interest arbitration is to make an appeal to the parties and carry out its purpose of avoiding protracted strife, it must, optimally, imitate the range of the negotiation which it supercedes. The interplay and "tradeoff" of mandatory and other terms which are described as "the very fabric of effective collective bargaining," have their place in voluntary arbitration of the terms of a labor contract and will tend to improve and make more livable the arbitral result. Of course, if for any reason the parties prefer a more limited arbitration, they can provide for it by agreement.[131]

The court's broad reading of chapter 150E, section 9, paragraph 5, grants a wide range of discretionary power to arbitrators.[132] However, the Massachusetts courts have not always agreed on the parameters of permissible arbitral scope.[133] Analogous to the issue of ascertaining the scope of mandatory collective bargaining,[134] the point at which the arbitrator's power conflicts with "fundamental principles"[135] of public policy has not been adequately clarified by the legislature.[136] Once again, this difficult task has been left to the discretion of the judiciary. This lack of clarity may produce the same instability and unpredictability at the bargaining table as may befall mandatory collective bargaining.[137]

> It is by now well recognized that the subjects of public sector collective bargaining are more restricted than those in private sector labor relations. "Public policy, whether derived from, and whether explicit or implicit in statute or decisional law, or in neither," may limit the ability of a public employer . . . to bind itself to a given contractual provision or to delegate to an arbitrator the power to bind it.

School Comm. v. Local 66, Boston Teachers Union, 79 Mass. Adv. Sh. 1238, 1244, 389 N.E.2d 970, 973 (1979) (citations omitted).

131. School Comm. v. Local 66, Boston Teachers Union, 372 Mass. 605, 612, 363 N.E.2d 485, 489 (1977) (citation omitted).

132. *See* 1973 Mass. Acts ch. 1078, § 4 (current version at MASS. GEN. LAWS ANN. ch. 150E, § 1 (West Supp. 1980)), note 88 *supra*.

133. *See, e.g.*, School Comm. v. Local 66, Boston Teachers Union, 79 Mass. Adv. Sh. 1238, 389 N.E.2d 970 (1979) (reversing a superior court's order to vacate an arbitral award, which directed the school committee to comply with contract language regarding policy concerning final examinations); School Comm. v. Korbut, 4 Mass. App. Ct. 743, 358 N.E.2d 831 (1976), *rev'd*, 373 Mass. 788, 396 N.E.2d 1148 (1977) (the Supreme Judicial Court reversed the lower court's ruling vacating an arbitral award requiring the reappointment of certain teachers); City of Taunton v. Taunton Branch of Mass. Police Ass'n, 80 Mass. App. Ct. Adv. Sh. 1359, 406 N.E.2d 1298 (1980) (reversing a superior court's order to vacate an arbitral award, which did not sever the valid from the invalid portions of the decision).

134. *See* notes 107-26 and accompanying text *supra*.

135. School Comm. v. West Bridgewater Teachers Ass'n, 372 Mass. 121, 128, 360 N.E.2d 886, 890 (1977) (referring to the sovereignty of public school management in deciding which applicants to employ as teachers).

136. The statutorily promulgated arbitral policy guidelines constitute subjective factors the implementation of which depends primarily upon the discretion of the individual arbitrator. *See* 1973 Mass. Acts ch. 1078, § 4 (current version at MASS. GEN. LAWS ANN. ch. 150E, § 1 (West Supp. 1980)), note 88 *supra*.

137. *See* notes 107-26 and accompanying text *supra*.

Although the scope of judicial review of arbitration awards is customarily narrow,[138] an arbitrator's abuse of delegated authority is always open for review.[139] If an arbitration award is found to exceed the legal ambit of delegable authority, the decree will be vacated.[140] If only part of the award is deemed excessive, the arbitration decision may be severable.[141] Consequently, when overly broad arbitral awards are vacated, the process of reaching final resolution is delayed and the parties must either resume another round of arbitration[142] or revert to collective bargaining all over again.[143]

4. Summary

Factors which have circumvented the efficacy of chapter 150E are undue reliance on prolonged collective bargaining and failure of the legislature to narrowly circumscribe the scope of mandatory collective bargaining and voluntary interest arbitration. Tendencies of the law to delay final resolution of contractual impasse, while simultaneously denying any right to strike, place public employees in a straight jacket. In a word, time is on the public employer's side. The strike surrogate procedures of mediation, fact-finding and voluntary interest arbitration are limited in their capacity to resolve negotiation disputes. These procedures are inadequate as a complete substitute for the strike weapon. Unless statutory remedies can be made more effective as overall alternatives, public unions may legitimately be compelled to strike.[144]

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138. School Comm. v. Korbut, 4 Mass. App. Ct. 743, 745, 358 N.E.2d 831 833 (1976), *rev'd on other grounds,* 373 Mass. 788, 369 N.E.2d 1148 (1977); Trustees of Boston & Me. Corp. v. Mass. Bay Transp. Auth., 363 Mass. 386, 390, 294 N.E.2d 340, 343 (1973). Generally, arbitration decisions are not overruled merely because a court has had differences with the fairness or practicality of the award. *See* United Steelworkers of America v. Enterprise Wheel and Car Corp., 363 U.S. 593, 599 (1960).

139. Local 66, Boston Teachers Union v. School Comm., 370 Mass. 455, 467, 350 N.E.2d 707, 716 (1976); School Comm. v. Korbut, 4 Mass. App. Ct. 743, 745, 358 N.E.2d 831, 834 (1976), *rev'd on other grounds,* 373 Mass. 788, 369 N.E.2d 1148 (1977); Trustees of Boston & Me. Corp. v. Mass. Bay Transp. Auth. 363 Mass. 386, 390, 294 N.E.2d 340, 343 (1973).

140. MASS. GEN. LAWS ANN. ch. 150C, § 11 (West 1971). *See* School Comm. v. Boston Teachers Union, 372 Mass. 605, 610, 363 N.E.2d 485, 488 (1977).

141. *See* Watertown Firefighters Local 1347 v. Town of Watertown, 78 Mass. Adv. Sh. 2956, 383 N.E.2d 494 (1978); City of Taunton v. Tauton Branch of Mass. Police Ass'n, 80 Mass. App. Ct. Adv. Sh. 1359, 406 N.E.2d 1298 (1980); Board of Selectmen v. Labor Relations Comm'n, 79 Mass. App. Ct. Adv. Sh. 645, 388 N.E.2d 302 (1979); Marlborough Firefighters Local 1714 v. City of Marlborough, 78 Mass. Adv. Sh. 1820, 378 N.E.2d 437 (1978). For the same rule applied to private sector, *see* Enterprise Wheel and Car Corp. v. United Steelworkers of America, 296 F.2d 327 (4th Cir. 1959), *rev'd in part on other grounds,* 363 U.S. 593 (1960).

142. *See* MASS. GEN. LAWS ANN. ch. 150C, § 11(b) and (c) (West 1971).

143. Based upon the prerequisite of voluntary submission to arbitration, either party can always force an abandonment of arbitration in favor of recommencing new rounds of negotiation. *See* MASS. GEN. LAWS ANN. ch. 150E, § 9 (West Supp. 1980).

144. The lack of effectiveness of the strike surrogate procedures results in strike actions. As one writer noted: "Despite the no-strike laws, at least 70,000 public workers now strike each year in July, August and September." U.S. NEWS AND WORLD REPORT, Aug. 7, 1978 at 65. *See general-*

Two changes could mitigate the deficiencies of chapter 150E in its attempted regulation of the public sector collective bargaining process. Emphasis could be focussed on perfecting the strike surrogate procedures already in existence or devising new procedures.[145] For instance, as previously discussed,[146] the state legislature could enact more exact definitions of the scope of mandatory bargaining and of arbitration. Yet, it may be wise to allow the judiciary more than a modicum of discretion in the application of the statute.[147]

The more preferable alternative is to reexamine the no-strike provision in terms of its effectiveness and fairness. The real solution to the problems of unequal bargaining status beween the employer and the employee does not lie in a superior fine tuning of the strike surrogate procedures,[148] but in granting the qualified right to strike in certain areas of public employment. This latter perspective is more direct than the former. It offers the most potential for effectuating a solid reapportionment of bargaining power in the state's public labor relations.

II. THE NO-STRIKE PROVISION

Historically, the mainstream of political thought has rejected the right to strike for public workers.[149] On the federal level, the statutory provisions of 5 U.S.C. § 7311 proscribes any form of strike activity by

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ly, Bernstein, *Alternatives to the Strike in Public Labor Relations,* 85 HARV. L. REV. 459, 462-63 (1971). Furthermore, during the 1970s, the top five states annually having the highest number of public work stoppages were usually those which had enacted the full spectrum of mediation, fact-finding and arbitration in public labor relations. Regularly, the top five states included California, Illinois, Michigan, New Jersey, New York, Ohio, Pennsylvania and Wisconsin. *See* the following publications of the U.S. DEP'T. OF LABOR, BUREAU OF LABOR STATISTICS: ANALYSIS OF WORK STOPPAGES, 1971, BULLETIN 1777 (1973); WORK STOPPAGES IN GOVERNMENT, 1972, Report 434 (1974); WORK STOPPAGES IN GOVERNMENT, 1973, Report 437 (1975); ANALYSIS OF WORK STOPPAGES, 1974, Bulletin 1902 (1976); WORK STOPPAGES IN GOVERNMENT, 1974, Report 453 (1976); WORK STOPPAGES IN GOVERNMENT, 1975, Report 483 (1976); WORK STOPPAGES IN GOVERNMENT, 1976, Report 532 (1978); WORK STOPPAGES IN GOVERNMENT, 1977, Report 554 (1979); WORK STOPPAGES IN GOVERNMENT, 1978, Report 582 (1980) [hereinafer referred to collectively as COMPILED LABOR STATISTICS]. Of the states most prone to strike activity in the public sector, all but California and Ohio had and still have statutes similar to Massachusetts's section 9; *see* note 94 *supra.*

145. *See* note 53 *supra.*

146. *See* note 124 *supra.*

147. Practical flexibility and the stability of labor relations must be effectively balanced. No procedure is completely efficient. Furthermore, added regulations could erode the basis for active collective bargaining by stifling the parties' desire to freely negotiate.

148. MASS. GEN. LAWS ANN. ch. 150E, § 9 (West Supp. 1980); *see* note 2 *supra.*

149. "If the doctrine of strikes against the government were sustained, the public employees would substitute their rule and domination over government and public affairs, restricted only by their own judgment." Vogel, *supra* note 58, at 612.

At the birth of the public sector labor movement, even the union leadership disavowed the right to strike. Such unions included: the International Association of Firefighters, American Federation of Labor (AF of L); the American Federation of Government Employees, AF of L; the United Federal Workers, Congress of Industrial Organizations (CIO); the State, County and Municipal Workers, CIO; the American Federation of State, County and Municipal Employees, AF of L. *Id.,* at 615.

employees of the United States government.[150] Affirming the validity of this statute the federal courts have adhered to the general rule that "in the absence of a statute, they [public employees] . . . do not possess the right to strike."[151] In contradistinction to the public sector strike ban, the federal government has guaranteed a qualified right to strike in the private sector for over forty years.[152] Generally, most states have adhered to the federal government's position.

A. In Massachusetts

Massachusetts has historically followed federal leadership in labor relations law. The state legislature has granted the qualified right to strike to employees of private industry,[153] while simultaneously pro-

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Another commentator postulated that public sector unions have historically been denied the right to strike because of their superior bargaining position. *See* Taylor, *supra* note 12, at 629. The inference from this premise was that, if granted a qualified right to strike, union leaders would exploit any chance to disrupt services at the expense of the public interest. *Id.*

150. 5 U.S.C. § 7311 (1976), which states in pertinent part:

> An individual may not accept or hold a position in the Government of the United States or the government of the District of Columbia if he —
>
> (3) participates in a strike, or asserts the right to strike, against the Government of the United States or the Government of the District of Columbia; or
>
> (4) is a member of an organization of employees of the Government of the United States or of individuals employed by the government of the District of Columbia that he knows asserts the right to strike against the Gonvernment of the United States or the government of the District of Columbia.

See also 18 U.S.C. § 1918 (1976), which enumerates the penalties of job termination, fine and/or imprisonment for violations of 5 U.S.C § 7311(3) (1976).

151. United Fed'n of Postal Clerks v. Blount, 325 F. Supp. 879, 882 (D.D.C.), *aff'd*, 404 U.S. 802 (1971).

152. Two major laws were passed by Congress during the early 1930s revolutionizing the rights of labor in the private sector. In 1932, the "Norris-LaGuardia Act" imposed restriction on the injunctive powers of the courts during or in anticipation of strike actions. *See* Pub. L. No. 72-65, 47 Stat. 70 (1932). This law has only been applied to the federal judiciary. *See* Ford v. Boeger, 362 F.2d 999 (8th Cir. 1966), *cert. denied sub nom.* Curtis v. Boeger, 386 U.S. 914 (1967), *reh. denied*, 386 U.S. 978 (1967), *reh. denied*, 387 U.S. 949 (1967). The act was also held not to apply to public employees on the federal level. *See* United States v. United Mine Workers, 330 U.S. 258 (1947). More than a decade later, Congress limited the scope of this law through passage of the "Taft-Hartley Act." *See* Pub. L. No. 80-101, 61 Stat. 136 (1947). The injunctive powers of the federal courts were thereby strengthened. Employers were required to petition the courts by way of the National Labor Relations Board or the United States Attorney General's office. *See* B. WERNE, LABOR RELATIONS LAW AND PRACTICE, 182-89 (1966).

The Congress authorized the right to strike in the private sector in 1935. The right to unionize and collectively bargain was also legitimized through the enactment of the "Wagner Act." *See* Pub. L. No. 74-198, 49 Stat. 449 (1935).

153. In 1935, the state legislature passed the "Baby Norris-LaGuardia Act," 1935 Mass. Acts ch. 407, § 4 (current version at MASS. GEN. LAWS ANN. ch. 214, § 9A (West 1958)). This act, as does its parent on the federal level, only applied to workers in private industry. *See* Hansen v. Commonwealth, 344 Mass. 214, 218, 181 N.E.2d 843, 847 (1962). Again, the purpose behind the statute was to place certain restraints upon the injunctive powers of the state courts. Judicial limitations countered the historic practice of employers to use the preliminary injunction as a tactic to break strikes. *See* Thayer Co. v. Binnall, 326 Mass. 467, 95 N.E.2d 193 (1950). MASS. GEN. LAWS ANN. ch. 214, § 9A (West 1958) has permitted the implementation of injunctive relief only if unlawful acts were threatened by labor, *id.* § 9A(1)(a); if substantial and irreparable injury to the

hibiting any form of strike activity in the public sector.[154] The no-strike provision in Massachusetts, embodied in chapter 150E, section 9A,[155] reflects the position of a majority of states.[156] Presently, only eight states have passed laws providing for a qualified right to strike for certain services in the public sector.[157]

During legislative consideration before the enactment of chapter 150E, sharp disagreement existed among the proponents of the various proposals concerning the no-strike provision.[158] The logic of some states' laws which permitted a limited level of strike activity by public employees evidently had a substantial impact upon this legislative

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the laborer than to the employer if a court decree was not issued, *id.* § 9A(1)(c); if there was no other adequate remedy at law, *id.* § 9A(1)(d); or if public officers responsible for protecting the adequate remedy at law, *id.* § 9A(1)(d); or if public officers responsible for protecting the private property in question were unable or unwilling to provide adequate protection, *id.* § 9A(1)(e).

In 1937, the state legislature passed its own "Baby Wagner Act," 1937 Mass. Acts ch. 436. *See* MASS. GEN. LAWS ANN. ch. 150A (West 1971). Also acting conjunctively with the federal government, Massachusetts passed the state's version of the "Taft-Hartley Act," 1947 Mass. Acts ch. 596 (current version at MASS. GEN. LAWS ANN. ch. 150B (West 1971)).

None of the above laws, nor those statutes discussed in note 152 *supra,* included public employees within their scope. *See generally* Grady, *supra* note 28.

154. Prior to the codification of public labor relations laws, Massachusetts denied the right to strike in the public sector by means of statutory exclusion. *See* MASS. GEN. LAWS ANN. ch. 150A, § 2 (West 1971); MASS. GEN. LAWS ANN. ch. 150B, § 2 (West 1971); MASS. GEN. LAWS ANN. ch. 214, § 9A(1) (West 1958).

155. MASS. GEN. LAWS ANN. ch. 150E, § 9A (West Supp. 1980).

156. *See, e.g.,* CONN. GEN. STAT. ANN. § 5-279 (West Supp. 1980) (state); *id.* § 7-475 (West Supp. 1980) (municipal); *id.* § 10-153e (West Supp. 1980) (educational); ME. REV. STAT. ANN. tit. 26 § 964(2)(c) (West 1974) (municipal); *id.* § 979-C(2)(c) (West 1974) (state); N.H. REV. STAT. ANN. § 273-A:13 (1978) (all); N.Y. CIV. SERV. LAW ANN. § 210 (McKinney 1973 & McKinney Supp. 1979) (all); R.I. GEN. LAWS § 28-9.1-2 (1979) (firefighters); *id.* § 28-9.2-2 (1979) (police); *id.* § 28-9.3-1 (1979) (teachers); *id.* § 36-11-6 (1970) (state).

157. Of these eight states, seven have explicit qualified right to strike provisions embodied within their public labor relations laws. One state, Montana, has effectuated the same right through judicial ruling. For the seven state statutes, *see* ALASKA STAT. § 23.40.200 (1972) (all excluding police, firefighters, hospital workers and prison guards); HAWAII REV. STAT. § 89-11 to -12 (1976 & Supp. 1979) (all excluding firefighters); MINN. STAT. ANN. § 179.64 (West Supp. 1979) (for non-essential services only and only under limited circumstances); OR. REV. STAT. § 243.726 (1979) (all excluding police, firefighters, prison guards and guards in mental hospitals); PA. STAT. ANN. tit. 43 § 1101.1001-.1010 (Vernon Supp. 1980) (all excluding prison guards, guards in mental hospitals and court personnel); VT. STAT. ANN. tit. 21, § 1730 (Supp. 1978) (municipal); WIS. STAT. ANN. § 111.70 (West Supp. 1980) (municipal). In Montana, *see* State *Ex rel.* Dep't of Highways v. Pub. Employees Craft Council, 165 Mont. 349, 529 P.2d 785 (1974). Here the state supreme court determined that the scope of "concerted activity" included strike activity as provided for in MONT. REV. CODE ANN. § 59-1603 (1) (Supp. 1977).

158. Three resolutions advocated a qualified right to strike in the public sector. Two of these proposals provided for strikes sixty days after the issuance of the fact-finder's report upon ten days advanced notice (providing that the parties had not submitted to arbitration proceedings). *See* H.R. DOC. NO. 6194, app. B, § 9(c)(1)-(6) (1973) and S. DOC. NO. 1771, § 9(b)(1)-(6) (1973). *Cf.* HAWAII REV. STAT. §§ 89-11 to -12 (1976 & Supp. 1979) (also stipulating a sixty-day cool out period). The other resolution, H.R. DOC. NO. 7715, § 9(b)(1)-(6) (1973), required only a thirty-day cool out period after issuance of the fact-finder's report before a possible strike could commence. *Cf.* OR. REV. STAT. § 243.726 (1979) and VT. STAT. ANN. tit. 21, § 1730 (1978) (both statutes stipulating a similar thirty-day cool out period).

review.[159] But the prevailing viewpoint favored maintaining a no-strike posture similar to the predecessor statutes.[160] Recognizing the accelerated growth of the union movement in the public sector which was, in part, a product of the statutory grant to public employees of the power to unionize and collectively bargain,[161] the state legislature found that a no-strike provision was best suited to the interests of the state.[162]

In Massachusetts, the no-strike provision under section 9A is enforced by the state Labor Relations Commission.[163] Under this section, if a strike is imminent or has occurred, the public employer may petition the commission to investigate the labor dispute.[164] If the commission finds that the no-strike clause is about to be or has been violated, the commission may employ the full panoply of coercive power in order to compel compliance with the law.[165] Among its powers, the injunctive remedy is the most forceful.[166] Judicial review over commission orders

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The majority view favored a blanket no-strike provision similar to the predecessor statutes, MASS. GEN. LAWS ANN. ch. 149, § 178F (10) and § 178M (West 1971). *See* H.R. DOC. NO. 7751, § 9A (1973); S. DOC. NO. 1929, § 10 (1973); S. DOC. NO. 1935, § 178M (1973).

159. *See* note 158 *supra.*

160. MASS. GEN. LAWS ANN. ch. 149, § 178F (10) and § 178M (West 1971).

161. About one sixth of the national work force is located in the public sector. *See* MONTHLY LAB. REV., *U.S. Dep't of Labor* (1980). By 1978, about half of all state and federal workers were unionized. *See* U.S. NEWS AND WORLD REPORT, *supra* note 144, at 66. The rate of unionization in the public sector has particularly exploded in the past decade. For instance, AFSCME's membership grew from less than 10,000 members in 1936 to 440,000 members in the early 1970s; currently, AFSCME includes almost 1,000,000 members (indicating an approximate 100% increase in the past ten years). *See* AFSCME REPORT, *supra* note 27, at 49, 159. *See also* TASK FORCE REPORT, *supra* note 58, at 158; Anderson, *supra* note 58, at 943-45.

162. *Contra,* the Mendonca Commission supported a qualified right to strike in the public sector in order to take "into account the realities of strikes" and to effectively deal with the "[r]ising concern over the militancy and conflict affecting labor relations in the public sector. . . ." H.R. DOC. NO. 6194 (1973), *Letter of Transmittal,* at 7. Also opposed to no-strike clauses in public labor relations laws are the public sector unions. Many unions which had formerly made no-strike pledges (*see* note 149 *supra*) renounced these vows soon after federal and state laws legalized unionization and collective bargaining. *See, e.g., Policy Statement on Public Employee Unions: Rights and Responsibilities,* International Executive Board, AFSCME, July 26, 1966, at 2. "AFSCME insists upon the rights of public employees . . . to strike. Wherever legal barriers to the exercise of this right exist, it shall be our policy to seek the removal of such barriers." *Id. See also* Ullman & Begin, *The Structure and Scope of Appeals Procedures for Public Employees,* 23 INDUS. & LAB. REL. REV. 323, 333 (1970); Note, *Government and Its Employees,* 75 HARV. L. REV. 391, 409 n.111 (1961).

163. *See* note 1 *supra.*

164. MASS. GEN. LAWS ANN. ch. 150E, § 9A(b) (West Supp. 1980).

165. The commission may employ three general powers: injunction, *id.;* fine and/or imprisonment, *id.* § 15. The commission may further utilize the contempt powers of the courts to force implementation of its orders. Labor Relations Comm'n v. Local 66, Boston Teachers Union, 374 Mass. 79, 93, 371 N.E.2d 761, 770 (1977).

166. The Supreme Judicical Court noted: "[T]he ability to obtain compliance through the use of coercive measures was more likely to be effective against the union as a whole than against only representative defendants of a class." *Id.* at 95, 371 N.E.2d at 771-72.

A similar assessment has been made in private sector labor disputes:

An award of damages after a dispute has been settled is no substitute for an immediate

is extremely limited. In the absence of extraordinary circumstances, jurisdictional dispute or the possibility of special public injury occurring as a result of a commission decree,[167] appeals for review rarely survive.[168]

B. Analysis of the No-Strike Provision

A key element of section 9A, as distinguished from the predecessor statutes,[169] is its broadened scope combined with increased enforcement powers vested in the commission.[170] In this context, the Supreme Judicial Court discussed the evolution of the public strike ban in *Labor Relations Commission v. Boston Teachers Union*:[171]

> While there are great similarities in both operation and language between c. 150E and the predecessor statutes, G.L. c. 149, secs. 178F-178N, there are also crucial differences. Moreover, the meaning, scope, and effect of the sections must be ascertained in light of

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halt to an illegal strike. Furthermore, an action for damages prosecuted during or after a labor dispute would only tend to aggravate industrial strife and delay an early resolution of the difficulties between the employer and the union.

Old Ben Coal Corp. v. Local 1487, UMW, 500 F.2d 950 (7th Cir. 1974), *quoting* Boys Markets, Inc. v. Retail Clerk's Union, 398 U.S. 235 (1970).

For illustrations of "cease and desist" orders made by the commission, *see, e.g.*, Westport School Comm. and AFSCME Council 93, and Local 1906, Am. Fed'n of Teachers, SI-74, 75, 5 M.L.R.R. 61 (4/24/1979) (strike in fact); Fall River School Comm. and Fall River Educ. Ass'n, SI-64, 5 M.L.R.R. 22 (9/14/1978) (strike in fact); Boston School Comm. and Boston Teachers Union, Local 66, SI-66, 5 M.L.R.R. 22 (9/13/1978) (threat of imminent strike action); Chelmsford School Comm. and Chelmsford Fed'n of Teachers, Local 3569, SI-65, 5 M.L.R.R. 22 (9/12/1978) (strike in fact).

167. City Manager of Medford v. State Labor Relations Comm'n, 353 Mass. 519, 524, 233 N.E.2d 310, 314 (1968). *See also* St. Elizabeth's Hospital v. Labor Relations Comm'n, 2 Mass. App. Ct. 782, 783, 321 N.E.2d 837, 838 (1975), wherein the court did not vacate the commission's order even though the court would have preferred a different determination. Harrision v. Labor Relations Comm'n, 363 Mass. 548, 551, 296 N.E.2d 196, 198 (1973), wherein the court stated that it was proper to postpone the review of any case before the commission until that agency has made its decision. For the statute prescribing standards of review over administrative agencies of the Commonwealth of Massachusetts, *see* 1954 Mass. Acts ch. 681 (current version at MASS. GEN. LAWS ANN. ch. 30A (West 1979)). Generally, the judiciary has slightly broader review powers over an administrative agency than over the arbitration process. *See* H. WELLINGTON & R. WINTER, *supra* note 60, at 171. The reason for this distinction is rooted in the different nature of the two processes. Most arbitration proceedings are commenced on a voluntary basis, whereas submission to an agency such as the Labor Relations Commission is mandatory. Consequently, a more serious injustice may be perpetrated by the decision in the latter process. *Id.*

168. One example of an extraordinary cirumstance which warranted judicial review occurred in the case of Director of the Div. of Employee Relations v. Labor Relations Comm'n, 370 Mass. 162, 346 N.E.2d 852 (1976). Here, the commission had ordered the disputing parties to commence arbitration proceedings before they had mutually and voluntarily agreed to such a proceeding. *Id.* at 164, 346 N.E.2d at 855. The Supreme Judicial Court sustained the superior court's order to vacate the commission's decree. *Id.* at 163, 346 N.E.2d at 854.

169. MASS. GEN. LAWS ANN. ch. 149, § 178F (10) and § 178M (West 1971).

170. MASS. GEN. LAWS ANN. ch. 150E, § 15 (West Supp. 1980). *See* note 71 *supra.*

171. 374 Mass. 79, 371 N.E.2d 761 (1977).

> the expanded legislative purpose evident in the enactment of c. 150E.
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> The most crucial difference for the purposes of this case lies in the expanded scope of the prohibition against strikes contained in [the current law], as compared to the predecessor statutes. The scope of the prohibition in the early statutes runs against public employees only; whereas the prohibition in [the current law] runs not only against "public employees" but "employee organizations" as well. The inclusion of the latter is not without significance. There is an implicit legislative recognition in this inclusion of "employee organization" that organizations may function in all respects as an entity and may in their capacity as an organization, irrespective of legal status, properly be made the subject of a court order and legal prohibition.[172]

In regard to the actual enforcement powers of the commission, the level of pecuniary penalty was raised substantially.[173] All other enforcement powers of the commission remained virtually unchanged.[174]

Despite the reenforcement of the no-strike clause by the state legislature, the success of G.L. ch. section 9A has been, at the very least, questionable. Most importantly, the law has not effectively deterred strike activity within the state.[175] The public labor force has

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172. *Id.* at 93-94, 371 N.E.2d at 771 (citations omitted).

173. *Compare* the present statute, MASS. GEN. LAWS ANN. ch. 150E, § 15 (West Supp. 1980) *with* the repealed provision, MASS. GEN. LAWS ANN. ch. 149, § 180 (West 1971).

174. *Compare* the present statute, MASS. GEN. LAWS ANN. ch. 150E, § 9A (West Supp. 1980) *with* the repealed provisions, MASS. GEN. LAWS ANN. ch. 149, § 178F (10) and § 178M (West 1971).

175. On the national level, between 1947 and 1959, incidents of strikes in the public sector were infrequent. Approximately 450 strikes occurred during this time. *See* Note, *supra* note 162, at 407. During the 1960s, however, a tremendous increase in strikes by public employees took place. *See* U.S. DEP'T. OF LABOR, BUREAU OF LABOR, STATISTICS WORK STOPPAGES IN GOVERNMENT, 1978, Report 582, Table I (1980). This trend continued at a slower pace during the 1970s. *Id.* In 1958, 15 public sector strikes occurred nationally; in 1963, 29 public sector strikes occurred; in 1968, 254 public sector strikes occurred; in 1973, 387 public sector strikes occurred; and in 1978, 481 public sector strikes occurred. *Id.* Approximately one out of every thirteen strikes in the past decade took place in the public sector despite the no-strike laws. *See* COMPILED LABOR STATISTICS, *supra* note 144.

The strike situation in Massachusetts reflects the overall national trend towards increased incidents of disruption. Statistical reports vary on this issue. The United States Department of Labor, Bureau of Labor Statistics, has indicated that strikes in Massachusetts have ranged from 5 to 9 work stoppages annually over the past decade. *Id.* However, surveys by the Massachusetts Labor Relations Commission has reported an increasingly higher rate of strike activity ranging from 5 to 13 or more incidents annually in the public sector. *See* the following reports in combination: MASSACHUSETTS LABOR RELATIONS COMMISSION, 1979 ANNUAL REPORT NO. 11665-23-200-12-70-CR; MASSACHUSETTS LABOR RELATIONS COMMISSION, 1978 ANNUAL REPORT NO. 10, 936-57-50-10-78-CR; MASSACHUSETTS LABOR RELATIONS COMMISSION, 1977 ANNUAL REPORT NO. 9906-57-200-8-77-CR; MASSACHUSETTS LABOR RELATIONS COMMISSION, 1976 ANNUAL REPORT NO. 9046-86-125-8-76-CR. Furthermore, during the latter half of the 1970s, the state has suffered from dramatic increases in the number of workers involved in public sector strike activity and, consequentially, in the number of idle work days in public employment.

repeatedly violated the law with impunity. This rise in public sector strikes notwithstanding the state's no-strike law is part of a general national trend.[176] The Supreme Judicial Court, in *Labor Relations Commission v. Boston Teachers Union,*[177] indicated that the state legislature drafted the current public labor relations law with this trend in mind:

> The obvious effect of the expansion of the bargaining and organizational power of public employees was an increase in the power of the employee organizations.
>
> The purpose behind such recognition is particularly evident in this case, while the Legislature clearly intended to forbid strikes by public employees, it was also cognizant of the possibility that such strikes were not unlikely, based on previous experience in other jurisdictions, thus accounting for the power granted to the commission in § 9A (a). It also presumably was cognizant of the greater likelihood that such strikes would take place with an expanded scope of organizational rights.[178]

But the exercise of the commission's authority may do more to exacerbate strike activity than prevent it. In most strike situations the commission is inevitably forced, by operation of the law, to issue last minute cease and desist orders.[179] Such eleventh hour tactics have often times served to inflame union militancy,[180] thereby effectuating a

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IN MASSACHUSETTS:*

	Workers involved in public sector strikes**	Days idle in public sector services**
1972	2.7	9.8
1973	1.7	2.7
1974	.7	1.3
1975	11.3	89.6
1976	21.3	70.3
1977	.7	5.0
1978	6.7	55.2

* Data for this chart was derived from COMPILED LABOR STATISTICS, *supra* note 144.
** Numbers represent thousands.

176. *See* note 175 *supra;* Appendices A and B *infra.*

177. 374 Mass. 79, 371 N.E.2d 761 (1977).

178. *Id.*, at 95, 371 N.E.2d at 771 (citations omitted).

179. MASS. GEN. LAWS ANN. ch. 150E, § 9A (b) (West Supp. 1980). *See* Note, *Private Damage Actions Against Public Sector Unions For Illegal Strikes,* 91 HARV. L. REV. 1309, 1319 (1978). *But see* Director of the Div. of Employee Relations v. Labor Relations Comm'n, 370 Mass. 162, 171, 346 N.E.2d 852, 858 (1976), wherein the court stated: "Even where resort by the Commission to a court [to support the enforcement of the no-strike provision] becomes necessary, the fact that it is an independent body that seeks the order, instead of the employer as before the enactment of ch. 150E . . ., is likely to make the result more acceptable to the employees." *Id.*

180. When unions are ready or have begun to strike, they are virtually saying through such action that the union membership is prepared for a confrontation. Consequently, injunctive action initiated by the public employer through the Commission is likely to meet resistance. Meanwhile, incarceration of the leading union activists may create martyrs which fuels additional resistance. *See* D. BOK & J. DUNLOP, LABOR AND THE AMERICAN COMMUNITY, 388-89 (1970). Instead, the commission may resort to less coercive remedies such as fines. However, pecuniary penalties have not constituted an effective strike deterrent unless the amount was substantial. *See* Taylor, *supra* note 12, at 618.

counterproductive result. In the past the state has anticipated labor hostility to the commission and has responded by careful gubernatorial appointments to the commission itself.[181]

A final point concerning section 9A is the inequitable policy of allowing a qualified right to strike in the private sector while, at the same time, withholding this right from the public sector. First, some services supplied by the private sector are more vital to the health, safety and welfare of the public than certain services provided by government.[182] Second, the private and public sectors frequently provide identical services.[183] Under the prevailing law of Massachusetts, public employees have no right to strike whatsoever while private sector employees, even if they render identical or less essential services, would not be affected by the no-strike provision.[184] Therefore, the public sector strike ban functions arbitrarily without regard to the importance of the service to

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181. The Governor appoints the three labor relations commissioners. *See* MASS. GEN. LAWS ANN. ch. 23, § 9O (West 1971). As of 1979, the wages of the three commissioners ranged between $23,000 and $25,500, approximately. *See* MASSACHUSETTS LABOR RELATIONS COMMISSION, 1979 ANNUAL REPORT NO. 11665-23-200-12-79-CR, at 2 (1979). More importantly, in choosing the commissioners, special emphasis has evidently been placed on past experience with union legal problems. Work experience of commissioners present and past have involved working for the Massachusetts Commission Against Discrimination, the National Association of Government Employees and the Massachusetts Teachers Association. *Id.*

182. For instance, a strike by privately employed fuel truck drivers during the winter heating season presents a greater threat to the public's health, safety and welfare than would a strike by public empolyees in the parks and recreation department. For further discussion of this subject, *see* Rankin v. Shanker, 23 N.Y.2d 111, 134, 242 N.E.2d 802, 816, 295 N.Y.S.2d 625, 644 (1968) (Keating, J., dissenting).

183. For examples of public employers who attempted to sub-contract public work out to private enterprise, *see, e.g.*, Town of Wilmington and Local 1703, AFSCME, Council 93, MUP-3545, 6 M.L.R.R. 1295 (11/16/1979) (holding that the employer had a duty to bargain over sub-contracting of services and, subsequently, terminating jobs performed by public employees); *accord,* Franklin School Comm. and AFSCME, Council 93, MUP-3206, 6 M.L.R.R. 1238 (7/18/1979).

184. No-strike advocates justify this discrepancy by asserting that public sector unions possess a "disproportionate share of effective power in the process of decision." *See* Wellington & Winter, *supra* note 12, at 1123. Further on, these authors stated: "What is wrong with strikes in public employment is that because they disrupt essential services, a large part of a mayor's political constituency will press for a quick end to the strike with little concern for the costs of settlement." *Id.*, at 1124. With the right to strike, many fear public sector unions would predominate as the most dominant interest group influencing the legislature. *Id. See also* Wellington & Winter, *More On Strikes By Public Employees,* 79 YALE L.J. 441, 442 (1970); Note, *supra* note 179, at 1313 n.26. Public strikes raise taxes. *See* Wellington & Winter, *supra* note 12, at 443. Moreover, unlike private industry, government does not have the capacity to "lockout" or transfer production. *See* Anderson, *supra* note 58, at 955. *But see* Philadelphia Fed'n of Teachers v. Ross, 8 Pa. Commw. 204, 301 A.2d 405 (1973) (Blatt, J., dissenting) (discussing the duty of the government to anticipate expenses and other consequences of public strikes). *See also* H. WELLINGTON & R. WINTER, *supra* note 60, at 196-97.

However, the reasons for granting a qualified right to strike in the private sector could pretain to many public employees as well. Thereby, industrial peace or management-employee cooperation could be enhanced by allowing full democratic representation of union membership. The following statement was directed at a labor dispute in private industry, but applies to many public employees as well:

the public. Regretfully, the law is cognizant only of the employer's identity.[185]

III. An Alternative to the No-Strike Policy

Following traditional theories based upon the sovereignty doctrine,[186] the Supreme Judicial Court continues to uphold the validity of the no-strike provision. In *School Committee of Boston v. Boston Teachers Union,*[187] the court stated that : "[U]nless the bargaining relationship is carefully regulated, giving public employees the collective power to negotiate labor contracts poses the substantial danger of distorting the normal political process for controlling public policy."[188] Yet, as previously discussed, eight states currently provide for a qualified right to strike in the public sector.[189] The courts of these states have confirmed the validity of these statutes.[190] In the absence of statutory authorization, the right to strike (whether in private industry or under governmental employ) is not supported at common law[191] nor protected under the United States Constitution.[192] These states which have enacted pro-strike laws have not experienced a noticeable increase in

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> There are constitutional as well as common law underpinnings of the rights of employees to strike, and engage in peaceful picketing, in order to improve the terms and conditions of employment. . . .
>
> The rights of self-help owned by both union and management have been deliberately preserved by Congress. . . . They survive, available for use when the statutory procedures to promote agreement are exhausted. They are indeed in a sense symbols of freedom, reminders that even though their occasional exercise and the disorder of industrial warfare may be vexing to the point of distress the underlying freedom is more productive of a healthy and vigorous economy and nation than a structure of economic regimentation and dictated order.

International Ass'n of Machinists and Aerospace Workers v. National Mediation Bd., 425 F.2d 527, 536-7 (D.C. Cir. 1970).

Still despite the vast array of services in both the public and private sectors, the rationale supporting a qualified right to strike in private industry is vigorously attacked when the issue is public services. *See* United Fed'n of Postal Clerks v. Blount, 325 F. Supp. 879, 882 (D.D.C.), *aff'd,* 404 U.S. 802 (1971).

185. No distinction is made among differing public services and their importance to the general health, safety and welfare of society. *See* MASS. GEN. LAWS ANN. ch. 150E, § 9A (West Supp. 1980). *But see* 1973 Mass. Acts ch. 1078, § 4 (current version at MASS. GEN. LAWS ANN. ch. 150E, § 1 (West Supp. 1980)), which does distinguish police and firefighters, thereby directing them to compulsory arbitration when mediations and fact-finding fail; *see also* notes 91-92 and accompanying text *supra.*

186. *See* notes 58 and 90 and accompanying text *supra.*

187. 79 Mass. Adv. Sh. 1238, 389 N.E.2d 970 (1979).

188. *Id.* at 1245, 389 N.E.2d at 974. *See generally* Wellington & Winter, note 12 *supra.*

189. *See* note 157 *supra.*

190. *E.g.,* Hafling v. Inlandboatmen's Union, 585 P.2d 870 (Alaska 1978); Hawaii State Teachers Ass'n v. Hawaii Pub. Employment Relations Bd., 60 Hawaii 361, 590 P.2d 993 (1979); Bellefonte Area Educ. Ass'n v. Board of Educ., 9 Pa. Commw. Ct. 210, 304 A.2d 922 (1973).

191. United Fed'n of Postal Clerks v. Blount, 325 F. Supp. 879, 882 (D.D.C.), *aff'd* 404 U.S. 802 (1971).

192. *Id.* at 883 (discussing the fourteenth amendment). *Accord,* Head v. Special School Dist. No. 1, 288 Minn. 496, 182 N.W.2d 887 (1970), *cert. denied sub nom.* Minneapolis Fed'n of

strikes.[193] In contrast, in states that maintain no-strike provisions, public sector strikes are not only prevalent, but continue to increase.[194] While there has been a nationwide increase in public sector strikes, this much is clear: *pro-strike laws have not increased strikes; no-strike laws have not deterred strikes.*[195] This evidence should eliminate alarmist fears that there will be more strikes if pro-strike laws are enacted. Thus, in light of current statistics, the consideration of a qualified right to strike in the public sector should be an important item in each state's legislative agenda.

For states entertaining a pro-strike statute, Alaska's Public Employment Relations Act of 1973 provides the best model.[196] Assessing governmental services on the criterion of essentiality,[197] the Alaskan legislature divided the state's public sector into three categories:

(1) those services which may not be given up for even the shortest time;[198]

(2) those services which may be interrupted for a limited period but not for an indefinite period of time;[199] and

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Teachers v. Spannaus, 404 U.S. 886 (1971) (discussing the first amendment). *But cf.* United Fed'n of Postal Clerks v. Blount, 325 F. Supp. 879, 885 (D.D.C.) (Wright, J., concurring) *aff'd* 404 U.S. 802 (1971). In his concurrence, Judge Wright stated: "But I do believe that the right to strike is, at least, within constitutional concern and should not be discriminatorily abridged without substantial or 'compelling' justification." *Id.*

193. All states statutorily providing a qualified right to strike in the public sector have low strike rates compared with most other states. Pennsylvania and Wisconsin, two industrial states, have been exceptions to this trend. *See* COMPILED LABOR STATISTICS, note 144 *supra;* note 175 *supra. See also* Appendix A *infra.*

194. *See* Appendix B *infra.*

195. *See* Appendix C *infra.*

196. ALASKA STAT. § 23.40.070 to .260 (1972).

197. *See generally* Burton & Krider, *The Role and Consequences of Strikes by Public Employees,* 79 YALE L.J. 418 (1970). Here, the authors classify public services into three categories: essential, intermediate and non-essential. *Id.* at 427. The degree of essentiality may depend, moreover, on the size of the municipality or the location of that municipality geographically. *Id. See also* Note, *supra* note 162, at 410-11. In opposition to this perspective, one writer has suggested that the determination of degrees of essentiality was "administratively impossible." *See* Taylor, *supra* note 12, at 627. In fact, notwithstanding existing no-strike laws, states have tended to allow strikes in non-essential services to last for longer durations as compared to strikes in more vital areas. *See* Burton & Krider, *supra,* at 427.

198. ALASKA STAT. § 23.40.200(a)(1) (1972). Included in this class are police, fire protection employees, jail, prison and other correctional institution employees and hospital workers. *Id.* § 23.40.200(b). For this class no strikes are allowed. Surrogate procedures of mediation and arbitration are employed for contract negotiation impasses. *Id.*

199. *Id.* § 23.40.200(a)(2). Included in this class are public utility employees, snow removal, sanitation and employees of the public school system. *Id.* § 23.40.200(c). After mediation, this class may be allowed to strike unless such concerted activity is found to threaten the health, safety or welfare of the public. *Id.* § 23.40.200(a)(3).

For a discussion of the parameters of the issue of health, safety and welfare to strike situations involving teachers, *see* Bellefonte Area Educ. Ass'n v. Board of Educ., 9 Pa. Commw. Ct. 210, 304 A.2d 922 (1973) (a non-violent strike, and consequent financial loss to the locality notwithstanding, was deemed by the court not to endanger the health, safety and welfare); Philadelphia Fed'n of Teachers v. Ross, 8 Pa. Commw. Ct. 204, 301 A.2d 405 (1973) (the state

(3) those services in which work stoppages may be sustained for extended periods without serious effects on the public.[200]

This formulation follows a simple balancing test. It weighs the electorate's right to uninterrupted essential services with the legitimate interests of public employees desiring to exert their strongest possible bargaining force at contractual impasse.

In Massachusetts, the same balancing test has been utilized, but to a limited degree. This is demonstrated in chapter 1078, section 4 of the 1973 Acts and Resolves of Massachusetts. In this section special attention is paid to municipal police and firefighters and compulsory arbitration procedures are mandated for these public employees during contractual impasse.[201] The Alaskan statute exemplifies how the *entire* public sector may be evaluated according to the economics of relative essentiality.[202] In states such as Massachusetts, the no-strike clause grants the public employer an unfair bargaining advantage without a convincing rationale, particularly in the area of nonessential services.[203] Based upon the Alaskan Public Employment Relations Act,[204] the legislature of Massachusetts should distinguish among the various services in the public sector according to their necessity to the private

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must accept a certain level of inconvenience, but heightened street gang activity, $133,000 additional police protection costs on a daily basis and a threat of the loss of subsidies were all factors warranting injunctive relief); Armstrong Educ. Ass'n v. Armstrong School Dist., 5 Pa. Commw. Ct., 378, 291 A.2d 120 (1972) (strike injunction dissolved; a teachers' strike must preclude the possibility of rescheduling make-up class days; loss of educational subsidy funds, loss of school days and cancellation of sports programs did not amount to endangering the health, safety or welfare of the public). *See generally* H. WELLINGTON & R. WINTER, *supra* note 60.

200. ALASKA STAT. § 23.40.200(a)(3) (1972). Included in this class are all other public employees not covered by § 23.40.200(a)(1) or § 23.40.200(a)(2). *Id.* § 23.40.200(d). This class of employees may strike with the only qualification being that a majority of the union membership vote by secret ballot to do so. *Id.*

201. 1973 Mass. Acts. ch. 1078, § 4 (current version at MASS. GEN. LAWS ANN. ch. 150E, § 1 (West Supp. 1980)). *See* notes 91-92 and 185 and accompanying text *supra*.

202. *See* notes 197-200 and accompanying text *supra*.

203. [W]e should give bargaining in the public sector the same opportunity it has received, with beneficial results, in the private sector. The most effective technique to produce acceptable terms to resolve disputes is voluntary agreement of the parties, and the best system we have for producing agreements between groups is collective bargaining — even though it involves conflict and the possibility of a work disruption. There is no other alternative.

Kheel, *supra* note 90, at 942.

For in the end, the solution to the wide range of labor problems involving the many aspects of a dynamic and complicated human relationship must depend on the human factor. The most elaborate machinery is no better than the people who man it. For too long our attention has been directed to the mechanics and penalties rather than to the participants and the process.

Id. at 941.

204. ALASKA STAT. § 23.40.070 to 40.260 (1972).

citizen. In this way, a more equitable balance will be reached between the competing interests of the government and its employees.

CONCLUSION

The Massachusetts public labor relations law is limited in its capacity to provide a viable substitute for strike activity. Although increased statutory precision would enhance the effectiveness of the statute,[205] a qualified right to strike in certain areas of public employment offers a more direct solution for the inequities present in the statute. The operation of G.L. ch. 150E produces, in numerous circumstances,[206] a prolongation of the collective bargaining process. This feature is the law's most critical defect. Protracted negotiations favor the public employer to the detriment of both the private citizen and the public worker. If Massachusetts public employees enjoyed a qualified right to strike, employers would be reluctant to prolong negotiations and labor disputes would be more expeditiously terminated.

Other states have successfully implemented a qualified right to strike in the public sector where nonessential services are involved.[207] Alaska affords an excellent example of a cogent statutory formula in this regard.[208] It provides the state of Massachusetts with a sensible scheme upon which the public labor relations law may be reorganized and redefined. The deficiencies in the current law should motivate a serious reevaluation of chapter 150E.

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205. *See, e.g.*, note 124 and accompanying text *supra*.
206. *See* notes 98-106 and accompanying text *supra*.
207. *See* notes 158 and 193 and accompanying text *supra*.
208. ALASKA STAT. § 23.40.070 to 40.260 (1972); *see* notes 198-200 and accompanying text *supra*.

APPENDIX A*

PUBLIC SECTOR STRIKES IN STATES WITH QUALIFIED RIGHT-TO-STRIKE LAWS

	1963	1964	1965	1966	1967	1968	1969	1970	1971	1972	1973	1974	1975	1976	1977	1978
Alaska	0	0	1	0	0	0	2	2	1	2	2	8	2	2	1	2
Hawaii	0	0	0	0	0	0	2	1	1	2	1	2	1	1	0	0
Minnesota	0	0	0	1	0	0	2	2	0	3	1	0	8	4	11	6
Montana	0	0	0	1	0	1	2	2	2	1	2	2	10	3	9	7
Oregon	0	0	0	0	1	0	0	0	0	2	5	2	2	6	5	4
Pennsylvania	2	0	0	4	10	13	38	30	87	73	65	78	107	93	59	69
Vermont	0	0	0	0	0	0	0	0	0	0	0	0	1	0	0	3
Wisconsin	1	2	2	3	5	2	15	10	15	14	24	9	7	10	8	4
Total**	3	2	3	9	16	16	61	47	18	5	7	2				
									88	92	93	99	138	119	93	95

* Data for this chart was derived from the following sources: WORK STOPPAGES IN GOVERNMENT, 1958-68, Report 348 (1970), GOVERNMENT WORK STOPPAGES, 1960, 1969 and 1970 (1971) and COMPILED LABOR STATISTICS (*see* note 144 *supra*). These are all publications by the United States Department of Labor, Bureau of Labor Statistics.

** The top total line indicates the number of public sector strikes in the years when the above states did not allow for a qualified right to strike in the public sector. The bottom total line shows the states' strike level a year after passage of pro-strike legislation. In 1971, Pennsylvania and Hawaii had passed pro-strike statutes; in 1972, Wisconsin and Minnesota had joined this group; in 1973, Alaska was included; in 1974, Vermont and Oregon had passed right-to-strike statutes; and by 1975, Montana's judiciary had upheld similar rights for public employees. Please note, however, the specific years in which such statutes were enacted:

1970: Hawaii and Pennsylvania
1971: Wisconsin and Minnesota
1972: Alaska
1973: Oregon and Vermont
1974: Montana (court decision)

None of these states allow for a right to strike in all public sector services. *See* note 157 *supra*. Since the data did not reflect strikes by service-type in each state, certain strikes which occurred may have been prohibited even though the state had enacted pro-strike legislation. Such a distinction would lend more precision to the study of the impact of pro-strike legislation. With this shortcoming in mind, only Pennsylvania experienced an apparent adverse impact on its strike rate due to the passage of pro-strike legislation. This was evidenced between the years 1970 and 1971. Montana and Minnesota experienced some impact between the years 1975-1978. The other five states witnessed no noticeable impact on their strike rate.

APPENDIX B*

PUBLIC SECTOR STRIKES IN STATES WITH NO-STRIKE LAWS

	1963	1964	1965	1966	1967	1968	1969	1970	1971**	1972	1973	1974	1975	1976	1977	1978
Alabama	0	0	0	1	5	2	2	3	4	11	6	6	2	8	7	14
Arizona	0	0	0	1	0	0	2	3	1	0	1	1	3	0	0	2
Arkansas	1	0	0	0	1	2	0	2	1	0	0	1	1	0	0	3
California	2	3	2	18	8	18	33	26	16	17	13	36	37	23	50	23
Colorado	1	0	0	1	0	0	3	5	4	1	3	4	2	0	4	2
Connecticut	1	1	0	2	1	14	13	18	3	5	4	4	15	6	7	6
Delaware	0	0	0	0	1	1	0	2	1	6	4	3	9	0	3	2
D. of Columbia	0	0	0	0	1	3	1	3	5	1	0	1	2	2	0	3
Florida	0	0	3	2	6	6	7	8	5	8	4	0	2	4	0	3
Georgia	3	1	1	6	2	2	3	4	2	9	7	3	4	2	4	2
Idaho	0	0	0	1	1	0	0	0	—	1	0	2	7	3	2	1
Illinois	4	7	3	11	18	22	36	42	31	29	32	26	41	43	29	38
Indiana	3	2	2	2	4	9	14	9	3	12	7	5	6	4	18	23
Iowa	0	0	0	1	1	3	4	4	3	3	0	4	0	1	0	0
Kansas	0	0	0	2	0	2	2	2	0	2	5	4	1	0	1	2
Kentucky	0	3	2	5	4	2	7	6	2	3	0	6	4	8	2	3
Louisiana	0	0	3	2	1	4	6	3	1	1	0	1	2	1	3	7
Maine	0	0	0	0	1	0	1	1	—	1	0	0	1	1	0	4
Maryland	0	0	1	0	2	3	5	6	2	2	4	4	1	1	2	1
Massachusetts	0	0	0	0	5	4	6	13	5	7	6	2	12	4	3	9
Michigan	1	0	1	27	34	42	69	60	28	28	73	53	28	26	51	74
Mississippi	0	1	0	0	0	2	0	1	0	1	0	1	0	1	0	3

	1963	1964	1965	1966	1967	1968	1969	1970	1971**	1972	1973	1974	1975	1976	1977	1978
Missouri	1	3	2	4	6	6	8	11	9	8	5	5	6	4	5	8
Nebraska	0	0	0	0	0	0	0	0	0	0	1	0	1	0	0	1
Nevada	0	0	0	0	0	0	2	1	—	0	0	2	0	0	0	0
New Hampshire	0	1	0	0	1	3	2	4	—	1	2	3	1	1	0	1
New Jersey	0	3	5	5	8	10	16	25	23	21	18	11	22	30	22	25
New Mexico	0	0	0	1	1	1	1	1	—	3	2	0	2	3	0	0
New York	2	4	4	15	15	23	15	36	19	27	16	18	32	15	14	16
North Carolina	0	0	1	3	2	4	9	9	0	3	3	3	1	4	1	6
North Dakota	0	1	1	0	0	0	1	0	—	0	0	0	0	0	0	0
Ohio	2	2	1	15	28	24	65	54	40	30	44	42	53	44	62	67
Oklahoma	0	0	1	1	0	1	1	2	0	0	2	2	3	1	2	1
Rhode Island	0	1	2	1	1	4	4	2	2	10	6	3	21	4	7	5
South Carolina	0	0	0	0	0	0	2	0	—	3	0	0	1	0	0	0
South Dakota	0	1	1	0	0	0	1	1	—	0	0	0	0	0	0	0
Tennessee	1	0	1	0	0	7	1	1	1	7	3	8	7	4	2	10
Texas	2	2	0	3	2	4	5	1	2	6	4	3	0	1	1	3
Utah	0	1	0	0	1	1	2	1	—	0	0	1	1	0	0	0
Virginia	1	2	0	0	2	0	1	1	2	2	2	2	1	1	1	1
Washington	0	0	0	0	0	0	1	2	0	4	7	14	6	5	15	16
West Virginia	1	1	3	3	2	7	7	6	6	5	3	2	2	4	2	4
Wyoming	0	0	0	0	0	0	0	0	—	0	1	0	0	0	0	0
TOTAL***	29	41	42	142	181	254	421	426	329	375	387	384	478	378	413	481
									88	92	93	99	138	119	93	95

* Data for this chart was derived from the following sources: WORK STOPPAGES IN GOVERNMENT, 1958-68, Report 348 (1970), GOVERNMENT WORK STOPPAGES, 1960, 1969 and 1970 (1971) and COMPILED LABOR STATISTICS (*see* note 144 *supra*). These are all publications by the United States Department of Labor, Bureau of Labor Statistics.

** For this year, the United States Department of Labor, Bureau of Labor Statistics, gave no public strike figures for the following states: Georgia, Maine, Nevada, New Hampshire, New Mexico, North Dakota, South Carolina, South Dakota, Utah and Wyoming. These States had an aggregate number of 20 public sector strikes, although the proportionate distribution was not clarified by the Bureau.

*** The top total line indicates the cumulative number of public sector strikes annually throughout the fifty states and the District of Columbia. *See* Appendix A for public strike figures pertinent to the eight pro-strike states not included in this chart. The bottom total line adds all public sector strikes in states which had passed pro-strike legislation in the year previous. In 1971, Pennsylvania and Hawaii had enacted pro-strike laws; in 1972, Wisconsin and Minnesota had done the same; in 1973, Alaska was included in this group; in 1974, Vermont and Oregon joined the pro-strike states; and in 1975, Montana became the last state up until the present time to acknowledge a qualified right to strike in the public sector.

APPENDIX C*

COMPARISON OF ANNUAL STRIKE RATES

	Pro-Strike States**		No-Strike States***	
	total strikes	annual precentage increase/decrease	total strikes	annual percentage increase/decrease
1973	100		387	
1974	101	+ 1%	383	− 1%
1975	138	+37%	340	−10%
1976	119	−14%	259	−24%
1977	93	−22%	320	+24%
1978	95	+ 2%	386	+21%

* Data for this chart was derived from COMPILED LABOR STATISTICS (*see* note 144 *supra*).

** For a list of states which allow for a qualified right to strike in the public sector, *see* Appendix A *supra*. Note that, in the years 1973 and 1974, respectively, the combined states of Oregon and Vermont and Montana had not yet become pro-strike states. For the sake of simplicity, they are included for these years as pro-strike states in order to show a five year continuum of the eight pro-strike states in aggregate. Incidentally, the strike rates of Oregon, Vermont and Montana were so low that their inclusion in the pro-strike section of the graph does not risk significant distortion of the ultimate comparison.

*** For a list of these forty-two states, *see* Appendix B *supra*.

The Development of a Strict Liability Cause of Action for Personal Injuries Resulting from Hazardous Waste

The indiscriminate disposal of toxic wastes is a matter of grave public concern.[1] Commonly known as "hazardous waste,"[2] the poisonous by-products of America's industries have generated massive pollution, causing grave damage to natural resources.[3] The Senate Commerce Committee estimates that there are two million chemical compounds in existence and approximately 250,000 new compounds produced by industry every year.[4] Alarmingly, it appears that the American countryside has long been the receptacle for chemical refuse[5] impacting upon the physical health of the population.

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1. "[A]s a result of the inadequate handling of hazardous wastes, hazardous waste management has become the country's most pressing environmental concern." SENATE SUBCOMM. ON OVERSIGHT OF GOVERNMENT MANAGEMENT, REPORT ON HAZARDOUS WASTE MANAGEMENT AND THE IMPLEMENTATION OF THE RESOURCE CONSERVATION AND RECOVERY ACT, 96th Cong., 2d Sess. at IV (remarks of Carl Levin, Chairman) [hereinafter referred to as REPORT ON HAZARDOUS WASTE].

> Toxic and other organic and inorganic chemical wastes are only beginning to plague this country. Such wastes have been shown to enter the food chain and the nation's most abundant supply of drinking water, the groundwater, because wastes improperly disposed of in landfills or other surface impoundments are leaching offsite and are threatening the environment and public health.

Id. at (1).

A study conducted by the Congressional Research Service has documented 219 instances of toxic chemical pollution within 41 states. *See* [1980] CONG. Q. (CCH) 1056.

2. For the purpose of this note, hazardous waste is defined as follows:

> a waste, or combination of wastes, which because of its quantity, concentration, chemical, corrosive, flammable, reactive, toxic, infectious or radioactive characteristics either separately or in combination with any other substance or substances constitutes a present or potential hazard to human health, safety or welfare, or to the environment, when improperly treated, stored, transported, or disposed of. . . .

MASS. GEN. LAWS ANN. ch. 21, § 26A (West Supp. 1979). *See also* Resource Conservation and Recovery Act, Pub. L. No. 94-580, 90 Stat. 2795, 42 U.S.C. § 6903(5) (1976) (defining hazardous waste).

3. The examples of hazardous waste damage are tragic: acid rains has reduced fish population by 90% in Alpine Lake in the Adirondack Mountains; 1,363 underground wells have been closed due to contamination. *See* [1980] CONG. Q. (CCH) 1056. Detectable traces of kepone which were contaminating the atmosphere were found by the Environmental Protection Agency (EPA) to be emanating from the Life Sciences Plant in Hopewell, Virginia, Wash. Post, Dec. 17, 1975 § A at 1, col. 5.

4. *See* SENATE COMM. ON COMMERCE TOXIC SUBSTANCES CONTROL ACT, S. REP. NO. 94-698, 94th Cong., 2d Sess., *reprinted in* [1976] U.S. CODE CONG. & AD. NEWS 4491.

5. The environmental damage done is varied and extensive. In Elizabeth, New Jersey, on April 22, 1980, a major fire in a toxic chemical storage area at Chemical Control Corp., released

The publicity attendant to the tragedy of the Love Canal dumping site in Niagara Falls, New York, has opened the eyes of the public to the environmental emergency which now faces the nation. From 1920 through 1953, an aborted canal project in the city of Niagara Falls was used as a disposal site for toxic chemical waste.[6] The dump site was filled and then sold to the city. A school and housing development were then constructed on the land.[7] As a result of the leakage of toxic chemicals into the basements of homes and surrounding properties,[8] families were evacuated and lawsuits were filed.[9] The Love Canal tragedy has underscored the gravity of health and environmental hazards and the enormity of the clean-up tasks ahead. Regrettably, many similar situations exist throughout the nation.[10]

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toxic fumes polluting the atmosphere. *See* Singer, *The Killing Ground — An Update,* ABC NEWS CLOSEUP at 29 (Aug. 21, 1980) (transcript of broadcast). *See also Slow Poison: America's Toxic Waste Scandal,* NBC UPDATE (Sept. 10, 1980) (transcript of broadcast) [hereinafter referred to as *Slow Poison*].

In Louisville, Kentucky, a hazardous chemical dump was uncovered in December, 1978. One hundred thousand barrels of toxic chemicals still sit with the potential to pollute the groundwater. *See* [1980] CONG. Q. (CCH) 795.

In Woburn, Massachusetts, as a result of 130 years of dumping, 500 acres of land are contaminated with toxic chemicals and metals allegedly causing damage to the health of Woburn citizens as well as contaminating the water supply. Woburn citizens claim there is a correlation between an increase in serious illness and the toxic dump. *Slow Poison, supra.*

In Lothrop, California, one of the nation's richest farm areas, the fresh water aquifer has become contaminated due to the dumping of the pesticide DBCP. [1980] CONG. Q. (CCH) 1056. An aquifer is "an underground layer of rock, sand or gravel from which significant quantities of subsurface water can be produced." W. RODGERS, ENVIRONMENTAL LAW § 4.3 at 370 (1977).

6. *See* Mervak v. City of Niagara Falls, 101 Misc.2d 68, 69-70, 420 N.Y.S.2d 687, 689 (1979). (Love Canal residents filed a class action suit for damages of $2,500,000,000 for personal injuries, wrongful deaths, and diminishing real estate values). For further discussion of Love Canal, see notes 7-10 and accompanying text *infra.*

7. Mervak v. City of Niagara Falls, 101 Misc.2d at 69, 70, 420 N.Y.S.2d at 689.

8. *See* Worobec, *An Analysis of the Resource Conservation and Recovery Act,* 11 ENVIR. REP. (BNA) 633, 634-35 (1980).

9. *See* Mervak v. City of Niagara Falls, 101 Misc.2d at 69, 420 N.Y.S.2d at 689.

10. The Senate Subcommittee on Oversight of Government Management observed:

> Cases other than Love Canal which demonstrated to this Subcommittee the widespread nature of the hazardous waste problem included:
>
> (1) Jacksonville, Arkansas, where wastes from the manufacture of 2,4,5-T; a principle component of the defoliant Agent Orange have been disposed of by the Vertoc Corporation on company property, and have resulted in the highest level of TCDD (dioxin) ever recorded in this country. [See note 71 *infra* for a discussion of the legal action resultant from this pollution.]
>
> (2) Montague, Michigan, where the on-site disposal by Hooker Chemical of chemical wastes in thousands of 55-gallon drums resulted in the leaching of organic contaminants into groundwater supplies and into a nearby recreational lake.
>
> (3) Hemlock, Michigan, where a not-yet-verified contaminant located in either the air, food chain or the groundwater has resulted in increased health disorders both for livestock and human residents.
>
> (4) Gray, Maine, where 750 families drank polluted groundwater for four years, as a result of leaks from an inactive solvent and oil processing facility.
>
> (5) Shakopee, Minnesota, where Pollution Controls, Inc., which incinerated combustible paint sludges, solvents and waste oils, is under court injunction to clean up and eliminate an inventory of 30,000 drums.

REPORT ON HAZARDOUS WASTE, *supra* note 1, at 1. *See also* note 5 *supra* and notes 37, 42 *infra.*

The presence of hazardous waste in our environment is a multifaceted problem involving industry, government, private citizens, and the courts. Only recently, with the passage of the Resource Conservation and Recovery Act of 1976[11] (RCRA), has industry been subject to comprehensive guidelines and regulations.[12] These regulations require industry to dump their chemical wastes in a very limited number of legally authorized dump sites or to create their own government approved disposal units.[13] Nonetheless the Act has many weaknesses. The federal government has recognized these flaws in the RCRA[14] and has attempted to close the loopholes through the passage of new legislation and new regulations.[15] Industry has complained that compliance with these regulations will impose an unreasonable financial burden.[16] Since consumers benefitted from lower costs in prior years, industry now feels any additional financial burdens should be borne by such consumers.[17] While the private sector suffers economic hardship under the new regulations, the disposal methods formerly in use have led to costs which must be absorbed by both industry and the public. The estimated cost of the clean-up resulting from past disposal methods is staggering.[18]

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11. 42 U.S.C. §§ 6901-6984. For some of the legislative history, *see* SENATE COMM. ON PUBLIC WORKS, SOLID WASTE DISPOSAL ACT OF 1976, S. REP. NO. 94-988, 94th Cong., 2d Sess. (1976); HOUSE COMM. ON INTERSTATE AND FOREIGN COMMERCE, RESOURCE RECOVERY AND CONSERVATION ACT OF 1976, H.R. REP. NO. 94-1491, 94th Cong., 2d Sess., *reprinted in* [1976] U.S. CODE CONG. & AD. NEWS 6238.

12. For a discussion of the RCRA regulations, see notes 80-99 *infra.*

13. Federal Regulations state:

> Subtitle C of RCRA establishes a Federal program to provide comprehensive regulation of hazardous waste. . . . Sections 3002 and 3003 require EPA to establish standards for generators and transporters of hazardous waste. . . . To ensure that these facilities are designed, constructed, and operated in a manner which protects human health and the environment, Section 3004 of RCRA directs EPA to promulgate technical, administrative, monitoring and financial standards for them. These independently enforceable standards will be used by EPA to issue permits to owners and operators of facilities under Section 3005.

45 Fed. Reg. 33066, 40 C.F.R. pt. 261 (1980).

14. For a discussion of the inadequacies of the RCRA, see notes 89-99 and accompanying text *infra.*

15. For a discussion of new legislation, see notes 113-17 and accompanying text *infra.*

16. "[T]he cost to industry to comply with the proposed regulations under the RCRA . . . will be in the neighborhood of $750 to $900 million per year." REPORT ON HAZARDOUS WASTE, *supra* note 1, at 2.

17. In response to why consumers should bear the cost of the regulations placed on industry, Jackson Browning, Director of Health, Safety and Environmental Affairs for Union Carbide Corp., stated: "Hazardous wastes are not the product of chemical industry activities alone. Rather, they are an integral by-product of our industrial society, and a by-product of the daily life of every citizen." [1980] CONG. Q. (CCH) 803.

18. The Environmental Protection Agency estimates these cleanup efforts could cost from 22 to 44 billion dollars. *See* [1980] CONG. Q. (CCH) 795. *See also* Commonwealth of Puerto Rico v. S.S. Zoe Colocotroni, 456 F. Supp. 1327 (D.P.R. 1978) (plaintiff entitled to over $6 million for extensive damage and cleanup costs resulting from an oil spill). For additional examples of the cost of cleanup, see note 112 *infra.*

Existing environmental legislation[19] provides for compliance orders, civil suits, and criminal penalties for violations of any provision. Violations may result in a civil penalty of $25,000 a day[20] and/or one year imprisonment.[21] The private citizen, often the innocent victim of environmental pollution, must somehow secure redress for personal injuries that result from hazardous waste pollution. Such redress is impossible to attain given present legislation.

In an attempt to avoid overburdening industry, Congress has been very cautious in creating new and more extensive remedies for private citizens.[22] Additionally, industry has lobbied successfully against legislative provisions for personal injury remedies.[23] Consequently,

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19. The four major statutes are: 1) RCRA, 42 U.S.C. §§ 6901-6984 (1976) which provides technical and financial assistance for the development of a nationwide hazardous waste management plan from the generation of hazardous waste to its disposal.

2) Toxic Substances Control Act, 15 U.S.C. §§ 2601-2629 (1976). Sections 2601 and 2603(2) broadly define chemical substance as "any organic or inorganic substance of a particular molecular identity [and] any combination of such substances occurring in whole or in part as a result of chemical reaction or occurring in nature." Section 2607(b) states that the Administrator of the Environmental Protection Agency must keep an up-to-date compilation of each chemical substance manufactured and/or processed in the United States.

3) Federal Water Pollution Control Act of 1974, (FWPCA), 33 U.S.C. §§ 1251-1376 (1979). This Act consists of five major sections: title I deals with research and demonstration projects; title II addresses grants for sewerage treatment plants; title III establishes standards and, inspection and enforcement procedures; title IV deals with permits and licenses and establishes the National Pollutant Discharge Elimination System; title V provides for a private cause of action, advisory committees, definitions and judicial reviews.

4) Safe Drinking Water Act of 1977, 42 U.S.C. §§ 300f-300j-10. This Act contains minimum requirements to prevent underground injection of chemicals from contaminating drinking water sources. It extends the FWPCA to include federal authority over injection well sources of groundwater pollution. *See* HOUSE COMM. ON INTERSTATE AND FOREIGN COMMERCE, SAFE DRINKING WATER ACT, H.R. REP. NO. 93-1185, 93rd Cong., 2d Sess. 4, *reprinted in* [1974] U.S. CODE CONG. & AD. NEWS 6454.

20. The statute provides: "If such violator fails to take corrective action within the time specified in the order, he shall be liable for a civil penalty of not more than $25,000 for each day of continued noncompliance and the Administrator may suspend or revoke any permit issued to the violator. . . ." RCRA, 42 U.S.C. § 6928(a)(3) (1976).

21. The statute provides that any person who knowingly:

> (1) transports any hazardous waste listed under this subtitle to a facility which does not have a permit under section 6925 . . . ,
> (2) disposes of any hazardous waste listed under this subtitle without having obtained a permit therefor under this subtitle,
> (3) makes any false statement or representation in any application, label, manifest, record, report, permit or other document filed, maintained, or used for purposes of compliance with the subtitle, shall, upon conviction, be subject to a fine of not more than $25,000 for each day of violation, or to imprisonment not to exceed one year, or both. If the conviction is for a violation committed after a first conviction of such person under this paragraph, punishment shall be by a fine of not more than $50,000 per day of violation, or by imprisonment for not more than two years, or by both.

RCRA, 42 U.S.C. § 6928(d) (1976).

22. Responding to the passage of a weak version of a "Superfund Bill" (*see* notes 101-13) Merchant Wentworth, congressional liaison for the Environmental Protection Agency, called to mind Congress's caution not to overburden industry with a victim's liability clause: "It's just another example of a chicken Congress unable to put the blame where it belongs — on the chemical industry." [1980] CONG. Q. (CCH) 2820.

23. "Industry representatives say their liability should end as soon as the wastes leave their

private citizens may be prevented from maintaining suit unless the courts recognize traditional common law remedies.[24]

This Note examines possible theories upon which a cause of action might be based. Section I describes the environmental problems caused by hazardous waste and the difficulties entailed in the effort to manage its disposal. An analysis of the Love Canal tragedy demonstrates the dilemma of Evironmental Protection Agency budgetary limitations as well as the obstacles facing private citizens attempting to file personal injury suits. Section II examines the legislation which has been enacted to address hazardous waste issues. Recent and pending legislation in Congress is analyzed in order to demonstrate the deficiencies in existing laws and the ongoing efforts in Congress relative to these issues. Section III of this Note considers common law theories of recovery and their applicability to the hazardous waste problem. Theories of strict liability,[25] nuisance,[26] and the effect of the statute of limitations[27] are considered. Finally, legislative and judicial rules in the area of strict liability are examined for their precedential value in applying common law theories of liability to the problem of hazardous waste.

I. HAZARDOUS WASTE: THE PARAMETERS OF THE PROBLEM

A. The By-Products of Industry

The Environmental Protection Agency (EPA)[28] reports that hazardous waste can be broken down into the following components: chemical and allied products (sixty percent); machinery (ten percent); primary metals (eight percent); paper and allied products (six percent); fabricated metal products (four percent); stone, clay and glass (three

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factory. They maintain they should not be held liable for the negligence of transporters or disposal site operators." [1980] CONG. Q. (CCH) 804. A few major personal injury suits could substantially damage the economy of an entire industry. For example, in Mervak v. Niagara Falls, 101 Misc.2d 68, 420 N.Y.S.2d 687 (1979), the plaintiffs filed damages for $2,500,000,000. *See* notes 6-10 and accompanying text *supra*.

24. Industry and government are so integrally concerned with the magnitude of the cost problem that the creation of a statutory remedy is an unlikely development. Thus, the responsibility falls upon the judicial system to create an avenue in the courts for personal injury suits resulting from injuries due to hazardous waste pollution.

25. For a discussion of strict liability, see notes 144-54 and accompanying text *infra*.

26. For a discussion of nuisance, see notes 133-43 and accompanying text *infra*.

27. For a discussion of the statute of limitations, see notes 168-77 and accompanying text *infra*.

28. The EPA was established by the executive branch as an independent agency according to Reorganization Plan No. 3 of 1970, effective December 2, 1970.

> The purpose of the Environmental Protection Agency (EPA) is to protect and enhance our environment today and for future generations to the fullest extent possible under the laws enacted by Congress. The Agency's mission is to control and abate pollution in the areas of air, water, solid waste, noise, radiation, and toxic substances. EPA's mandate is to mount an integrated coordinated attack on environmental pollution in cooperation with State and local governments.

U.S. GOV'T MANUAL 507 (1978-79).

percent); all others (nine percent).[29] Since waste is unavoidable, society must responsibly construct a comprehensive program of industrial waste management. Industry is a vital and necessary part of our economy and its waste products are a highly significant aspect of production.

The by-products of industry can take various forms including: asbestos-laden ore tailings (produced by the mining industry),[30] polychlorinated biphenyls (PCB),[31] and the basic metals of lead, cadmium or mercury.[32] The EPA estimated that 126 billion pounds of hazardous waste would be produced by industry in 1980.[33] Industry's past and present need to dispose of hazardous waste raises a number of problems: the danger caused to health and environment by improperly constructed dump sites and disposal facilities,[34] midnight dumping,[35] and new disposal methods and costs.[36]

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29. *See* [1980] CONG. Q. (CCH) 803. The House Oversight Subcommittee surveyed the nation's 53 largest chemical companies regarding where they had disposed of their hazardous wastes during the past 30 years. Of the 762 million tons of disposed waste, 94% of it was on company property. The total number of dumps reported was 3,383. Of this total, 1,965 are still in use, 1,099 are no longer in use, and 319 are undetermined. The five states having the largest total number of dumps are: Texas with a total of 319, of which 207 are still in use; Ohio with a total of 253, of which 150 are still in use; New Jersey with a total of 223, of which 113 are still in use; California with a total of 177, of which 114 are still in use; Illinois with a total of 176, of which 106 are still in use. The 53 companies surveyed were: Air Products and Chemicals, Allied Chemical, American Cyanamid, Ashland Oil, Atlantic Richfield, Borden, Borg-Warner, CF Industries, Celanese, Chevron, Cities Service, Diamond Shamrock, Dow Chemical, Dow Corning, Du Pont, Eastman Kodak, Esmark, Ethyl, Exxon, FMC Corp., Farmland Industries, General Electric, B.F. Goodrich, Goodyear Tire and Rubber, W.R. Grace, Gulf Oil, Hercules, IMC Corp., Kerr-McGee, Koppers, Lubrizol, Mobil, Monsanto, NL Industries, Nalco Chemical National Distillers, Occidental Petroleum, Olin Corp., PPG Industries, Pennwalt, Pfizer, Phillips Petroleum, Reichhold Chemical, Rohm and Haas, Shell Oil, Standard Oil of Indiana, Stauffer Chemical, Tenneco, Texaco, Union Carbide, Union Oil of California, U.S. Steel, Williams Companies. *See* HOUSE SUBCOMM. ON OVERSIGHT AND INVESTIGATIONS, WASTE DISPOSAL SITE SURVEY, H.R. NO. 95-IFC (Oct. 1979).

The latest EPA research (Sept., 1980) indicates that 30 to 40 million metric tons of hazardous waste are generated annually in this nation. *See* 11 ENVIR. REP. (BNA) 769 (1980). Eighty-three percent of the nation's hazardous waste is generated in twenty states: California, Florida, Georgia, Illinois, Indiana, Louisiana, Massachusetts, Michigan, Missouri, New Jersey, New York, North Carolina, Ohio, Pennsylvania, South Carolina, Tennessee, Texas, Virginia, Wisconsin and West Virginia. *See* EPA J., Mar., 1980, at 35.

30. *See* United States v. Reserve Mining Co., 380 F. Supp. 11 (D. Minn.), *remanded,* 498 F.2d 1073 (8th Cir.), *stay sustained,* 419 U.S. 802 (1974), *modified and remanded,* 514 F.2d 492 (8th Cir. 1975) (federal and state agencies sued to prevent a continuing discharge of taconite and asbestos from the mining industry into Lake Superior which is a major source of drinking water for the people of Minnesota).

31. *See Chemicals and Health,* EPA J., Mar., 1979, at 4-7. PCB is a substance used as an insulating fluid in transformers. *See also* note 49 *infra.*

32. *See* Heritage, *Industrial Pretreatment,* EPA J., July/Aug. 1980, at 17-18.

33. *See* [1980] CONG. Q. (CCH) 795. Compare this 1980 figure to the 1975 estimate of a mere 260 million tons per year. *See Hearings on Waste Control Act of 1975, Subcomm. on Transportation and Commerce of the House Comm. on Interstate and Foreign Commerce,* 94th Cong., 1st Sess. (1975).

34. *See* notes 37-46 and accompanying text *infra.*

35. *See* notes 47-53 and accompanying text *infra.*

36. *See* notes 45-65 and accompanying text *infra.*

B. Danger to Health and Environment

The pollution of the land, water supply and atmosphere, caused by the indiscriminate disposal of industrial refuse, has been documented.[37] The direct correlation between health problems and the proliferation of toxic chemicals is just beginning to be established.[38] It has been demonstrated that those persons living along the old stream beds of the Love Canal in Niagara Falls are three times as likely to have miscarriages and children born with birth defects and seven times as likely to suffer from nervous breakdowns as persons situated elsewhere.[39] Similarly, the cancer rate of persons in the area surrounding the Woburn, Massachusetts dump site is ten times the national average.[40]

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37. Examples of rampant pollution are prevalent today. As a result of a two year investigation by the New York Public Interest Research Group, Inc., 66 companies were found to have dumped 10 million gallons of contaminated waste water daily into eleven city sewerage systems on Long Island, New York. Thus, the drinking water for 3 million residents is in serious danger of contamination. *See The Poisoning of America,* TIME, Sept. 22, 1980, at 58-60.

At the request of the EPA, United States Attorney Edward Harrington has filed suit against W.R. Grace and Co. for disposal of hazardous waste which has resulted in polluting the groundwater supply of Acton, Mass. *See* EPA J., June, 1980, at 30.

At the request of the EPA, the Department of Justice has filed suit against Flemington Landfill in New Hanover County, North Carolina for causing an imminent and substantial danger to health and environment due to the leaching of dangerous chemicals into groundwater. *See* EPA J., Mar., 1980, at 34. *See* note 10 *supra* for further instances of hazardous waste pollution.

38. For example, PCB, TRIS, and vinyl chloride have been shown to cause cancer. *See* CHEMICALS AND HEALTH, *supra* note 31, at 4-9. The Surgeon General of the United States, Dr. Julius Richmond, admits that the nation's health is in serious danger due to toxic chemicals. However, the specific injurious effect of many chemicals on human health has yet to be determined. *See The Poisoning of America,* TIME, Sept. 22, 1980, at 58. *See also* the asbestos line of cases cited in note 173 *infra.*

39. *See Slow Poison, supra* note 5. Among the 82 chemicals identified in Love Canal, at least eleven are known carcinogens, including 500 pounds of dioxin. *See* Speth, *The Best of Times, The Worst of Times: Environmentalism in the 1980's,* Tenth Annual ALI-ABA Environmental Law Conference, Washington, D.C., Feb. 21, 1980. *See also* United States v. Vertoc Chemical Corp., 14 E.R.C. 1587 (D. Ark. 1980) (EPA having determined that no level of dioxin exposure has been proven safe, sued for an injunction requiring the defendant to abate the discharge of dioxin from defendant's facility). *See* notes 6-10 and accompanying text *supra* & note 68 *infra* for discussion of Love Canal.

40. *See Slow Poison, supra* note 5. The Subcommittee on Oversight of Government Management began an investigation in June, 1979 of alleged chemical contamination in Hemlock, Michigan, a highly industrialized area including industries such as Dow Chemical and Dow Corning. *See* REPORT ON HAZARDOUS WASTE, *supra* note 1, at 34-35. The Michigan Department of Public Health was unable to find a direct correlation between well water and health complaints. "The Michigan Department of Public Health, in cooperation with the Saginaw County Health Department, discovered a greater number of health complaints in the [Hemlock] area than in a comparison township area but has been unable to establish a link between the complaints and private well water." THE HEMLOCK AREA STUDY: AN INVESTIGATION INTO REPORTED HEALTH PROBLEMS AND POSSIBLE WATER CONTAMINATION 14 (1979), *quoted in* REPORT ON HAZARDOUS WASTE, *supra* note 1, at 35. Citizen testimony further indicated to the Subcommittee that unusual health problems existed. A resident of the area:

> testified before the Subcommittee on July 19, 1979. Their personal investigation into area health problems disclosed a graphic display of wide-ranging ailments in local residents: Lupus, tumorous cysts and lumps, one case of a brain tumor, bone disorders, convulsions, spasms, cancer, high blood pressure, heart attacks, gall bladder, spleen and

Toxic chemicals are usually more potent than the classic air pollutants and thus pose a greater immediate and long term risk to health and environment.[41] Often the effects of these chemicals are compounded by an interaction with other chemicals in the soil or atmosphere which may increase their toxicity.[42] The latent effect of toxic chemicals distinguishes this environmental problem from others.[43] Chronic exposures can result in serious health problems which may not surface for many years.

> Chronic poisoning, as a result of lengthy or repeated exposure to smaller amounts of poison, is more subtle and harder to trace to a causative factor. The symptoms may resemble natural aging or mimic numerous diseases. In some cases, chronic effects may show after long periods of exposure with no intervening symptoms, or years after the exposures have stopped.[44]

The problem of research and control also distinguishes chemical tox-

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liver problems, hysterectomies, miscarriages, stillbirths, birth defects and kidney and bladder diseases.

REPORT ON HAZARDOUS WASTE, *supra* note 1, at 35.

41. One commentator states:

> [a]ir pollutants, which continue to dominate governmental concern, are sulfur oxides, nitrogen oxides, particulates, hydrocarbons, oxidants, and carbon monoxide. Although these pollutants are perceived as direct health threats, the emphasis had been on their short-term, milder effects, such as irritation to the eyes from oxidants, headaches from carbon monoxide, and respiratory distress. . . . A common assumption is that air pollution primarily affects the weak, with little effect on the healthy.

Page, *A Generic View of Toxic Chemicals and Similar Risks,* 7 ECOLOGY L. Q. 207, 218 (1978).

Hazardous waste can concentrate in and destroy the groundwater supply of an entire metropolitan area. For example, the fresh water aquifer beneath the San Joaquin Valley in California, one of the world's richest farm areas has been contaminated by the pesticide DBCP. *See* [1980] CONG. Q. (CCH) 1056. *See also* note 5 *supra* for a description of aquifer. Groundwater lies beneath the earth's surface and supplies wells and springs. WEBSTER, NEW INTERNATIONAL DICTIONARY 1004 (3d ed. 1961). Toxic elements can seep deeper into the earth with each rainfall and eventually poison the aquifer, groundwater, and drinking water. Until very recently, once groundwater was contaminated, it was impossible to decontaminate it of most chemicals with the result that many town and city water supplies are no longer usable. However, "EPA researchers have developed a mobile system which removes hazardous *organic* chemicals from water. Granular activated carbon absorbs pollutants as the water passes through the regenerator. The cleaned water can then be safely used." ENVIRONMENT NEWS, Nov. 1980, at 2 (emphasis added). The EPA estimates that 50 billion gallons of liquid waste are emptied daily into industrial surface water impoundments. EPA estimates further indicate that there are 2,100 deficient sites for the disposal of hazardous waste and these facilities are located above usable groundwater sources. These sites are deficient in that they each contain at least one unlined impoundment which can eventually allow the waste to leak from the impoundment into the groundwater. *See* 11 ENVIR. REP. (BNA) 753 (1980). There are no barriers between these waste areas and the groundwater, thus allowing for the eventual and inevitable contamination of groundwater. *Id.*

42. *See* Page, *supra* note 41, at 222.

43. The latent period results in many adverse health effects caused by toxic substances which are not realized until years after the first exposure. This creates a problem in a cause of action due to the statute of limitations. *See* notes 171-80 and accompanying text *infra.*

44. Perham, *Legacy of Poisons,* EPA J., July/Aug. 1979, at 4. Detailed studies have been done regarding the nuclear industry and health. Dr. Helen Caldicott, an Australian pediatrician, president of the Physicians for Social Responsibility and presently a researcher at Harvard Children's Hospital has discussed the effects of nuclear industry on health. For example, during uranium mining, radium and radon are released and if workers swallow mine dust containing

icity from other environmental issues.[45] The difficulty of isolating factors which may contribute to an illness, coupled with the total unpredictability of chemical behavior, has made the task of the researcher most difficult.[46] Thus, because of their complex nature, toxic chemicals in the environment cannot in all instances be directly linked to health problems.

C. *Midnight Dumping*

Toxic wastes are a by-product of many major industries.[47] Yet, there are few adequate and safe dump sites.[48] Furthermore, because of the publicized hazards of chemical wastes, many communities have refused to allow such dumping sites to be situated close to their residential areas.[49] Because there are so few approved sites,[50] some industries have

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radium, it can result in leukemia or bone cancer. If radon is inhaled it can cause lung cancer. Plutonium, a by-product of the fission in a nuclear reactor, is one of the most carcinogenic substances known, having a half life of 24,000 years. Less than one-millionth of a gram is considered a carcinogenic dose. Plutonium is concentrated in the ovaries and testicles causing genetic mutations. *See* H. CALDICOTT, NUCLEAR MADNESS 11-39 (1978).

45. Dr. Irving Selikoff, Mt. Sinai Medical Center, who established the asbestos-cancer connection, maintains: "There is no classic set of symptoms for chemical diseases." *The Toxicity Connection,* TIME, Sept. 22, 1980, at 63.

46. For example, "[t]he chemical dioxin can produce the skin condition chloracne, but allergies and plants produce conditions with similar symptoms. Benzene can cause leukemia, but so does radiation." *Id.*

47. For examples of studies on the amounts of wastes produced by industry, see note 29 and accompanying text *supra.*

48. The Senate Subcommittee on Oversight of Government Management reported: "In developing regulations, the Subcommittee finds that EPA increased the delay in promulgation by its revision and reduction of the scope of the draft regulations." REPORT ON HAZARDOUS WASTE, *supra* note 1, at 5.

The effects of the delay were "[t]o inhibit waste disposal companies from investing in new equipment for fear of the facilities' inability to meet EPA standards. . . ." *Id.* "In order to improve the inventory of [safe] hazardous waste sites, the Subcommittee recommends that EPA and the states review all NPDES [National Pollutants Discharge Elimination System] permit applications and all permitted facilities to determine what alternate forms of disposal will be or are being utilized to treat the effluent discharges." *Id.* at 7.

The EPA is attempting to demonstrate to industry that safe dumping sites can be economically efficient. *See* notes 56-61 and accompanying text *infra.* EPA estimates that at least 50 to 60 new dump sites will be needed nationally. In addressing the siting problem, members of Congress have proposed the use of federal and state owned lands. *See* [1980] CONG. Q. (CCH) 802.

49. For example, on February 21, 1980, the residents of Curtis Bay, Maryland, protested the arrival of thousands of gallons of PCB contaminated oil at a storage facility in their town. *See* [1980] CONG. Q. (CCH) 802. (For a description of PCB see note 31 *supra.*) Citizen opposition to sixteen proposed disposal sites in Minnesota resulted in the state returning 3.7 million dollars in funding to the EPA. *See* [1980] CONG. Q. (CCH) at 802. Governor King of Massachusetts recently signed the Hazardous Waste Siting Bill, MASS. GEN. LAWS ANN. ch. 150B (West Supp. 1980), which is the first attempt by any state to offer incentives and compensation for facility impacts. *See* 2 NEWS AND VIEWS, MASS. DEPARTMENT OF ENVIRONMENTAL QUALITY ENGINEERING 1 (1980). The Hazardous Waste Siting Bill "creates a Hazardous Waste Facilities Site Safety Council. . . . This council would oversee the entire siting process, facilitate negotiations, and guarantee assistance and information to all parties involved." Wetmore, *Mass. Hazardous Waste Facility Siting Act,* ENVIRONMENTAL NEWS (Oct. 1980), at 2.

50. For example, in Massachusetts, only 8% of the hazardous waste can be disposed of ade-

resorted to illegal dumping procedures, commonly known as "midnight dumping."[51] Millions of dollars are now being expended by federal and state authorities to uncover and clean-up these dump sites.[52] The EPA estimates that present clean-up efforts could cost from 22 to 44 billion dollars.[53] Very recently, Congress enacted legislation giving the EPA greater enforcement powers to control midnight dumping by making such dumping a felony rather than a misdemeanor.[54]

D. New Disposal Methods and Costs

The government is encouraging industry to construct adequate disposal units in the future.[55] The most common disposal methods to date are: secure landfill,[56] deep well injection,[57] chemical fixation,[58] microbiological treatment,[59] and high temperature incineration.[60] The

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quately. *See* 2 NEWS AND VIEWS, MASS. DEPARTMENT OF ENVIRONMENTAL QUALITY ENGINEERING 1 (1980).

51. The dumping of hazardous waste has gone unregulated. On-site disposal is quite common as is illegal dumping in streams, sewers, landfills and abandoned mines. *See Hearings on Waste Control Act of 1975. Subcomm. on Transportation and Commerce of the House Comm. on Interstate and Foreign Commerce,* 94th Cong., 1st Sess., 769-72 (1975).

William Carraciolo, who is facing a two year jail sentence for dumping, stated: "You can go out and rent a piece of property . . . get a permit to handle drums of hazardous waste. Bring them onto the property and just store them. As soon as the heat gets too great, just go bankrupt and get out. There's no law against it." Singer, *supra* note 5, at 25. Presently there is a law against midnight dumping as a result of recently effective RCRA regulations. *See* 45 Fed. Reg. 33068, 40 C.F.R. pt. 260 (1980).

52. For example: "To provide emergency response and site cleanup for the so-called 'ticking time bombs' such as Love Canal alone would cost from 4.6 to 6.1 billion dollars." REPORT ON HAZARDOUS WASTE, *supra* note 1, at (1). *See* note 132 *infra.*

53. *See* [1980] CONG. Q. (CCH) 795.

54. Solid Waste Disposal Act Amendments of 1980, Pub. L. No. 96-482. *See* H. R. REP. NO. 96-1444, 96th Cong., 2nd Sess., *reprinted in* [1980] U.S. CODE CONG. & AD. NEWS 8674.

55. "In order to improve the inventory of hazardous waste sites, the subcommittee recommends that EPA and the states review *all* National Pollutants Discharge Elimination System (NPDES) permit applications and *all* permitted facilities to determine what alternate forms of disposal will be or are being utilized to treat the effluent discharges." REPORT ON HAZARDOUS WASTE, *supra* note 1, at 7.

56. This type of disposal method demands building an impermeable encasement such as a thirty foot deep layer of clay and requires continuous monitoring. *See* [1980] CONG. Q. (CCH) 802.

57. Although one of the cheapest methods of disposal, deep well injection is fraught with dangers. The toxic wastes are injected into abandoned mines or underground pockets. However, possibilities exist that underground water will become contaminated if the toxic wastes are not injected below the water table. *Id.*

58. This method can be used for metallic wastes by processing these wastes with silicate chemicals which hardens the wastes into harmless cement-like blocks. *Id.*

59. Microbiological treatment neutralizes organic wastes by using microbes to break down the chemicals into carbon dioxide, water and sludge. *Id.*

60. High temperature incineration is the disposal method most favored by industry. It demands burning toxic wastes at high temperatures (2400°F) to convert them to harmless gases and salts. "Although it is expensive and requires a lot of energy, this method is probably the wave of the future, according to the Chemical Manufacturers Association." *Id.*

last method seems to be the most favored by both the EPA and industry.[61]

Some companies have resorted to shipping hazardous waste to other nations[62] in order to avoid present RCRA regulations.[63] The EPA predicts that pollution control efforts will prove to be economically efficient and actually will result in making industry more profitable. For example, an 8 million dollar water treatment system at the Great Lakes Paper Company reduced overall plant operating costs by 4 million dollars per year and improved the quality of the water.[64] Similarly, solid waste incinerators were installed at Deere and Company in Dubuque, Iowa, generating heat for the factory while saving $1,175.00 per day in waste disposal and fuel costs.[65]

E. The Individual's Dilemma

Today, the individual is experiencing the ill effects of yesterday's unregulated hazardous waste disposal methods. Some citizens have recently discovered that their homes were built upon abandoned dump sites.[66] Others have been depending on drinking water drawn from contaminated water sources.[67] Some children play in areas which have been designated as abandoned chemical dumpsites.[68] The nation's citizens are beginning to realize the adverse effects of these wastes.[69] Individuals

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61. *Id.*

62. For example, when clothing treated with a flame retardant carcinogen (TRIS) was banned in the United States, some of the manufacturers shipped such clothing at discount rates to Puerto Rico. Asbestos manufacturing plants were established in Mexico when Occupational Safety and Health Administration demands on such manufacturing became too restrictive and too costly. Recently, the State Department has learned of plans to ship hazardous wastes to Sierra Leone, Haiti, Chile, Liberia, Senegal and Nigeria for sizeable payments for the privilege of dumping. *See* 207 SCIENCE 962 (1980).

63. For a discussion on the RCRA regulations, see notes 80-99 and accompanying text *infra.*

64. *See* Hoard, *Cleanliness Pays,* EPA J., Jan., 1979, at 21.

65. *Id.*

66. For an example, see notes 6-10 and accompanying text *supra.*

67. For an example, see notes 3, 5, & 37 *supra* and note 95 *infra.*

68. For example: Hooker Chemical & Plastics Corporation used Love Canal as a depository for an estimated 352 million pounds of industrial wastes until 1953. *See* Worobec, *An Analysis of The Resource Conservation and Recovery Act,* 11 ENVIR. REP. (BNA) 633, 634 (1980). A school and homes were built on this site. In 1976, heavy rains raised the water table causing the long buried chemicals to seep into basements and playgrounds. *Id. See also* notes 6-10 and accompanying text *supra.*

69. It has been observed:

> Since the Industrial Revolution an increasing number of poisons are used in, produced by, or left over from the daily business of modern life. The substances permeate the air, land, and water and can be unknowingly absorbed by persons entirely unaware of their existence.
>
> A miniscule amount of any given substance in drinking water, for example, may seem like a petty concern. Who drinks that much water? But suppose the contaminant

who are victims of past abuses are often faced with staggering medical costs. Unfortunately, difficult problems of proof and procedural limitations may bar any eventual recovery.[70] Thus, unless industry or government responds, private citizens will continue to bear the entire cost of decades of unregulated waste management.

Federal authorities are now addressing problems of waste management.[71] Recent legislation has been established regulating the transportation and disposal of hazardous waste.[72] However, legislation providing personal injury remedies has yet to be enacted.[73]

The Carter Administration proposed that personal injury costs be absorbed by the eventual enactment of national health insurance coverage.[74] It is anticipated that protection and environmental concern will be low priority in the Reagan Administration.[75] The EPA maintains that personal injury costs could be placed on industry through legislation.[76] Congress has been unable to pass any legislative provisions dealing with private citizens' suits for personal injuries from hazardous waste.[77]

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also adheres to cooking and eating utensils, is breathed in household dust, finds its way into food, collects on the skin day after day, is stored in body tissues, and is not excreted from the body? In this manner unsuspecting people can accumulate surprising amounts of unwanted substances.

Perham, *supra* note 44, at 35.

70. For a discussion of problems of proof and procedural limitations, see notes 144-77 and accompanying text *infra*.

71. United States v. Vertoc Chemical Corp., 14 E.R.C. 1587 (D. Ark. 1980) (EPA sued for an injunction against Vertoc Chemical to abate the discharge of dioxin from their facility. The court determined that the defendant's actions were an imminent danger under the RCRA and held for the plaintiff.); United States v. Solvents Recovery Service, 496 F. Supp. 1127, (D. Conn. 1980) EPA sought an injunction to abate and remedy unlawful groundwater pollution by the defendant in Southington, Connecticut.

72. For a discussion of recent legislation, see notes 113-17 *infra*.

73. For a discussion of possible remedies, see notes 131-84 *infra*.

74. "Concerned with inflation fighting and budget austerity, the [Carter] administration feels victim compensation should be handled by private law suits against the responsible company. National health insurance, if passed, could handle long-term medical costs if the responsible company could not be found or were unable to pay, administration officials argue." [1980] CONG. Q. (CCH) 803. For a discussion of the Reagan Administration's response, see note 75 *infra*.

75. "Reagan ... has consistently said that environmental regulations should be overhauled to meet cost-benefit tests. . . . [He] claims federal regulations and specifically some environmental laws, have crippled American business. He promises to inject 'balance' and 'common sense' into environmental policy." [1980] CONG. Q. (CCH) 3161. As Governor of California, Reagan is on record as having vetoed a strong solid waste law. *See* [1980] CONG. Q. (CCH) 3163.

76. Environmentalists favored the proposed Senate Bill S. 1480 because, as opposed to other legislation, it has provision for victim compensation. *See* [1980] CONG. Q. (CCH) 803. For a discussion of S. 1480, see notes 100-12, 125, 126 and accompanying text *infra*.

77. For an examination of the division within Congress regarding victim compensation and the final resultant legislation, see notes 100-17 and accompanying text *infra*.

II. LEGISLATIVE SOLUTIONS

A. Resource Conservation and Recovery Act of 1976

Before 1976, there was only a fragmentary approach to regulating the disposal of hazardous wastes on land.[78] In 1976, two years before the uncovering at the Love Canal site, Congress passed the Resource Conservation and Recovery Act.[79] Popularly known as the RCRA, this act is a "multifaceted approach"[80] to the environmental problem of hazardous solid waste.[81] The RCRA requires the identification and listing of hazardous wastes[82] and the registering of generators, transporters and disposal facilities[83] so that all hazardous waste can be

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78. "To date, government regulation of hazardous waste, from generators to disposers, has been virtually non-existent." REPORT ON HAZARDOUS WASTE, *supra* note 1, at (1).

79. 42 U.S.C. §§ 6901-6984 (1976). This represents a comprehensive rewriting of the Solid Waste Disposal Act of 1965, Pub. L. No. 89-272, 79 Stat. 997.

80. The multifaceted approach of the RCRA is demonstrated in its stated goal: "[t]o provide technical and financial assistance for the development of management plans and facilities for the recovery of energy and other resources from discarded materials and for the safe disposal of discarded materials, and to regulate the management of hazardous waste." S. 1250, 96th Cong., 2d Sess., (1976) which was enacted as the RCRA, Pub. L. 94-580 on Oct. 21, 1976. *See also* T. SULLIVAN, OVERVIEW OF THE RCRA, RESOURCE CONSERVATION AND RECOVERY ACT: A COMPLIANCE ANALYSIS 2 (1978) (Proceedings of Hazardous Wastes RCRA Seminar).

81. The RCRA commenced with the passage of the first federal legislation on solid waste, the Solid Waste Disposal Act of 1965, Pub. L. No. 89-272, 79 Stat. 997 (1965). The Resource Recovery Act of 1970, Pub. L. No. 91-512, 84 Stat. 1227 (1970), amended the Solid Waste Disposal Act. The 1970 Act specified a series of studies which were to be the groundwork for future legislation. Section 212, 84 Stat. 1233 (1970) provided for a "comprehensive report and plan for the creation of a system of national disposal sites for the storage and disposal of hazardous wastes, including radioactive, toxic chemical, biological, and other wastes which may endanger public health or welfare." Eventually, this comprehensive plan evolved to become the RCRA of 1976.

It was not until the tragedy of Love Canal that the need for hazardous waste regulations received recognition by the general public. *See* REPORT ON HAZARDOUS WASTE, *supra* note 1, at (1). *See also* Worobec, *supra* note 68, at 633-35.

82. "[T]he Administration shall, ... develop and promulgate criteria for identifying the characteristics of hazardous waste, and for listing hazardous waste, . . . taking into account toxicity, persistence, and degradability in nature, potential for accumulation in tissues, and other related factors such as flammability, corrosiveness, and other hazardous characteristics." RCRA, 42 U.S.C. § 6921 (1976).

83. The statute provides:

> ... [T]he Administrator shall promulgate regulations establishing such standards, applicable to generators of hazardous waste identified or listed under this subchapter, as may be necessary to protect human health and the environment. Such standards shall establish requirements respecting —
> (1) recordkeeping practices that accurately identify the quantities of such hazardous waste generated, the constituents thereof which are significant in quantity or in potential harm to human health or the environment, and the disposition of such wastes;
> (2) labeling practices for any containers used for the storage, transport, or disposal of such hazardous waste ...;
> (3) use of appropriate containers for such hazardous waste;
> (4) furnishing of information on the general chemical composition of such hazardous waste to persons transporting, treating, storing, or disposing of such wastes;
> (5) use of a manifest system to assure that all such hazardous waste generated is designated for treatment, storage, or disposal in treatment, storage, or disposal facilities

traced from cradle to grave, that is, from generation to final disposal. It provides a qualified prohibition of open dumping of solid or hazardous wastes[84] and a comprehensive waste management scheme.[85] Provision is made for states to create their own management scheme, provided it complies with statutory requirements.[86]

Congress in passing the RCRA mandated that the EPA promulgate regulations regarding the identification and listing of hazardous wastes and the registering of generators, transporters and disposal facilities.[87] The EPA was to develop these regulations within eighteen months of the enactment of the RCRA.[88] It was three years before the Agency finally promulgated the necessary regulations beginning in the spring of 1980.

In response to the growing public concern triggered by the Love Canal problem,[89] the Senate Subcommittee on Oversight of Government Management held hearings on hazardous waste management and the implementation of the RCRA.[90] The report from these hearings was

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(other than facilities on the premises where the waste is generated) for which a permit has been issued as provided in this subchapter; and

(6) submission of reports to the Administrator or the State agency in any case in which such agency carries out an authorized permit program pursuant to this subchapter at such times as the Administrator (or the State agency is appropriate) deems necessary, setting out —

(A) the quantities of hazardous waste identified or listed under this subchapter that he has generated during a particular time period; and

(B) the disposition of all hazardous waste reported under subparagraph (A).

RCRA, 42 U.S.C. § 6922 (1976).

84. "Any solid waste management practice or disposal of solid waste or hazardous waste which constitutes the open dumping of solid waste or hazardous waste is prohibited." RCRA, 42 U.S.C. § 6945(c) (1976).

85. *See* RCRA, 42 U.S.C. §§ 6921-6931 (1976).

86. The statute provides:

Any State which seeks to administer and enforce a hazardous waste program pursuant to this subtitle may develop and, after notice and opportunity for public hearing, submit to the Administrator an application ... for authorization of such program. . . . Such state is authorized to carry out such program in lieu of the Federal program under this subtitle in such State and to issue and enforce permits for the storage, treatment, or disposal of hazardous waste unless, within ninety days following submission of the application the Administrator notifies such State that such program may not be authorized and, within ninety days following such notice and after such opportunity for public hearing, he finds that (1) such State program is not equivalent to the Federal program under this subtitle, (2) such program is not consistent with the Federal or State programs applicable in other States, or (3) such program does not provide adequate enforcement of compliance with the requirements of this subchapter.

RCRA, 42 U.S.C. § 6926(b) (1976).

87. *See* note 82 *supra.*

88. "Not later than eighteen months after the date of the enactment of this Act, the Administrator shall,... develop and promulgate criteria for identifying the characteristics of hazardous waste. . . ." RCRA, 42 U.S.C. § 6921 (a) (1976).

89. For a discussion of Love Canal, see notes 6-10 and accompanying text, and notes 39 & 77 *supra.*

90. *See* REPORT ON HAZARDOUS WASTE, *supra* note 1.

very critical of the EPA's delay in formulating regulations.[91] In his opening remarks at the hearing, Senator William S. Cohen commented on the EPA's delay in promulgating the regulations:

> Now the cost of the delay in dollars and harm to the public is immense. Without regulations, no private firm is going to build a toxic waste facility and thus risk losing huge investments if the facility does not comply with the yet-to-be issued criteria. And many states, including my own state of Maine, cannot afford to enact their own waste treatment laws. So long as other states remain free to subsidize the pollution created by local industry, honest businesses are forced to choose between disposing of their wastes in an unsafe manner or paying exorbitant and possibly bankrupting fees to have their wastes transported to safe facilities.[92]

In response to criticism, the EPA explained the delay as being the result of intensive work required by the complexity of the environmental problems, lack of monetary resources, and the necessity of analyzing 1,200 comments received by the EPA in response to its published proposals.[93] The EPA's delay in issuing the hazardous waste regulations had widespread ramifications. The delay allowed unsafe disposal practices to continue and discouraged industry from investing monies to change these unsafe operations.[94]

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91. The report concluded:

The Subcommittee finds EPA's justifications for the delay as lacking in merit.

. . . .

1. EPA has failed to make full use of its authority to identify and mitigate the hazards posed by the improper disposal of hazardous waste. Enforcement actions taken by the Agency to remedy inadequate disposal problems have been insufficient to date.
2. The Subcommitee finds that the costs to remedy past unsound hazardous waste disposal practices are extremely high, and that a mechanism for the financing of most identification, enforcement, and remedial efforts does not exist at the state or federal level.
3. The EPA and state environmental protection agencies have failed to scrutinize the disposal activities of industry to prevent the tremendous levels of environmental disrupting that have and will prevail without added controls.
4. Requiring disposal facilities to obtain a National Pollution Discharge Elimination System (NPDES) permit may have the effect of reducing effluents removed from discharges in an unsound manner on the land.
5. EPA has not yet adequately assessed the extent of the hazardous waste problem by compiling a comprehensive inventory of facilities and sites.

REPORT ON HAZARDOUS WASTE, *supra* note 1, at 5-6.

92. Subcommittee Hearing Transcript, July 19, 1979, at 9-10 as *quoted in* REPORT ON HAZARDOUS WASTE, *supra* note 1, at 17.

93. *See* REPORT ON HAZARDOUS WASTE, supra note 1, at 17-20 for a detailed explanation of the delay.

94. The report found:

1. The Subcommittee finds EPA's justifications for the delay without merit.
2. Recognizing the virtual certainty of judicial challenge to its final regulations, the EPA should not be spending such an inordinate amount of time trying to second-guess the courts.
3. In developing regulations under Subtitle C the Subcommittee finds that EPA in-

The RCRA of 1976 has proven to be inadequate in meeting the regulatory and enforcement needs created by the hazardous waste problem.[95] The law empowers neither the EPA nor the Justice Department to subpoena documents or persons suspected of illegal dumping, nor does it authorize emergency clean-up measures.[96] Finally, by excluding from regulations those companies which generate less than 1000 kilograms of hazardous waste per month[97] and by employing a limited

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creased the delay in promulgation by its revision and reduction of the scope of the draft regulations. The effects of the delay were:
To further retard implementation of the Act at the state and federal level;
To allow unsafe disposal practices to continue and to further endanger public health and the environment;
To inhibit waste disposal companies from investing in new equipment for fear of the facilities' inability to meet EPA standards;
To increase public uncertainty resulting in an increase in the opposition to siting of new hazardous waste facilities;
To force the Department of Justice to resort to common law and various statutory authorities, such as the "imminent hazard" provision of RCRA, for enforcement action;
To reduce the effectiveness of EPA's internal regulatory development process by reducing morale and confidence amongst employees at the program level.

REPORT ON HAZARDOUS WASTE, *supra* note 1, at 24-25.

95. At the hearings held by the Subcommittee on Oversight of Government Management on July 19 and August 1, 1979, William Sanjour, Chief, Hazardous Waste Implementation Branch of State Programs and Resource Recovery Division of the EPA, cited examples of that which would not be covered by the RCRA regulations:

Waste residues from the manufacture of C-56, which was identified in hazardous waste disposal problems at Love Canal and "Bloody Run" in Niagara Falls; the "Valley of the Drums" in Kentucky; Montague, Michigan; . . .
Also, waste residue from the manufacture of kepone, which destroyed the fishing in the James River.
Also, waste residue from the manufacture of Mirex, which destroyed fishing in Lake Ontario.
Also, waste residue from the manufacture of Heptachlor, which is a carcinogen.
Also, waste residue from the manufacture of DBCP, which causes sterility.
Whereas previously these wastes may have been disposed of inadequately and secretly, they can soon — thanks to a clean bill of health from the EPA — be disposed of inadequately and openly. This means that such a waste may legally be used, for example, as a fertilizer where it can enter the human food chain;
can be used as landfill where it can leach into underground drinking water supplies;
can be stockpiled where it can run off into surface water and leach into groundwater; and finally, if the waste is volatile — as in Love Canal — it will be allowed to poison the air without constraints.

Subcommittee Hearing Transcript, Aug. 1, 1979 at 194-196, as *quoted in* REPORT ON HAZARDOUS WASTE, *supra* note 1, at 11-12.

96. *See* RCRA, 42 U.S.C. § 6973 (1976), which merely empowers the EPA to sue for injunction to halt an activity deemed an imminent and substantial hazard.

97. EPA regulation, 45 Fed. Reg. 33104-120, 40 C.F.R. pt. 261 (1980) provides for the exemption of generators of less than 1,000 kilograms of hazardous waste because of the burden of record keeping and paper work on such small enterprises. A White House panel, the Regulatory Analysis Review Group was critical of this exemption in that the exemption is based on volume rather than the degree of hazard. *See* Worobec, *supra* note 68, at 638.

characterization of toxic chemicals,[98] much hazardous waste production may go unregulated.[99]

B. *Superfund Legislation*

Members of the United States House and Senate have attempted to draft laws which address the inadequacies of the RCRA.[100] In a "landmark" legislative move,[102] the Senate Environment and Public Works Subcommittee drafted a bill[101] which dealt not only with hazardous waste releases but also with the release of any toxic substance or contaminant not already covered under the RCRA.[103] This bill, commonly known as the Senate Superfund Bill, established a fund of 4.1 billion dollars,[104] collected primarily from industry. The bill as proposed would have compensated some hazardous waste victims for medical costs and property damage.[105] This bill was unique in that it proposed to

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98. EPA regulations, 45 Fed. Reg. 33107-12, 40 C.F.R. pt. 261 (1980), provides a listing of characteristics by which industry can determine whether their waste is considered hazardous under the RCRA and therefore subject to its regulations. The four characteristics are: ignitability, *i.e.*, that which poses a fire hazard during routine management; corrosivity, *i.e.*, that which possesses the ability to corrode standard containers and/or to dissolve components of other wastes; reactivity, *i.e.*, that which has a tendency to explode under routine management; toxicity *i.e.*, that which has the presence of a specified degree of toxicity. See note 95 *supra* for a discussion on the results of such a limited list of characterizations of hazardous waste.

99. See note 95 *supra* for a discussion of those hazardous wastes which are not covered under the federal regulations.

100. For a discussion of the inadequacies of the RCRA, see notes 89-99 *supra*.

101. [1980] CONG. Q. (CCH) 800.

102. S. 1480, 96th Cong., 2d Sess. (1979).

103. Besides those hazardous substances included in existing legislation, S. 1480 proposed to include:

> [A]ny substance or mixture ... any element, substance, compound, or mixture, including disease-causing agents, which after release into the environment and upon exposure, ingestion, inhalation, or assimilation into any organism either directly from the environment or indirectly by ingestion through food chains, will or may reasonably be anticipated to cause death, disease, behavioral abnormalities, cancer, genetic mutation, physiological malfunctions (including malfunctions in reproduction) or physical deformations, in such offspring.

Id., § 2(b)(13).

104. *Id.*, § 5(b)(c). The $4.1 billion fund is twice as much as that proposed in the comparable House bill, H.R. 7020, 96th Cong., 2d Sess. (1979) and almost four times the amount provided for in the statute finally enacted (Comprehensive Environmental Responses, Compensation, and Liability Act of 1980, Pub. L. No. 96-510, discussed in notes 113-17 *infra*).

105. The bill states:

> All damages for economic loss or loss due to personal injury or loss of natural resources resulting from such a discharge, release, or disposal, including —
>
> (A) any injury to, destruction of, or loss of any real or personal property, including relocation costs;
>
> (B) any loss of use of real or personal property;
>
> (C) any injury to, destruction of, or loss of natural resources, including the reasonable costs of assessing such injury, destruction, or loss;
>
> (D) any loss of use of any natural resources, without regard to the ownership or management of such resources;
>
> (E) any loss of income or profits or impairment of earning capacity resulting from

clean up all types of chemical contamination, not just dumps or spills.[106] Because of the victim's compensation clause[107] and the amount of the "superfund," industry maintained that this form of legislation was "totally unacceptable."[108] Conversely, environmentalists were in support of this bill for these very reasons.[109]

The House version of the Superfund Bill[110] was passed on September 23, 1980.[111] The House bill failed to deal with key issues of victim compensation and toxic waste pollution found in areas other than dump sites. Additional Senate and House bills proposed non-comprehensive plans for attacking the hazardous waste problem.[112]

On December 3, 1980, Congress passed a watered down version of the Senate Superfund Bill.[113] Facing the end of the 96th session, pro-superfund members of Congress were forced to agree to a major compromise which resulted in the elimination of victim compensation for medical expenses.[114] This compromise also resulted in the elimination of the provision allowing an individual victim to sue industry in federal

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personal injury or from injury to or destruction of real or personal property or natural resources, without regard to the ownership of such property or resources;

(F) all out-of-pocket medical expenses, including rehabilitation costs or burial expenses, due to personal injury.

S. 1480, 96th Cong., 2d Sess. (1979), at § 4(a)(2) (A-F) (1979).

106. "[T]he term 'release' means —

(A) any spilling, leaking, pumping, pouring, emitting, emptying, discharging, *injecting,* escaping, leaching, or dumping *into the environment,* or

(B) any other release into the environment which presents or may present a substantial danger to the public health *or welfare* or the *environment." Id.* at § 2(b)(16) (A-B) (emphasis added).

107. *See* note 119 *infra.*

108. [1980] CONG. Q. (CCH) 2820.

109. *Id.*

110. *See* H.R. 7020, 96th Cong., 2d Sess. (1979).

111. Because the Chemical Manufacturers' Association (CMA) at the last minute switched positions and supported the House version of the superfund, the bill passed the House. EPA maintains that CMA's choice to support such legislation was a choice for the lesser of two evils. CMA could never agree to the Senate version of the superfund because it included a victims' compensation clause. *See* [1980] CONG. Q. (CCH) 2819.

112. S. 1156, 96th Cong., 1st sess. (1979), amends the Solid Waste Disposal Act. S. 1325, 96th Cong., 1st Sess. (1979), provides for post-closure liability and compensation for claims arising from discharges from hazardous waste management facilities. H.R. 5291, 96th Cong., 1st Sess. (1979) amends the RCRA of 1976 by establishing a program to identify and reclaim abandoned waste sites and establishes a fund for the reclamation of these sites and the compensation for injuries or property damage. H.R. 85, 96th Cong., 2d Sess. (1979), provides a system of liability and compensation for oil spill damage and removal costs.

113. On November 24, 1980, the Senate version of the superfund (S. 1480) was indefinitely postponed in lieu of the House bill (H.R. 7020). Comprehensive Environmental Responses, Compensation and Liability Act of 1980, Pub. L. No. 96-510 (1980). "The ... more ambitious $4.1 billion measure was cut back by about 75 percent on the floor to appease Republican opponents who had threatened to filibuster it." [1980] CONG. Q. (CCH) 3435. For legislative history, see H. REP. NO. 96-1016, 96th Cong. 2d Sess., *reprinted in,* [1981] U.S. CODE CONG. & AD. NEWS 10249.

114. "As passed, only state or local governments could be compensated, and only for damages to trees and other natural resources, such as lakes or parks." [1980] CONG. Q. (CCH) 3435.

court.[115] Although weakened in scope, a superfund of 1.6 billion dollars has been established with 1.38 billion coming from fees charged to the chemical and oil industries, and 220 million dollars coming from general tax revenues.[116] This superfund will pay for

> losses resulting from hazardous chemical releases; 90 percent of the operation and maintenance costs of any remedial action at the release site (states would pay the other 10 percent); loss of natural resources and costs of restoring lost resources up to $50 million; and costs of health studies and diagnostic examinations for victims' health problems, but not other medical expenses.[117]

Although the individual has no statutory remedy for personal injuries under this Act, the financial responsibility for hazardous waste management is placed upon industry.[118]

C. The Problems Inherent in Drafting Effective Legislation

Under the RCRA any person may initiate enforcement action against: (a) (1) "any person ... [or] any governmental instrumentality ... who is alleged to be in violation of any permit, standard, regulation, condition, requirement, or order which has become effective pursuant to this Act"[119] and (b) against the administrator of the EPA for failure to perform a non-discretionary duty.[120] The EPA itself may sue to restrain activity which is deemed an "imminent and substantial endangerment to health or the environment."[121] The penalties for such violations include

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115. Sen. George J. Mitchell (D-Maine) stated regarding the compromise, "This Senate has made the judgment that property is more significant than human beings. We are telling the people of this country that under our value system property is worth compensating, but a human life is not." *Id.*

116. The superfund bill authorizes the president to order whatever emergency clean up is deemed necessary. It exempts from regulations releases of toxic substances in the workplace, releases of nuclear materials or by-products, and normal field applications of fertilizers and enzyme exhausts. *Id.* at 3437.

117. *Id.*

118. Citizens remain uncompensated for health problems resulting from the impact of chemicals on the human body. For a discussion of the impact of hazardous waste on health, see notes 37-47 and accompanying text *supra*.

119. *See* RCRA, 42 U.S.C. § 6972(a)(1)(b) (1976).

120. *Id.* § 6972(a)(2).

121. *Id.* § 6972. For examples of suits under the RCRA to abate activities deemed a substantial endangerment to health and environment, see United States v. Vertoc Chemical Corp., 14 E.R.C. 1587 (D. Ark. 1980) (EPA sued Vertoc Chemical for an injunction to abate the discharge from their facility of dioxin, an acutely toxic substance, and the court held for the EPA, determining that the discharge of dioxin is a substantial endangerment); United States v. Solvents Recovery Serv., 496 F. Supp. 1127 (D. Conn. 1980) (EPA sued Solvents Recovery Service for an injunction to abate and remedy continuing groundwater pollution in Southington, Connecticut, and the court held that the enforcement of the federal common law of nuisance may be retroactive despite the fact that some of the acts causing the hazardous condition antedated the RCRA).

a fine of $25,000 to $50,000 a day, suspension or revocation of permits, and/or imprisonment.[122]

Recognizing the failure of the RCRA to authorize private suits for personal injuries resulting from past or present disposal of hazardous wastes, the legislators attempted but failed to include this issue in the recent 1.6 billion dollar superfund Act.[123] The earlier version of the superfund bill[124] provided that the person, owner, operator of vessel, or owner of facility, responsible for a "[h]azardous substance ... pollutant or contaminant ... [release] shall be jointly and severally liable"[125] for all damages, economic loss, or loss due to personal injury. Personal injury was defined as being "all out-of-pocket medical expenses, including rehabilitation costs or burial expenses, due to personal injury. . . . "[126]

Whether or not it was feasible for the bill to have been passed with a strict liability provision was an issue of debate.[127] On April 15, 1980, Assistant United States Attorney General, James W. Moorman stated to a Senate subcommittee that joint, several and strict liability provisions were needed in the superfund legislation. He believed that "public considerations establish a compelling basis for imposing such liability; and that the superfund would not have enough money with which to operate unless hazardous waste generators were held strictly liable."[128] However, the joint, several and strict liability clause of the legislation was eliminated before passage. Although having failed, the attempt to include a strict liability and victim's compensation clause in a Superfund Bill, demonstrated awareness on the part of the legislators[129] of the necessity to protect the individual's right to compensation for personal injuries and that a victim's compensation clause would be an incentive for industry to be more careful in the disposal of waste.[130]

III. COMMON LAW THEORIES OF RECOVERY

Since there is no provision in existing legislation for recovery for personal injuries from hazardous waste,[131] the citizen must resort to the

122. *See* notes 20-21 *supra*.

123. For a discussion of the Superfund Act, see notes 113-17 and accompanying text *supra*.

124. *See* notes 100-12 and accompanying text *supra*.

125. S. 1480 § 4(a).

126. S. 1480 § 4(2)(f).

127. For a discussion of the debate on the strict liability provision, see notes 128-30 and accompanying text *infra*.

128. 10 ENVIR. REP. (BNA) 2263 (1980).

129. Senator J. Culver of Iowa (D), former Senator E. Muskie of Maine (D), and Rep. J. Florio of New Jersey (D) introduced the Superfund Bills in their respective houses of congress.

130. "[E]nvironmentalists and senators argue that holding companies liable for victim compensation is a powerful incentive for proper waste handling." [1980] CONG. Q. (CCH) 803. For a discussion of the deterrent effect of a strict liability clause, see notes 183-85 and accompanying text *infra*.

131. For a discussion of recent legislation, see notes 113-17 and accompanying text, *supra*

common law. Negligence as a theory of recovery based on the notion of fault has been used by the individual in actions involving hazardous substances with some degree of success.[132] This Note examines two other possible theories of recovery for personal injuries from hazardous waste: nuisance and strict liability for an abnormally dangerous activity.

A. Nuisance

In discussing the common law theory of nuisance and its applicability to civil actions for personal injury due to hazardous wastes, private nuisance must be distinguished from public nuisance. Private nuisance is the substantial and unreasonable intrusion upon the use and enjoyment of one's property.[133] Since private nuisance addresses an individual's property rights,[134] it is not applicable to this discussion of personal injury suits.

Public nuisance is defined as an unreasonable interference with a common right of the public.[135] Authorities maintain that "[i]n order to recover damages in an individual action for a public nuisance, one must have suffered harm of a kind different from that suffered by other members of the public exercising the right common to the general public that was the subject of the interference."[136] In a hazardous waste case, each individual can be affected quite differently.[137] In the Love Canal

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132. *See, e.g.,* Daniels v. Atlantic Refining Co., 295 F. Supp. 125 (D. Del. 1968) (farm laborer sued for damages for injuries when herbicide caught on fire and the court held that plaintiff failed to prove by a preponderance of evidence that the accident was proximately caused by the negligence of defendant manufacturer). *See also* Spada v. Stauffer Chemical Co., 195 F. Supp. 819 (D. Or. 1968) (plaintiff sued for damages when his crop was damaged by defendant's herbicide and the court held that plaintiff failed to demonstrate that defendant manufacturer was in any way negligent).

133. *See* RESTATEMENT (SECOND) OF TORTS § 821B (1977).

134. *See, e.g.,* Louisville & Nashville Terminal Co. v. Lellyett, 114 Tenn. 368, 85 S.W. 881 (1905) (plaintiff commenced private nuisance action against defendant to abate the invasion of his property rights from smoke, dust, and noise from the defendant's terminal yard); Bartel v. Ridgefield Lumber Co., 131 Wash. 183, 229 P. 306 (1924) (plaintiff commenced private nuisance action against the defendant for damages to plaintiff's neighboring farm).

135. *See* RESTATEMENT (SECOND) OF TORTS § 821B (1977). *See, e.g.,* Soap Corp. v. Reynolds, 178 F.2d 503 (5th Cir. 1949) (public nuisance action to remedy odors from soap factory affecting local residents); Briggs v. Griffeth, 231 S.W.2d 875 (Mo. Ct. App. 1950) (public nuisance suit to remedy noise from defendant's public address system affecting local residents). *See also* Mount Pleasant v. Van Tassell, 7 Misc.2d 643, 166 N.Y.S.2d 458 (1957), *aff'd,* 6 A.D.2d 880, 177 N.Y.S.2d 1010 (public nuisance action to remedy odors, rats, and flies from defendant's piggery).

136. *See* RESTATEMENT (SECOND) OF TORTS § 821C (1977); *see also* Oppen v. Aetna Ins. Co., 485 F.2d 252 (9th Cir. 1973) (private pleasure boat owners commenced public nuisance action for damages for loss of navigation rights resulting from an oil spill, and the court held for the defendants invoking "special injury" requirement); Columbia River Fishermen's Protective Union v. St. Helens, 160 Or. 654, 87 P.2d 195 (1939) (finding a different kind of injury, court held for commercial fishermen who filed public nuisance suit seeking damages for water pollution).

137. The unique effects of toxic waste on each individual is due to differences of age and health. For a discussion of hazardous waste and its impact on health, see notes 37-47 and accompanying text *supra.*

case[138] the court held that personal injuries due to poisoning from hazardous chemicals cannot be brought as a class action.[139] The fact that each toxicity injury is unique led the court to hold that 900 separate claims should be filed.[140] This decision interprets the injuries of each individual as being different from those suffered by other members of the community.[141] Despite this precedent, traditionally public nuisance has been a criminal offense brought to court by a public prosecutor.[142] Thus, a private citizen claiming an injury different from that suffered by the community, could only invoke the public nuisance doctrine by filing a complaint asking "a governmental authority ... to abate the pollution as a public nuisance."[143]

B. Strict Liability for an Abnormally Dangerous Activity

The common law theory of recovery for strict liability had its beginnings in England during the last century.[144] The rudiments of the theory are most clearly expressed in an early formulation:

> The person who for his own purpose brings on his land and collects and keeps there anything likely to do mischief if it escapes, must keep it at his peril, and if he does not do so, is prima facie answerable for all the damage which is the natural consequence of its escape.[145]

Cases in the United States have followed the English pattern emphasizing the risks created and the location of the activity.[146]

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138. Mervak v. City of Niagara Falls, 101 Misc.2d 68, 420 N.Y.S.2d 875 (1979).

139. The Federal Rules of Civil Procedure as amended in 1966 establishes four prerequisites for a class action: (1) size: the class must be so large that the joinder of all members is not possible; (2) common questions: questions of law or questions of fact must be common to the class; (3) typical claims: the representatives of the class must be "typical" of the class; (4) representation: the representatives must fairly and adequately represent the class. *See* FED. R. CIV. P. 23. Besides convenience, class actions may advance social policies. That is class actions serve "as instruments for the enforcement of important national legislative policy and for the vindication of the rights of, and recompense for the wrongs done to, large segments of the population." Meyer, *The Social Utility of Class Actions,* 42 BROOKLYN L. REV. 189, 192 (1976).

140. *See* Mervak v. City of Niagara Falls, 101 Misc.2d 68, 420 N.Y.S.2d 687 (1979).

141. The precedent in foreclosing the Love Canal case to a class action affirms the principle that each personal injury from hazardous waste poisoning is unique. The extenuating variables such as age, sex, and general health, affect the poisonous results of the toxic substances to which all plaintiffs may be exposed. For a discussion of toxicity and human health, see notes 37-47 and accompanying text *supra.*

142. The Model Penal Code now specifies only a few offenses for public nuisance: MODEL PENAL CODE § 250.2 (disorderly conduct); § 250.5 (public drunkenness); § 250.7 (obstructing public passages); and § 250.8 (disrupting public gatherings).

143. Katz, *The Function of Tort Liability in Technology Assessment,* 38 U. CIN. L. REV. 587, 622 (1969).

144. *See* Rylands v. Fletcher, 159 Eng. Rep. 737 (1865), *rev'd,* L.R. 1 Ex. 265 (1866), *aff'd,* L.R. 3 H.L. 330 (1868) Plaintiffs sued for damages to property resulting from water bursting out of a reservoir constructed by the defendants. The water flowed into abandoned mines and caused damage to plaintiff's property. The court held defendant strictly liable for the damage.

145. Rylands v. Fletcher, L.R. 3 H.L. at 334.

146. *See, e.g.,* McLane v. Northwest Natural Gas Co., 255 Or. 324, 467 P.2d 635 (1970) (the

The theory of strict liability contains criteria to determine whether an activity is abnormally dangerous.[147] Authorities find that: "In general, strict liability has been confined to consequences which lie within the extraordinary risk whose existence calls for such special responsibility."[148] Strict liability has been found in situations analagous to the hazardous waste cases.[149]

Hazardous waste management should be deemed an abnormally dangerous activity by the courts. The countless instances of hazardous waste pollution[150] create a risk "so unusual ... because of its magnitude [and] because of the circumstances surrounding it as to justify the imposition of strict liability for the harm that results from it, even though it be carried on with all reasonable care."[151] Hazardous waste management meets the criteria for an abnormally dangerous activity: a high degree of risk to persons and property[152] which cannot be

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court held surface storage of pressurized petroleum liquid gas to be an abnormally dangerous activity); Turner v. Big Lake Oil Co., 128 Tex. 155, 96 S.W.2d 221 (1936) (the court held that the escape of salt water from ponds which were constructed and used by defendant in the operation of oil wells was not a result of an abnormally dangerous activity because oil is a vital business in Texas and the salt water pond construction is necessary for that industry).

147. The drafters of the Restatement commented:

> In determining whether an activity is abnormally dangerous, the following factors are to be considered:
> (a) existence of a high degree of risk of some harm to the person, land or chattels of others;
> (b) likelihood that the harm that results from it will be great;
> (c) inability to eliminate the risk by the exercise of reasonable care;
> (d) extent to which the activity is not a matter of common usage;
> (e) inappropriateness of the activity to the place where it is carried on; and
> (f) extent to which its value to the community is outweighed by its dangerous attributes.

RESTATEMENT (SECOND) OF TORTS § 520 (1977).

148. W. PROSSER, HANDBOOK OF THE LAW OF TORTS 518 (1971). *See also* McLane v. Northwest Natural Gas Co., 255 Or. 324, 467 P.2d 635 (1970); Fritz v. E.I. Dupont de Nemours & Co., 6 Del. 427, 75 A.2d 256 (1950). The court held that Dupont was not strictly liable for injuries caused by chlorine fumes which escaped from the chemical plant. The court determined that the presence of chlorine gas was not an abnormally dangerous activity when examining the location of the industry. *Id.* at 261.

149. Analogously, the RESTATEMENT (SECOND) OF TORTS § 520A (1977) accepts the operation of the SST (supersonic transport) as an abnormally dangerous activity. Ground injuries to persons or property caused by its sonic boom result in strict liability actions. *Id.* Surely, the disposal of hazardous wastes is far more dangerous to life and property than a sonic boom.

Legislation has resolved strict liability in other analogous areas. The Price Anderson Act imposes strict liability within limits for a nuclear catastrophe. *See* 42 U.S.C. § 2210 (1957). Some states have imposed strict liability for damage from oil spills. *See* Florida Oil Spill Prevention and Pollution Control Act, FLA. STAT. ANN. §§ 376.011-21 (West 1975). *See also* Lansco v. Department of Environmental Protection, 138 N.J. Super. 275, 350 A.2d 520 (1975) (court held the defendant liable for clean-up costs resulting from an oil spill). Strict liability is imposed for damages from pesticides in certain situations. *See* Environmental Pesticide Control Act, 7 U.S.C. §§ 135(b), 135(n) & 135(t) (1947).

150. For examples of hazardous waste pollution, see notes 3, 5, 6-10, 37 and accompanying text *supra*.

151. RESTATEMENT (SECOND) OF TORTS § 520 comment f (1977).

152. For examples of substantial damage to persons and property caused by hazardous waste, see notes 5, 37 *supra* and note 172 *infra*.

totally eliminated by reasonable care;[153] an activity practiced by a great many people of the community; and more often than not located in residential and business areas.[154]

Today the damages to persons and property being discovered usually are a result of disposal methods used from ten to thirty years ago which were not subject to regulations or standards.[155] With the increased knowledge of the effects of hazardous waste on human beings and the environment, new regulations and standards of care have been developed by federal and state governments.[156] However, Love Canal and other chemical waste dumps were not subject to recent regulations and yet their toxic legacies continue to damage health and the environment.[157]

Faced with the possibility of industry being held strictly liable for actions regarding hazardous waste, three issues need to be addressed: whether the industry should have known the chemicals were substantially dangerous to human health;[158] when the statute of limitations should commence to run in hazardous waste cases;[159] and whether social policy demands that industry be held strictly liable.[160] Courts have determined that industry knew or should have known of substantial dangers in the use of potentially harmful products. For example, in what is popularly known as the DES case,[161] the California Appeals Court held the drug manufacturer liable for injuries caused by that drug even though the manufacturer had followed the criteria for testing and marketing established by the government through the Food and Drug Administration (FDA).[162]

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153. Hazardous waste is defined as that "which because of its quantity, concentration, or physical, chemical, or infectious characteristics may cause, or significantly contribute to an increase in mortality or an increase in serious . . . illness or pose a substantial present or potential hazard to human health, safety, or welfare or to the environment. . . ." MASS. GEN. LAWS ANN. ch. 21, § 26A (West 1979). The very nature of hazardous waste coupled with the probability of human error in the handling of such dangerous and volatile substances creates a risk which cannot be totally eliminated by reasonable care.

154. Examples of present locations of hazardous waste sites are: Montague, Michigan — on site disposal of chemical wastes, situated close to a recreation lake; Niagara Falls, New York — on site chemical dump eventually became residential and school zones. *See* REPORT ON HAZARDOUS WASTE, *supra* note 1, at 31, 32.

155. "To date, government regulations of hazardous waste, from generators to disposers, has been virtually non-existent." REPORT ON HAZARDOUS WASTE, *supra* note 1, at (1).

156. For a discussion of hazardous waste regulations, see notes 80-99 and accompanying text *supra.*

157. For a discussion of *Love Canal,* see notes 6-10 and accompanying text *supra.*

158. *See* notes 166-72 and accompanying text *infra.*

159. *See* notes 174-84 and accompanying text *infra.*

160. *See* notes 184-89 and accompanying text *infra.*

161. Sindell v. Abbott Laboratories, 26 Cal.3d 588, 607 P.2d 924, 163 Cal. Rptr. 132 (1980) (in a products liability suit by the daughters of women who ingested DES as a miscarriage preventative, the court held the drug companies proportionately liable for injuries sustained as a result of the drug).

162. Liability in this case was based on a "market share liability" theory because the actual

In *Dalehite v. United States*[163] Justice Jackson, dissented, maintaining that in a strict liability suit where industry failed to adequately warn the public, "the public [must not] be expected to possess the faculties or the technological knowledge to learn for itself of inherent dangers. The claim that a hazard was not foreseen is not available to one who did not use foresight appropriate to his enterprise."[164] Thus, with its vast technological knowledge and facilities, the large industries would be hard-pressed to demonstrate that they did not have the appropriate foresight to know of the latent dangers to health and environment of the chemicals buried under or dumped into the earth's surface.[165] Thus, courts do have a basis for determining that industry should have known the dangers of toxic substances to human health and to the environment.[166]

Time becomes an important factor in applying the theory of strict liability to the hazardous waste situation. If industry is held strictly liable for the results of past activities, the issue must be raised as to how far back its liability will extend.[167] If wastes were dumped thirty or seventy-five years ago, should there be any distinction in liability? The courts will need to address this issue and set limits on retroactive liability.

In examining cases of long term exposure to hazardous chemicals the statute of limitations[168] may often prevent the private citizen from

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manufacturer was unable to be determined since there were many manufacturers of DES. *Id.* at 611-14, 607 P.2d at 936-38, 26 Cal. Rptr. at 144-46.

163. 346 U.S. 15 (1953). In a strict liability suit to recover damages for a death resulting from an explosion of ammonium nitrate fertilizer, the Court held that the district court did not have jurisdiction under the Tort Claims Act.

164. *Id.* at 52 (Jackson, J., dissenting).

165. In a paper delivered at the Tenth Annual Environmental Law Conference, Mr. Gus Speth, Chairman of the President's Council on Environmental Quality, in response to the recent revelations of hazardous waste dumps across the nation, asked:

> How, in these times of supposed wisdom and enlightenment, could officials of a major corporation believe that they could "solve" the problem of toxic chemical wastes simply by burying them in their own, or somebody else's, backyard? How could trained chemists and engineers suppose that the environment was some vast infinitely forgiving septic tank, capable of absorbing endless amounts of chemical wastes with no ill effect?

Speth, *supra* note 39, at 9. Speth theorizes that the attempt to control industry from the "outside" via governmental regulations has resulted in a vicious cycle. "The intensity of government regulation has tended to lead business to abandon its own sense of responsibility in favor of the philosophy that that which is not proscribed by law is permitted. This leads to questionable corporate activities and, in turn, provokes still greater regulation." *Id.* at 12. Thus, it was not due to a lack of knowledge or foresight, but rather due to a lack of social responsibility which resulted in industry's legacy of hazardous waste dumps and accidents.

166. For a discussion on disposal methods, see notes 56-69 and accompanying text *supra*.

167. In a recent federal case, United States v. Solvents Recovery Serv., 496 F. Supp. 1127 (D. Conn. 1980), the court, in applying the federal common law of nuisance via section 7003 of the RCRA, held that it is permissible to find an industry retroactively responsible for hazardous conditions created by acts performed before the enactment of RCRA.

168. Statutes of limitations prescribe a specific time in which to bring action after the cause of action has accrued. *See* F. JAMES & J. HAZARD, CIVIL PROCEDURE § 4.8 (1977).

having a day in court.[169] Serious health problems may not be detected for years after exposure has ceased.[170] A statute of limitations which accrues when the initial act of exposure occurs bars an otherwise valid claim because the cause of action took place years before the discovery of the injury. "A continuing tort whose assaults or insults upon the person of the victim do not germinate into detectable injury for a long period of time *should render meaningless* the traditional concept of a ... statute of limitations beginning with the date of first exposure to the malevolent product."[171]

In other situations courts have determined that the statute of limitations begins to run when the injury is discovered or should have been discovered.[172] The asbestos line of cases[173] resemble the hazardous waste cases in that they deal with personal injuries resulting from long term exposure to asbestos products. Cases in both areas raise the issue of statute of limitations. The general tendency of courts in these cases is to envision the exposure as a continuing tort whose statute of limitations accrues when the injury is discovered.[174]

Thus, courts could follow this precedent, and rule that personal in-

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169. For example, in Massachusetts in actions of tort, malpractice or personal injuries, the cause of action accrues when the injury takes place or when the person is first exposed to the hazardous waste rather than at the time of discovery. *See* MASS. GEN. LAWS ANN. ch. 260, § 2A(7)(4) (West Supp. 1981).

170. For a discussion of hazardous waste and serious health problems, see notes 37-46 and accompanying text *supra*.

171. Kelner, *Asbestos Litigation: An Update*, 182 N.Y.L.J. 51 (1979) (emphasis added).

172. *See, e.g.*, Sindell v. Abbott Laboratories, 26 Cal.3d 588, 607 P.2d 924, 163 Cal. Rptr. 132 (1980). Plaintiffs brought a class action suit against drug companies for injuries resulting from the administration of drug DES to plaintiffs' mothers during pregnancy. The court held that the statute of limitations period did not commence until the injured parties discovered or should have discovered within reason the injury due to exposure from the drug.

In cases involving similar injuries as a result of exposure to harmful substances, courts tend to hold that the statute of limitations does not begin to run until the effects of exposure manifest themselves. *See, e.g.*, United States v. Reid, 251 F.2d 691 (5th Cir. 1958). Plaintiff sued for injuries resulting from negligence of the defendant doctor who failed to advise plaintiff of probable tuberculosis. The court held that the claim did not accrue until the illness manifested itself. Associated Indem. Corp. v. Industrial Accident Comm'n, 124 Cal. App. 378, 12 P.2d 1075 (1932).

173. *See* Karjala v. Johns-Manville Prod., 523 F.2d 155 (8th Cir. 1975) (plaintiff, a construction worker, who contracted asbestosis sued defendant manufacturer of asbestos insulation) (the court determining that since "there is rarely a magic moment when one exposed to asbestos can be said to have contracted asbestosis; the exposure is more in the nature of a continuing tort. . .[,]" *id.* at 160, held that the statute of limitations in a personal injury begins to run when the harm manifests itself); Borel v. Fibreboard Paper Prods. Corp., 493 F.2d 1076 (5th Cir. 1973) (plaintiff, an insulation worker, sued defendant manufacturer of insulation materials for injuries resulting in pulmonary asbestosis) (the court concluded that the cause of action did not accrue until the disease or the effects of exposure manifest themselves).

174. The discovery rule deals with cases where foreign objects resulting from medical surgery are discovered in a patient's body. In such cases, some states determine that the cause of action accrues from the date of discovery of the foreign object. *See, e.g.*, Flanagan v. Mt. Eden Gen. Hosp., 24 N.Y.2d 427, 301 N.Y.S. 2d 23, 248 N.E.2d 871 (1969); Smalls v. New York City Health & Hosp. Corp., 55 A.D.2d 537, 389 N.Y.S.2d 372 (1st Dept. 1976).

juries from hazardous waste constitute continuing torts. As in the DES cases[175] and the asbestos cases,[176] the statute of limitations should accrue when the toxic effect is discovered or reasonably should have been discovered.[177] Thus, the private citizen can have the right to sue for personal injury as a result of hazardous wastes if the courts follow the course they have already established and determine that the statute of limitations accrues in hazardous waste personal injury cases when the injury is discovered or should reasonably have been discovered.

Applying the strict liability doctrine in hazardous waste cases may be the most reasonable solution to the problem presented. In tort law there is an increasing emphasis on social policy objectives: a shift from fault analysis to compensation analysis, a focus on the goals of preventing the occurrence of the injury, including a consideration of cost shifting and risk spreading.[178] When faced with the question of whether strict liability should be imposed on the hazardous waste producing industry as an abnormally dangerous activity, the question must be raised as to who is better able to allocate the costs, insure against the risks, and reduce or warn against the inherent dangers.[179] The theory of enterprise liability in torts establishes the premise that society's losses which are created or caused by an enterprise should be absorbed by that enterprise.[180] These losses will eventually be reflected in the costs at the market place and in the allocation of the community's resources.[181]

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175. For a discussion of the DES cases, see notes 161-62 and accompanying text *supra*.

176. For a discussion of the asbestos cases, see note 173 *supra*.

177. For a discussion of the length of time usually needed before determining the effects of toxicity on the human body, see notes 37-47 and accompanying text *supra*.

178. One commentator observed:

> In recent decades, the introduction into tort doctrine of an increasing emphasis on social welfare objectives has tended to shift the fulcrum of analysis from fault to compensation for the victim and a wide distribution of the financial burden. . . . Such a concern would be applicable primarily in actions against industrial enterprises for injuries caused by their operations. In such lawsuits whether based on strict products liability, or responsibility for an abnormally dangerous activity . . . it would portend a gradual evolution of the several tort doctrines toward a general doctrine of enterprise liability.

Katz, *supra* note 143, at 606-07. *See also* Calabresi, *Optimal Deterrence and Accidents*, 84 YALE L. J. 656 (1975).

179. *See* Calabresi, *Some Thoughts on Risk Distribution and the Law of Torts*, 70 YALE L. J. 499 (1961).

180. It has been observed:

> The underlying justification for this theory, . . . is a well known ethical premise of classical economics. This postulate is that, recognizing at any one point in time that the total resources available to a society are limited, the "best" way for the members of a community to decide collectively how they want those limited resources to be used and distributed in order to satisfy most efficiently the greatest possible number of the members' individual wants and desires is through an open, competitive market system. The various competing uses to which the community's limited resources might be allocated in order to satisfy the maximum possible individual wants and desires will accordingly be determined through operation of the laws of supply and demand.

Klemme, *The Enterprise Liability Theory of Torts*, 47 U. COLO. L. REV. 153, 158-59 (1976).

181. *Id.* at 159.

If held strictly liable, industry will initially absorb the cost of the personal injury suits while planning to distribute these costs to the public in the future.[182] The imposition of such liability will be an impetus for industry to insure against the risks of injury by taking greater precautions in the handling and disposal of hazardous waste and making certain that citizens are warned of any potential dangers to health and environment.[183] The deterrent effect will eventually benefit society by prompting industry to take greater precautions for the sake of economic gain. At the Environmental Law Conference in 1980, Gus Speth, the Chairman of the President's Council on Environmental Quality, emphasized his belief that industry's main concerns in production are cost control and profits, while a sense of responsibility to society is practically nonexistent.[184] A socially responsible industry is the ideal. An industry held strictly liable for injuries and damages in the interest of deterring irresponsible operations and disposal methods is a more realistic goal: one which will eventually accrue to the benefit of society.

CONCLUSION

The Resource Conservation and Recovery Act of 1976, was the first attempt by the federal government to establish a comprehensive hazardous waste management program.[185] With the promulgation of the RCRA regulations last year, federal and state government agencies have begun to take necessary steps to achieve hazardous waste control.[186]

The uncovering of waste dumps along the Love Canal in Niagara Falls and the discovery of hundreds of other similar waste sites has prompted Congress to recognize that hazardous waste is a grave national concern. Realizing that the RCRA of 1976 did not adequately address the nation's needs for hazardous waste clean-up,[187] the legislature recently passed the Comprehensive Environmental Response, Compen-

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182. Katz states:

> Shifts in certain doctrines of tort liability . . . could alter the terms of industrial cost-benefit calculations by converting certain "social costs" into enterprise costs or internalizing "external costs." There is of course nothing new about making certain accidents, or measures to prevent them, costs of doing business. It is in fact an old story, often retold through the course of industrial accident . . . and the judicial evolution of liability for abnormally dangerous activities. . . .

Katz, *supra* note 143, at 606.

183. *See* note 130 and accompanying text, *supra* for a discussion of a proposed strict liability clause in recent legislation to achieve similar ends, namely to induce industry to take greater precautions in hazardous waste management.

184. Speth, *supra* note 39, at 10.

185. "Years of inadequate handling and disposal of hazardous chemical wastes have pushed hazardous waste management to the forefront of environment protection concerns facing this nation over the last decade. To date, government regulation of hazardous waste, from generators to disposers, has been virtually non-existent." REPORT ON HAZARDOUS WASTE, *supra* note 1, at (1).

186. *See* notes 89-112 and accompanying text *supra.*

187. For a discussion of the inadequacies of the RCRA, see notes 107-12 and accompanying text *supra.*

sation, and Liability Act of 1980, popularly known as the Superfund Bill.[188] Among the weaknesses of the RCRA is the failure to provide a provision for personal injury suits.[189] This omission and similar omissions in recent legislation presently bars individuals from a statutory remedy for personal injuries resulting from hazardous waste exposure.

Congress addressed this issue by providing for personal injury suits in the Superfund Bill.[190] This victim compensation clause was subsequently eliminated before the enactment of the 1.6 billion dollar Comprehensive Environmental Response, Compensation, and Liability Act of 1980, on December 3, 1980.[191] Since in this recent legislation, no provision was made for victim compensation, the judiciary must address the rights of citizens by establishing the common law theory of strict liability for abnormally dangerous activity as a viable theory upon which an individual may base a personal injury suit against an industry for hazardous waste poisoning.[192] The courts must determine that hazardous waste is an abnormally dangerous activity.[193] As in the asbestos[194] and the DES[195] line of cases, the court must examine the nature of such injuries which result from long-term exposure to hazardous substances and do not manifest themselves for a long period of time. The courts must also recognize that the intent behind the statute of limitations was not to deny justice for an entire group of injured citizens. As in other areas of law, this potential obstacle can be removed by the courts by finding that the statute of limitations accrues upon discovery of the injury.

As the number of uncovered toxic waste dump sites increases, public awareness and concern will also increase. If the campaign to clean up the countless dump sites from the past and the establishment of regulations and controls for the future are successful, then the number of injuries and incidence of damage to the environment will eventually decrease. In the meantime, the courts have the responsibility to provide an opportunity for the private citizen to have a day in court.

MARY HURLEY-BRUNO

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188. For a discussion of the recently enacted Superfund Bill (Comprehensive Environmental Responses, Compensation, and Liability Act of 1980), see notes 113-17 and accompanying text *supra*.

189. For a discussion on the controversy regarding the inclusion of a personal injury, strict liability clause in recent legislation, see notes 100-18 and accompanying text *supra*.

190. For a discussion on proposed Superfund Bills, see notes 100-12 and accompanying text *supra*.

191. For a discussion on the recently enacted Superfund Bill, see notes 113-18 and accompanying text *supra*.

192. *See* notes 147-77 and accompanying text *supra*.

193. *See* notes 150-54 and accompanying text *supra*.

194. For a discussion of the asbestos cases, see note 173 and accompanying text *supra*.

195. For a discussion of the DES case, see notes 161-62 & 172 and accompanying text *supra*.

COMMENTS

Brown v. Brown: The Current Status of Interspousal Immunity in Massachusetts

The special relationship between husband and wife provided the fundamental basis for the common law rule of interspousal immunity.[1] At common law the husband and wife were treated as "a single person, represented by the husband."[2] The disabilities acquired by the wife through marriage included the lack of capacity to contract for herself, or to sue or be sued without the joining of her husband as a plaintiff or defendant.[3] Consequently, in order to bring an action sounding in tort for injury to her person, a wife had to join her husband as a plaintiff. If any judgment was obtained he was entitled to the proceeds.[4] Conversely, no action could be brought against a married woman without the

1. *See* Lewis v. Lewis, 370 Mass. 619, 351 N.E.2d 526 (1976). At common law, the "unity" theory provided that during marriage the separate legal identity of the wife became merged with that of the husband. *See generally* W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 122 (4th ed. 1971); Nolin v. Pearson, 191 Mass. 283, 284, 77 N.E.2d 890, 890 (1906). *See also* notes 3-6 and accompanying text *infra;* Williams, *The Legal Unity of Husband and Wife,* 10 MOD. L. REV. 16 (1946).

2. Lewis v. Lewis, 370 Mass. 619, 621, 351 N.E.2d 526, 527 (1976). The merger of legal identities through marriage has been described as:

> [T]he husband and wife are one person in the law ... that is, the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband; under whose wing, protection, and *cover*, she performed everything.... Upon this principle, of a union of person in husband and wife, depend almost all legal rights, duties and disabilitites, that either of them acquire by the marriage.

1 W. BLACKSTONE, COMMENTARIES 442 (1765). *See* Nolin v. Pearson, 191 Mass. 283, 284, 77 N.E.2d 890, 890 (1906).

3. W. PROSSER, *supra* note 1, at § 122 (4th ed. 1971); Laughlin v. Eaton, 54 Me. 156 (1866) (doctrine of interspousal immunity held to bar a wife from suing in her own right for malicious prosecution). *See, e.g.,* Farrar v. Bessey, 24 Vt. 89 (1852) (action of book account brought to recover balance claimed due from wife was barred due to wife's lack of capacity to contract for herself); Stockton v. Farley, 10 W. Va. 171 (1877) (action of debt cannot be brought against a married woman on any contract made by her while married).

4. *See* 1 F. HARPER & F. JAMES, THE LAW OF TORTS § 8.10 (1956). *See also* Little v. March, 137 N.C. 18 (1841) (legal title to slave given to wife during coverture vests in the husband upon his assent, and legal title in any bond, note or bill given to the wife during coverture also vests in the husband upon his assent and he alone may sue).

joining of her husband as a defendant. A judgment in such a case, if obtained during coverture,[5] became the obligation of the husband.[6]

In *Brown v. Brown,*[7] the Massachusetts Supreme Judicial Court considered whether a wife could sue her husband in tort seeking damages for personal injuries sustained by her as a result of her husband's negligence.[8] Prior to *Brown,* spouses could not sue each other for torts in Massachusetts unless the injury arose out of a motor vehicle accident.[9] By allowing spouses to bring suit against one another for injuries other than those arising from motor vehicle accidents, the *Brown* decision should have substantial impact on Massachusetts tort law. Interspousal immunity is an anachronism that heretofore had not been sufficiently dealt with in Massachusetts. Although *Brown* is a profound departure from the common law, the Massachusetts Supreme Judicial Court has now come into line with the modern trend of abolishing interspousal immunity.[10]

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5. Coverture is defined as "the condition or state of a married woman. Sometimes used elliptically to describe the legal disability arising from a state of coverture." BLACK'S LAW DICTIONARY 330 (Rev. 5th ed. 1979).

6. *See* McCurdy, *Personal Injury Torts Between Spouses,* 4 VILL. L. REV. 303 (1959) for a discussion of the evolution of interspousal immunity. The original rationale for joint liability of both spouses due to liability incurred by the wife was grounded in the belief that by marriage the wife became one person in the husband and therefore a suit against her was a suit against the husband. *See* Phillips v. Barnet, 1 Q.B.D. 436, 34 L.T.R. 177 (1876). This belief that a wife and husband are one is closely tied to the prohibition of suits between spouses, which is what interspousal munity stands for. The reason for the banning of civil personal injury lawsuits between spouses is really twofold. The first reason is a belief by courts during the 19th century that it would be poor policy to allow the civil remedy sought by the aggrieved spouse. *See* Abbott v. Abbott, 67 Me. 304 (1877). In *Abbott,* the court expressed its belief in prohibiting interspousal suits on the grounds that it would be poor policy to grant the civil remedy of damages. However, the policy about which the court was speaking, oddly enough, was not that of promoting marital discord as a probable and natural result of interspousal lawsuits, but rather was that of a multiplicity of litigation resulting from interspousal lawsuits.

A second reason for the ban against civil lawsuits between spouses was the belief by the late 19th century courts that the aggrieved spouse had remedy enough in the criminal law, divorce and the like. *See* Abbott v. Abbott, 67 Me. 304 (1877). This twofold rationale still exists in some of the nonabrogating jurisdictions, but with some variations. For example, the policy reason most often advanced by the modern day courts which refuse to abandon the immunity is that the doctrine promotes marital tranquility. *See, e.g.,* Burns v. Burns, 111 Ariz. 178, 526 P.2d 717 (1974) (interspousal immunity upheld as being necessary to avoid tension and disharmony within the marital relationship); Lyons v. Lyons, 2 Ohio St.2d 243, 208 N.E.2d 533 (1965) (interspousal immunity's abolition will disrupt domestic tranquility). *See also* note 60 and accompanying text *infra.*

7. 80 Mass. Adv. Sh. 1779, 409 N.E.2d 717 (1980).

8. *Id.* at 1781, 409 N.E.2d at 718. The husband in *Brown* is alleged to have been in control of the premises and to have had the responsibility to maintain and repair the premises upon which they lived. Brief for Plaintiff at 3, Brown v. Brown, 80 Mass. Adv. Sh. 1779, 409 N.E.2d 717 (1980). On the date in question, the husband is alleged to have failed to meet his responsibility in that he purportedly did not shovel the premises after a snowstorm. *Id.* The *Brown* case is now pending before the Superior Court of Middlesex County and is not expected to be heard for some time. Brown v. Brown, No. 79-1391 (Middlesex Sup. Ct., filed Mar. 14, 1979).

9. *See* Lewis v. Lewis, 370 Mass. 619, 351 N.E.2d 526 (1976). For a discussion of the facts and holding of *Lewis, see* notes 63, 64 and accompanying text *infra.*

10. *See* note 37 and accompanying text *infra.*

Section I of this Comment will describe the facts and holding of *Brown*. Section II discusses the historical perspective and evolution of the immunity into what is presently a national trend toward the elimination of the doctrine. Section III examines the current status of the immunity, in light of *Brown*. Finally, Section IV analyzes the problems presented by a total eradication of the immunity and suggests possible criteria Massachusetts should adopt to deal with these problems.

I. FACTS OF THE CASE

On December 21, 1978,[11] William P. Brown allegedly failed to clear the snow from his premises after a snowstorm.[12] On that same day his wife, Shirley Brown, fell and fractured several bones. Consequently, she incurred medical expenses in excess of $2,500.[14] Mrs. Brown claimed that her husband was in control of the premises and responsible for sanding, salting or shoveling after a snowstorm.[15] She further alleged that her husband's failure to meet his responsibilities caused her to fall and be injured.[16] Subsequently, Mrs. Brown brought suit in Massachusetts Superior Court.

In response, William Brown motioned for, and obtained, summary judgment on the sole ground of interspousal immunity.[16] Mrs. Brown appealed, and the Supreme Judicial Court of Massachusetts allowed her application for direct appellate review.[17] The court reversed the order granting summary judgment and remanded the case to the superior court for further proceedings.[18]

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11. Brief for the Plaintiff at 3, Brown v. Brown, 80 Mass. Adv. Sh. 1779, 409 N.E.2d 717 (1980).

12. Brown v. Brown, 80 Mass. Adv. Sh. 1779, 1781, 409 N.E.2d 717, 718 (1980).

13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.* at 1780, 409 N.E.2d at 718. In support of his motion for summary judgment, the defendant cited Lewis v. Lewis, 370 Mass. 619, 351 N.E.2d 526 (1976), which limited the abrogation of the immunity to those claims which arose out of motor vehicle accidents. Since the action in *Brown* was a personal injury claim not arising out of a motor vehicle accident, it was a perfunctory matter for the trial court to grant the defendant's motion. Since the action was barred by the doctrine of interspousal immunity, there appeared to be no issue in controversy, and, therefore, the motion was granted, and the matter was taken up on appeal.

17. Brown v. Brown, 80 Mass. Adv. Sh. 1779, 1780, 409 N.E.2d 717, 718 (1980). *See* MASS. GEN. LAWS ANN. ch. 211A, § 12 (West Supp. 1981), which provides in relevant part: "The supreme judicial court may order any matter, in whole part, or any issue therein, pending before the appeals court, transferred to the supreme judicial court for further proceedings."

18. Brown v. Brown, 80 Mass. Adv. Sh. 1779, 1780, 409 N.E.2d 717, 718 (1980). Before remanding the case to the superior court for further proceedings, the Supreme Judicial Court recognized that certain situations still exist which will not support a claim for personal injuries between spouses. *Id.* at 1781, 409 N.E.2d at 718, *citing* Merenoff v. Merenoff, 76 N.J. 535, 388 A.2d 951 (1978). The court further noted that these "excepted areas" are best defined through a case-by-case method. 80 Mass. Adv. Sh. at 1781, 409 N.E.2d at 718. Finally, before remanding the case, the court implied that certain aspects of married life may be privileged and thus escape

The *Brown* court noted that "[c]onduct tortious between two strangers, may not be tortious between spouses because of the mutual concessions implied in the marital relationship. But denial of liability on such grounds does not rest on interspousal immunity."[19] The court went on to say that the common law rule of interspousal immunity was supported by "antediluvian assumptions" and that there was a trend toward its judicial abrogation.[20] The court took notice of the fact that there is widespread criticism by commentators in the field and it also found the public policy reasons often advanced in support of the immunity unpersuasive.[21]

II. HISTORICAL PERSPECTIVE

The inflexibility of the doctrine of interspousal immunity is best exemplified in the English case of *Phillips v. Barnet*.[22] This case involved a suit by a wife against her husband after dissolution of the marriage for injuries she sustained during the marriage.[23] Phillips alleged that her husband "assaulted and beat, bruised, wounded, and ill treated the plaintiff, by means of which premises the plaintiff became and was sick,

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judicial action. *Id.* The court concluded that whether or not this case fits into these "excepted" or "privileged" areas cannot be known until certain facts are established. Thus, the case was remanded to the trial court to establish these facts.

19. Brown v. Brown, 80 Mass. Adv. Sh. 1779, 1779, 409 N.E.2d 717, 718 (1980), *quoting* Lewis v. Lewis, 370 Mass. 619, 629-30, 351 N.E.2d 526, 532 (1976).

20. *Id.* at 1780, 409 N.E.2d at 718. *See* note 39 and accompanying text *infra*. For a history of the immunity, *see* notes 1-6 and accompanying text *supra*.

21. Brown v. Brown, 80 Mass. Adv. Sh. 1779, 1780, 409 N.E.2d 717, 718 (1980). Most commentators criticize the immunity on three grounds: first, that the immunity developed from the now obsolete unity theory that husband and wife are merged in the husband; second, commentators in the area believe the immunity does not promote domestic tranquility because it denies access to the legal system; finally, critics in the field discount the greater potential for fraud and collusion in interspousal suits since there are adequate safeguards to prevent such occurrences. *See* W. PROSSER, *supra* note 1, at § 122 (4th ed. 1971); McCurdy, *Personal Injury Torts Between Spouses*, 4 VILL. L. REV. 303 (1959); McCurdy, *Torts Between Persons in Domestic Relation*, 43 HARV. L. REV. 1030 (1930); Recent Development, *Interspousal Immunity — Time for a Reappraisal*, 27 OHIO ST. L. J. 550 (1966).

The public policy reasons often advanced in support of the immunity parallel those grounds on which the commentators criticize the doctrine, namely that interspousal immunity encourages domestic tranquility and prevents fraudulent and collusive suits between spouses. *See, e.g.*, Lyons v. Lyons, 2 Ohio St. 2d 243, 208 N.E.2d 533 (1965) (immunity necessary to preserve domestic harmony); Rubalcava v. Gisseman, 14 Utah 2d 344, 384 P.2d 389 (1963) (immunity necessary to prevent risk of fraudulent and collusive suits). Apparently, the Massachusetts Supreme Judicial Court rejected these policy arguments, based on what the commentators had to say about them.

22. 1 Q.B.D. 436, 34 L.T.R. 177 (1876). The *Phillips* decision is significant because it exemplifies the inflexibility and tenacity of the doctrine of interspousal immunity. Additionally, this case is noteworthy because it was cited as authority for all the American jurisdictions which soon followed its holding. In effect, this case brought interspousal immunity to American jurisprudence, or at least provided a legitimate framework upon which courts could impose upon America the harsh results of this common law doctrine.

23. *Id.*

sore, and disordered, and permanently injured in health, and was put to expense for medical and other assistance, and was and is otherwise injured."[24] The court held that the action was not viable "because by law,... a husband has a right to correct his wife."[25] The court reasoned that the law recognizes no civil rights between husband and wife, and because the alleged complaints occurred during coverture, no cause of action arose.[26]

Phillips was first followed in this country by the Supreme Judicial Court of Maine in *Abbott v. Abbott.*[27] The issue in *Abbott* was the same as in *Phillips:* whether a wife may sue her former husband in tort for injuries she sustained from his assault upon her during coverture.[28] In *Abbott,* the complaint alleged that the plaintiff's husband and others made several assaults upon her, and she was beaten and wounded.[29] Although Mrs. Abbott was divorced when she commenced this action, the incidents occurred during marriage and, therefore, the court held that no cause of action was allowable.[30] The *Abbott* court cited *Phillips* in support of its holding and stated that "the legal character of an act of violence by husband upon wife and of the consequences that flow from it, is fixed by the [marital] condition of the parties at the time the act is done."[31] In other words, no civil cause of action could ever arise between husband and wife, regardless of the severity of the complaints. The *Abbott* and *Phillips* decisions established an absolute bar to suit between spouses.[32]

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24. *Id.* It is not stated exactly how much the medical expenses amounted to, but the plaintiff requested £10,000 in damages.

25. *Id.* The view that a husband has a right to correct his wife is Q.C. Russel's interpretation of Blackstone's Commentaries. About this notion, Judge Blackburn said that this idea of the law had been exploded. *Id.*

26. Phillips v. Barnet, 1 Q.B.D. 436, 34 L.T.R. 177 (1876). Unlike the view expressed in *Phillips* that a husband may forcibly and physically correct his wife, the idea that one spouse could never be held civilly liable as a tortfeasor to the other spouse was readily accepted by American courts as a reason for not allowing personal injury suits between spouses. *See, e.g.,* Saunders v. Hill, 57 Del. 519, 202 A.2d 807 (1964) (no cause of action could ever arise for personal injuries inflicted by husband upon wife because of the common law unity theory); Corren v. Corren, 47 So.2d 774 (Fla. 1950) (common law unity theory is the foundation for the rights, duties and disabilities of marriage).

27. 67 Me. 304 (1877). *Abbott* was the first case to follow *Phillips* in the United States. For further case discussion *see* McCurdy, *supra* note 6. *See generally* Comment, *The Rise and Fall of* Buckeye v. Buckeye, *1931-1959: Marital Immunity for Torts in Conflict of Laws,* 29 U. CHI. L. REV. 237 (1962).

28. Abbott v. Abbott, 67 Me. 304 (1877).

29. *Id.* at 305.

30. *Id.* at 308-09.

31. *Id.* at 306.

32. *See* McCurdy, *Personal Injury Torts Between Spouses,* 4 VILL. L. REV. 303, 307 (1959). The author states, in a succinct manner, the then status of interspousal immunity:

> [A]t common law, therefore, the combination of the various incidents of marriage, some substantive, some procedural, some conceptual, made it impossible for one spouse ever to be held civilly liable as a tortfeasor, in any situation, and without exception, to the

It is apparent that the American courts were very willing to accept interspousal immunity and its accompanying harsh consequences.[33] Originally, the immunity grew out of the strict adherence to, and belief in, the common law unity theory. For example, the court in *Abbott* said "[a]ccording to the oldest authorities, the being of the wife became, by marriage, merged in the being of the husband."[34] As a result of such "antediluvian assumptions concerning the role and status of women in marriage and in society"[35] the common law doctrine was, until recently, upheld in a number of jurisdictions.[36] Today, however, this is no longer the case. Currently, there is a clear and decisive trend to abrogate the common law doctrine of interspousal immunity.[37] The reasons for this trend are several.

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other for any act, antenuptial or during marriage, causing personal injury which would have been a tort but for the marriage.

Id. See also Sacknoff v. Sacknoff, 131 Me. 280, 161 A. 669 (1932) (wife barred by interspousal immunity from suing husband for personal injuries sustained as a result of his negligent operation of an automobile); Libbey v. Berry, 74 Me. 286 (1883) (common law doctrine of interspousal immunity bars wife from maintaining action against husband for assault in inducing her to procure a miscarriage by the insertion of an unknown instrument into her body); Smith v. Gorman, 41 Me. 405 (1856) (action of trover by wife against husband for conversion of personal property barred by interspousal immunity).

33. Concerning the issue of whether or not a wife may sue her former husband in tort, the court in *Abbott* stated: "Precisely the same question was lately before the English Court, in Phillips v. Barnet and the decision and the reasons on which the decision is grounded meet with our *unqualified approval.*" Abbott v. Abbott, 67 Me. 304, 306 (1877), *citing* Phillips v. Barnet, 1 Q.B.D. 436, 34 L.T.R. 177 (1876) (emphasis added).

34. Abbott v. Abbott, 67 Me. 304, 306 (1877).

35. Lewis v. Lewis, 370 Mass. 619, 621, 351 N.E.2d 526, 528 (1976). *See* notes 63, 64 and accompanying text *infra* for the facts of *Lewis*. The *Lewis* court reasoned that the doctrine of interspousal immunity and the grounds upon which it was based at common law made some sense and had some validity. However, the court went on to explain that most of the reasons for the doctrine were premised on assumptions and beliefs concerning women that are now antiquated and inconsistent with modern American society and thus, the doctrine is an anachronism.

36. Even though it was clear that the doctrine of interspousal immunity worked undue hardship on wives such as those in *Phillips* and *Abbott,* these have been cited as support for the retention of the immunity as recently as 1972. *See* Ebel v. Ferguson, 478 S.W.2d 334, 337 (Mo. 1972) (wife may not recover damages from former husband for wrongful act committed during marriage).

37. The following states have abrogated, in whole or in part, the doctrine of interspousal immunity: Johnson v. Johnson, 201 Ala. 41, 77 So. 335 (1917); Cramer v. Cramer, 379 P.2d 95 (Alaska 1963); Katzenberg v. Katzenberg, 183 Ark. 626, 37 S.W.2d 696 (1931); Self v. Self, 58 Cal.2d 683, 376 P.2d 65, 26 Cal. Rptr. 97 (1962) (doctrine abrogated as applied to intentional torts); Klein v. Klein, 58 Cal.2d 692, 376 P.2d 70, 26 Cal. Rptr. 102 (1962) (doctrine abrogated as applied to negligent torts); Rains v. Rains, 97 Colo. 19, 46 P.2d 740 (1935); Brown v. Brown, 88 Conn. 42, 89 A. 889 (1914); Rogers v. Yellowstone Park Co., 97 Idaho 14, 539 P.2d 566 (1975); Brooks v. Robinson, 259 Ind. 16, 284 N.E.2d 794 (1972); Shook v. Crabb, 281 N.W.2d 616 (Iowa 1979); Combs v. Combs, 262 S.W.2d 821 (Ky. 1953); Lewis v. Lewis, 370 Mass. 619, 351 N.E.2d 526 (1976); Hosko v. Hosko, 385 Mich. 39, 187 N.W.2d 236 (1971); Beaudette v. Frana, 285 Minn. 366, 173 N.W.2d 416 (1969); Imig v. March, 203 Neb. 537, 279 N.W.2d 382 (1979); Rupert v. Stienne, 90 Nev. 397, 528 P.2d 1013 (1974); Lumbermens Mut. Cas. Co. v. Blake, 94 N.H. 141, 47 A.2d 874 (1946); Merenoff v. Merenoff, 76 N.J. 535, 388 A.2d 951 (1978); Maestas v. Overton, 87 N.M. 213, 531 P.2d 947 (1975); Fitzmaurice v. Fitzmaurice, 62 N.D. 191, 242 N.W. 526 (1932);

One reason for the abandonment of the immunity is that the assumptions and ideas which gave support to the doctrine are now "perceived as inconsistent with the principles and realities of a progressing American society."[38] American courts have been able to eradicate the immunity through the use of Emancipation, or Married Woman's Acts.[39] Circa 1844, these statutes were adopted in all American jurisdictions. Primarily, they secured for married women a separate legal identity and estate in their own property.[40] As early as 1906, the Massachusetts Supreme Judicial Court noted that "[t]his remedial legislation has resulted in very largely impairing the unity of husband and wife as it existed at common law."[41] Today, despite the use of these statutes by many courts as a vehicle to abandon the immunity, many jurisdictions with similar statutes still uphold interspousal immunity as a bar to recovery for personal injuries.[42] For example, in *Thompson v. Thompson,*[43] the Supreme Court of the United States addressed the

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Courtney v. Courtney, 184 Okla. 395, 87 P.2d 660 (1938); Prosser v. Prosser, 114 S.C. 45, 102 S.E. 787 (1920); Scotvold v. Scotvold, 68 S.D. 53, 298 N.W. 266 (1941); Richard v. Richard, 131 Vt. 98, 300 A.2d 637 (1973); Freehe v. Freehe, 81 Wash.2d 183, 500 P.2d 771 (1972); Wait v. Pierce, 191 Wis. 202, 209 N.W. 475 (1926); N.C. GEN. STAT. § 525 (1976); N.Y. GEN. OBLIG. LAW § 3-313 (McKinney 1978).

38. Lewis v. Lewis, 370 Mass. 619, 622, 351 N.E.2d 526, 528 (1976). *See* notes 63, 64 and accompanying text *infra* for the facts of *Lewis.*

39. The Massachusetts Married Woman's Act is codified in MASS. GEN. LAWS ANN. ch. 209, § 1-13 (West Supp. 1981). For cases interpreting the statute *see* Hale v. Hale, 332 Mass. 329, 125 N.E.2d 142 (1955); Magrath v. Sheehan, 296 Mass. 263, 5 N.E.2d 198 (1936); Patterson v. Patterson, 197 Mass. 112, 83 N.E. 364 (1908). *See generally* W. PROSSER, *supra* note 1, at § 122 (4th ed. 1971).

40. *See* W. PROSSER, *supra* note 1, at § 122 (4th ed. 1971). *See also* MASS. GEN. LAWS ANN. ch. 209, § 1 (West Supp. 1981), which provides, in part, the following: "The real and personal property of any person shall, upon marriage, remain the separate property of such person, and a married person may receive, receipt for, hold, manage and dispose of property, real and personal, in the same manner as if such person were sole." Courts have generally agreed that under this type of statute, a wife was able to maintain an action to protect her property interests. *See, e.g.,* Hamilton v. Hamilton, 255 Ala. 284, 51 So.2d 13 (1950) (wife may recover from husband for conversion); Langley v. Schumacker, 46 Cal.2d 601, 297 P.2d 977 (1956) (wife may recover from husband for fraud).

41. Nolin v. Pearson, 191 Mass. 283, 285, 77 N.E. 890 (1906). The court reasoned that although the common law still prevails in Massachusetts, it is obvious from the enactment of such statutes as the Married Woman's Act, and from the development of modern society, that modification or abrogation of many of these archaic common law conditions should take place. Furthermore, these statutes have greatly impaired the unity theory of husband and wife upon which the entire doctrine of interspousal immunity is based. *Accord,* Bradford v. City of Worcester, 184 Mass. 557, 69 N.E. 310 (1904); Butler v. Ives, 139 Mass. 202, 29 N.E. 654 (1885).

42. The courts in the following cases have held that the Married Woman's Act of their jurisdiction did not abolish the interspousal immunity doctrine: Thompson v. Thompson, 218 U.S. 611 (1910); Schwartz v. Schwartz, 7 Ariz. App. 445, 440 P.2d 326 (1968); Fields v. Synthetic Ropes, Inc., 58 Del.2d 506, 211 A.2d 617 (1965); Plotkin v. Plotkin, 32 Del. 455, 125 A. 455 (1924); Corren v. Corren, 47 So.2d 774 (Fla. 1950); Bencomo v. Bencomo, 200 So.2d 171 (Fla.), *cert. denied,* 389 U.S. 970 (1967); Taylor v. Vezzani, 109 Ga. App. 167, 135 S.E.2d 522 (1964); Tugaeff v. Tugaeff, 42 Hawaii 455 (1958); Sink v. Sink, 172 Kan. 217, 239 P.2d 933 (1952).

43. 218 U.S. 611 (1910).

issue of interspousal immunity in light of the District of Columbia's Married Woman's Act.[44] The issue in this case was whether, under the statute, a wife may bring an action against her husband to recover damages for assault and battery upon her person.[45] In *Thompson,* the Court construed the act as not demonstrative of a congressional intent to permit suits between spouses and held that the wife was barred from recovery.[46]

Although *Thompson* held the wife's action was not maintainable, history has proven that the significant aspect of this case is the strong dissent by Justice Harlan.[47] He construed the legislative intent of Congress in passing the District of Columbia's Married Woman's Act as allowing a wife to sue her husband to recover damages for personal in-

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44. *Id.* at 615-17. *See* D.C. CODE ANN. § 1155 (West 1901), which provides in significant part:

> Married women shall have power to engage in any business, and to contract, whether engaged in a business or not, and to sue separately upon their contracts, and also to sue separately for the recovery, security, or protection of their property, and for torts committed against them, as fully and freely as if they were unmarried. . . .

Id. The cause of action in *Thompson* was also based on § 1151 of the District of Columbia's Married Woman's Act, which provides in part: "All the property, real, personal, and mixed, belonging to a woman at the time of her marriage, and all such property which she may acquire or receive after her marriage from any person whomsoever,... shall be her own property as absolutely as if she were unmarried. . . ." *Id.*

45. Thompson v. Thompson, 218 U.S. 611, 614 (1910). In *Thompson,* the plaintiff's complaint contained seven counts. The first three counts charged assault by the husband upon the wife over the course of three days. The final four counts charged the husband with assaults upon the wife on different days named. The complaint further alleged that the wife was pregnant at the time of the assault and the husband was well aware of the fact. *Id.* at 619-20.

46. *Id.* at 618-19. The majority reasoned that had it been the intent of the Legislature to allow suits for personal injuries between spouses, "it would have been easy to have expressed that intent in terms of irresistible clearness." *Id.* at 618. The majority concluded that this statute lacked evidence of a clear and plain intent on the part of Congress to allow spouses to sue each other in tort. *Id.* Thus, the statute was found by the Court not to give a right of action against the husband, but, instead, "to allow the wife, in her own name, to maintain actions of tort which at common law must be brought in the joint names of herself and husband." *Id.* at 617. It is hard to understand how the majority came to such a conclusion and denied recovery to the wife in light of the express language of the statute, which states that "[m]arried women shall have the power ... *to sue separately ... for torts committed against them,* as fully and freely as if they were unmarried." D.C. CODE ANN. § 1155 (West 1901) (emphasis added). Clearly, the intent of Congress was to allow a wife *to sue separately* for torts committed against her, as Justice Harlan so aptly points out in his dissenting opinion. 218 U.S. 611, 619-24. *See also* notes 47-49 and accompanying text *infra.*

47. Along with the abandoning of interspousal immunity by a clear majority of the states, *see* note 37 and accompanying text *supra,* came the critical acclaim for Justice Harlan's dissenting opinion in *Thompson.* Many commentators approved of discarding the common law doctrine as well as of the action taken by courts who followed Justice Harlan's lead. *See* McCurdy, *Personal Injury Torts Between Spouses,* 4 VILL. L. REV. 303 (1959); Sanford, *Personal Torts Within the Family,* 9 VAND. L. REV. 823 (1956); Note, *Torts Between Husband and Wife,* 30 CHI.-KENT L. REV. 343 (1952); Note, *Tort Actions Between Husband and Wife,* 42 KY. L.J. 497 (1954); Comment, *Marital Disability in Personal Tort Actions,* 14 U. MIAMI L. REV. 99 (1959); Comment, *Domestic Relations-Torts-Action by Wife Against Husband for Personal Injuries,* 7 VAND. L. REV. 717 (1954). *See also* W. PROSSER, *supra* note 1, at § 122 (4th ed. 1971).

juries sustained by an assault and battery.[48] Moreover, Justice Harlan found the majority's interpretation of the Act to be contrary to the express intention of Congress.[49] Justice Harlan's interpretation of the statute and his finding that it is beyond the duty of the Court to judge the wisdom of such statutes most likely inspired the trend to discard the immunity.[50]

In addition to utilizing Married Woman's Acts as vehicles for abrogating interspousal tort immunity, courts have paid deference to widespread criticism of the common law doctrine.[51] One commentator makes the point that in the tort field, immunities, which furnish "ab-

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48. Thompson v. Thompson, 218 U.S. 611, 623 (1910) (Harlan, J., dissenting). Justice Harlan was very unhappy with the result the majority reached in *Thompson* and with the way they reached it. He felt that Congress in no way intended to allow a wife to sue her husband separately in tort seeking damages for withholding her property, and at the same time deny her the right to sue him separately, for tortious personal injury. *Id.* Additionally, Justice Harlan felt the majority was legislating, not merely interpreting the statute, in order to effectuate the result they desired. Moreover, he stated that the following clause would necessarily have to be added to the statute in question to reach the same result as did the majority: "Provided, however, that the wife shall *not* be entitled, in any case, to sue her husband separately for a tort committed *against her person.*" *Id.* at 622-23 (emphasis in original). Criticizing his brethren for the result he felt they erroneously reached, Justice Harlan believed the majority was trying to avoid a radical change in the common law by mere statutory construction. *Id.* at 623.

49. Thompson v. Thompson, 218 U.S. 611, 619-24 (1910) (Harlan, J., dissenting). In the following passage, Justice Harlan expresses his belief that the majority's result is inconsistent with congressional intent:

> [U]nder the construction now placed by the Court on the statute, Congress is put in the anomalous position of allowing a married woman to sue her husband separately, in tort, for the recovery of property, but denying her the right or privilege to sue him separately, in tort, for damages arising from his brutal assaults upon her person.

Id. at 623.

50. Many courts have relied on their jurisdiction's Married Woman's Act to discard the doctrine of interspousal immunity. These abrogating courts have reasoned that such statutes have dissolved the common law unity theory and thus, removed any foundation for the doctrine. *See, e.g.*, Johnson v. Johnson, 201 Ala. 41, 77 So. 335 (1917) (married woman's statute had the effect of destroying common law view of husband and wife); Katzenberg v. Katzenberg, 183 Ark. 626, 37 S.W.2d 696 (1931) (married woman's act allows action by wife against husband for negligent operation of automobile); Self v. Self, 58 Cal.2d 683, 376 P.2d 65 (1962) (married woman's act allows suit for intentional tort). *But see* Thompson v. Thompson, 218 U.S. 611 (1910) (District of Columbia's married woman's act does not allow suit for assault by wife against husband); Schwartz v. Schwartz, 7 Ariz. App. 445, 440 P.2d 326 (1968) (common law followed regarding interspousal immunity in spite of married woman's act). *See also* note 37 and accompanying text *supra* for a trend to discard the doctrine of interspousal immunity. Gilman v. Gilman, 78 N.H. 4, 95 A. 657 (1915) (married woman's act allows any action by a wife that would be maintainable if she were unmarried); Brown v. Gosser, 262 S.W.2d 480 (Ky. 1953) (married woman's act expresses legislative intent of allowing personal injury suits between spouses).

51. The following commentators favor the abolition of the common law doctrine of interspousal immunity: RESTATEMENT (SECOND) OF TORTS § 895F (1979); 1 F. HARPER & F. JAMES, *supra* note 4, at § 8.10 (1956); W. PROSSER, *supra* note 1, at § 122 (4th ed. 1971); McCurdy, *Torts Between Persons in Domestic Relation,* 43 HARV. L. REV. 1030 (1930); Comment, *Personal Injury Torts Between Husband and Wife: The Interspousal Immunity Doctrine,* 21 U. MIAMI L. REV. 423 (1966); Comment, *Dissolving the "Metaphysical" Merger in Interspousal Torts,* 12 NEW ENGLAND L. REV. 333 (1976).

solution from liability,"[52] stand in conflict with the general principle that there should be a remedy for wrongful injury.[53] Interspousal immunity does not advance the fundamental policy consideration of providing judicial redress for an otherwise cognizable wrong.[54] Although a handful of jurisdictions unqualifiedly retain the immunity,[55] it remains that a fundamental tenet of our judicial system is to provide redress for wrongs committed.[56] However, interspousal immunity denies access to the legal process merely because the injury complained of occurred while the parties were married.

Finally, another important reason advanced for the nullification of the interspousal immunity doctrine is the widespread use of liability insurance.[57] Courts have reasoned that it is likely that general liability insurance is held by a substantial number of spouses, or is otherwise readily available to them.[58] Although courts should be mindful of the fact that some married couples may not be insured, this alone should not defeat the claims of others who are covered.[59]

One of the most frequently advanced arguments for the continuance of the immunity is that its abolition will disrupt, if not destroy, domestic tranquility. This view has been expressed over the years by courts which have refused to abolish the immunity.[60] The theory states

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52. W. PROSSER, *supra* note 1, § 131 (4th ed. 1971). Prosser, in referring to immunities as furnishing absolution from liability, makes the distinction between privileges, which avoid liability for tortious conduct under certain circumstances, and immunities, which avoid liability in tort under *all* circumstances. *Id.*

53. The courts in the following cases have partially based their actions in limiting or discarding the doctrine of interspousal immunity on the fundamental principle that a person injured should be afforded a remedy: Self v. Self, 58 Cal.2d 65, 376 P.2d 65 (1962); Rains v. Rains, 97 Colo. 19, 46 P.2d 740 (1935); Lewis v. Lewis, 370 Mass. 619, 351 N.E.2d 526 (1976); Rupert v. Stienne, 90 Nev. 397, 528 P.2d 1013 (1974); Merenoff v. Merenoff, 76 N.J. 535, 388 A.2d 951 (1978); Fiedler v. Fiedler, 42 Okla. 124, 140 P. 1022 (1914); Richard v. Richard, 131 Vt. 98, 300 A.2d 637 (1973). *Contra,* Alfree v. Alfree, 410 A.2d 161 (Del. 1979).

54. *See* Shook v. Crabb, 281 N.W.2d 616, 618 (Iowa 1979). The Supreme Court of Iowa recenty noted there was a definite trend toward limiting or abolishing the doctrine of interspousal immunity based on the concern for advancement of the whole purpose of the judicial system, namely to provide a remedy for wrongs done. *Id.*

55. *See, e.g.,* Paiewonsky v. Paiewonsky, 446 F.2d 178 (3rd Cir. 1971), *cert. denied,* 405 U.S. 919 (1972); Monk v. Ramsey, 223 Tenn. 247, 443 S.W.2d 653 (1969); Donsback v. Offield, 488 S.W.2d 494 (Tex. Civ. App. 1972).

56. As early as 1803, the United States Supreme Court noted in *Marbury v. Madison* 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 the government is to afford that protection." 5 U.S. (1 Cranch) 137, 163 (1803).

57. It should be noted that some jurisdictions originally only abrogated the immunity for personal injuries which arose out of motor vehicle accidents. In such cases the courts nearly always referred to the prevalence of automobile insurance. *See, e.g.,* Immer v. Risko, 56 N.J. 482, 267 A.2d 481 (1970); Rupert v. Stienne, 90 Nev. 397, 528 P.2d 1013 (1974).

58. *See, e.g.,* Merenoff v. Merenoff, 76 N.J. 535, 388 A.2d 951 (1978). *See also* note 57 and accompanying text *supra.*

59. *See* Merenoff v. Merenoff, 76 N.J. 535, 388 A.2d 951 (1978).

60. *See, e.g.,* Burns v. Burns, 111 Ariz. 178, 526 P.2d 717 (1974); Corren v. Corren, 47 So.2d 774 (Fla. 1950); Holman v. Holman, 73 Ga. App. 205, 35 S.E.2d 923 (1945).

that if a husband and wife are allowed to sue each other it will naturally promote tension within the marital relationship. However, this view fails to take into account two important factors. First, it is unlikely that any marital harmony worth preserving is extant by the time spouses resort to legal redress. Second, in most suits between husband and wife the real defendant is an insurer, not the tortious spouse.[61] Therefore, denial of access to the legal process can only result in the cost of injury being absorbed by the spouses. If nothing else would, this additional financial burden should put a strain on the marriage and disrupt domestic tranquility.[62]

Since the United States Supreme Court's decision in *Thompson,* Massachusetts has clearly moved toward eliminating the immunity. Beginning with the decision in *Lewis v. Lewis,*[63] Massachusetts abandoned the immunity for all personal injuries between spouses which arose out of motor vehicle accidents.[64] Subsequently, in *Pevoski v. Pevoski,*[65] the court extended the *Lewis* holding to all existing interspousal motor vehicle claims not yet barred by the statute of limitations or disposed of through settlement or judgment.[66] Most recently,

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61. *See, e.g.,* Rupert v. Stienne, 90 Nev. 397, 528 P.2d 1013 (1974); Richard v. Richard, 131 Vt. 98, 300 A.2d 637 (1973). In both *Rupert* and *Richard* the courts noted that the widespread use and requirement of insurance substantially obviated the potential for marital disharmony which might result from interspousal suits.

62. *See, e.g,* Merenoff v. Merenoff, 76 N.J. 535, 388 A.2d 951 (1978); Immer v. Risko, 56 N.J. 482, 267 A.2d 481 (1970).

63. 370 Mass. 619, 351 N.E.2d 526 (1976).

64. *Id.* at 629, 351 N.E.2d at 532. In *Lewis,* the plaintiff was a passenger in a car driven by her husband which slid on wet pavement, struck a light pole and rolled over on its side, causing injury to Mrs. Lewis. Mr. Lewis moved for summary judgment on the grounds that the case was barred by the doctrine of interspousal immunity. The trial court granted the motion and Mrs. Lewis's subsequent petition for direct appellate review was allowed. After a complete discussion of the arguments for and against interspousal immunity, the Supreme Judicial Court of Massachusetts abrogated the common law tort immunity for all personal injuries between spouses which arise out of motor vehicle accidents. *Id.* at 629, 351 N.E.2d at 532. This "limited abrogation" has been employed by many courts that are reluctant to eliminate *in toto* interspousal immunity and thus have restricted the abolition of the doctrine to those suits between spouses which arise out of motor vehicle accidents. *See, e.g.,* Rupert v. Stienne, 90 Nev. 397, 528 P.2d 1013 (1974); Digby v. Digby, 388 A.2d 1 (R.I. 1978); Richard v. Richard, 131 Vt. 98, 300 A.2d 637 (1973); Surrat v. Thompson, 212 Va. 191, 183 S.E.2d 200 (1971). The exception to interspousal immunity for actions arising from motor vehicle accidents was both cheered and criticized by the commentators in this area. The partial abolition of the doctrine was hailed as "dissolving the metaphysical merger in interspousal torts." Comment, Lewis v. Lewis: *Dissolving the "Metaphysical" Merger in Interspousal Torts,* 12 NEW ENGLAND L. REV. 333 (1976). Conversely, this "limited abrogation" or any movement toward abandoning the doctrine was criticized by insurers. *See* Casey, *The Trend of Interspousal and Parental Immunity-Cakewalk Liability,* 45 INS. COUNSEL J. 321 (1978).

65. 371 Mass. 358, 358 N.E.2d 416 (1976).

66. In *Pevoski,* a husband and wife were involved in a three-car collision. The plaintiff, a passenger in the car that was driven by her husband, the defendant, instituted an action for damages for personal injuries sustained in the accident. At the trial level Mr. Pevoski's motion for summary judgment was granted on the sole ground of interspousal immunity. Subsequently, the plaintiff sought review in the Masachusetts Appeals Court, but the Supreme Judicial Court, on its own initiative, ordered direct appellate review. Pevoski v. Pevoski, 371 Mass. 358, 358 (1976).

Brown v. Brown[67] presented the Massachusetts Supreme Judicial Court with the issue of whether or not to abandon the immunity for *all* personal injuries between spouses.

III. ANALYSIS OF *BROWN*

A. *Need for a Standard*

In *Brown v. Brown,*[68] the court said "we are now asked to extend [the] holding [of *Lewis*] to a claim not arising out of a motor vehicle accident, and we do so."[69] In the final analysis, the court is saying that courtroom doors will no longer be closed to actions in tort seeking damages for personal injuries between spouses. The court in *Brown* acknowledged that situations still remain wherein claims for personal injuries between spouses will fall within "the privileged or consensual aspects of married life"[70] and fail to be actionable, but that these excepted areas are best left to be defined on a case-by-case basis.[71]

The question that naturally arises from the *Brown* decision concerns the privileged and consensual aspects of married life that are not subject to judicially prescribed damage awards. The Massachusetts court gave no clues as to the resolution of this issue. In *Merenoff v. Merenoff,*[72]

The *Pevoski* court extended the holding in *Lewis* to cover all similar claims which have not been disposed of by settlement or judgment or by the running of the statute of limitations. *Id.* at 361, 358 N.E.2d at 418. This language indicates that the court in *Pevoski* was making the *Lewis* holding retroactive. The court recognized the availability of no fault insurance in almost all interspousal motor vehicle claims as one important factor in its decision. *Id.* at 361, 358 N.E.2d at 418.

In applying the *Lewis* principle to all cases not yet disposed of by judgment, settlement or by the running of the statute of limitations, the *Pevoski* court recognized the availability of medical payments coverage. Although not specifically mentioned, the court most likely based this upon the law in Massachusetts providing for compulsory medical liability insurance for all automobiles registered in Massachusetts. *See* MASS. GEN. LAWS ANN. ch. 90, §§ 34A-34O (West Supp. 1980).

Moreover, the *Pevoski* court reasoned that the expansion of the *Lewis* principle to all preexisting interspousal motor vehicle claims would not have a substantial impact on the expectations of the insureds nor their insurers. Pevoski v. Pevoski, 371 Mass. 358, 361, 358 N.E.2d 416, 418 (1976).

67. 80 Mass. Adv. Sh. 1779, 409 N.E.2d 717 (1980).

68. *Id.*

69. *Id.* at 1779, 409 N.E.2d at 718.

70. *Id.* at 1781, 409 N.E.2d at 719 (1980), *quoting* Merenoff v. Merenoff, 76 N.J. 535, 558, 388 A.2d 951, 963 (1978).

71. Brown v. Brown, 80 Mass. Adv. Sh. 1779, 1781, 409 N.E.2d 717, 719 (1980).

72. Merenoff v. Merenoff, 76 N.J. 535, 388 A.2d 951 (1978). In *Merenoff,* the plaintiff and defendant were trimming bushes in their front yard. In an attempt to help his wife trim a low bush, the defendant cut off his wife's index finger at the first phalanx. Shortly thereafter, the wife commenced this tort action against her husband. The court in *Merenoff* was quick to note both parties were insured under a homeowners policy and that the insurance company was defending the action.

After a lengthy discussion of the origins of interspousal immunity and the trend to eradicate the doctrine, the *Merenoff* court rejected the policy arguments advanced in support of the im-

the New Jersey Supreme Court addressed the problem of circumscribing actionable tortious conduct between spouses. The *Merenoff* court recognized that it must meet its judicial duty of *"defining and delineating marital conduct which cannot and should not be the basis for tort litigation."*[73] It is highly inconsistent that both the *Merenoff* and *Brown* courts have recognized the problem, yet neither have sufficiently addressed the issue.

Concededly, as a result of *Brown,* there is a new avenue of relief for spouses. However, it is doubtful that any married couple will be able to recognize whether or not they qualify for this relief. The Massachusetts court must adequately detail and define that conduct which will not give rise to a cause of action between spouses, instead of deferring to a case-by-case analysis. The method the court has adopted will put spouses in the tenuous position of waiting for case law to evolve far enough to determine which areas are exempt from judicial scrutiny. Moreover, this ad hoc procedure can only result in a plethora of litigation which will clutter already burgeoning court dockets.

B. Formulation of a Standard

The *Brown* court's reluctance to fashion standards of conduct defining the "privileged or consensual aspects of married life"[74] is understandable because it is difficult to account for every injury between spouses which may not give rise to a cause of action. However, the court in *Brown* has gone absolutely in the opposite direction by giving no examples or clues whatsoever, as to what these areas may be.

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munity, namely greater domestic tranquility and prevention of fraud and collusion. However, the court did recognize that "there still remain situations wherein, as a matter of law or fact, claims for personal injuries between married persons will not justify a recovery of damages." *Id.* at 557, 388 A.2d at 962. The court then held:

> [T]hat subject to these excepted areas which are best left to be defined on a case-by-case basis, there presently exists no cogent reason why the doctrine of interspousal tort immunity should be continued, and it is hereby abrogated as a bar to civil suit between married persons for damages for personal injuries.

Id.

73. *Id.* at 555, 388 A.2d at 961 (emphasis added). The *Merenoff* court stated that: "Special matters of privacy and familiarity may be encompassed by a marital or nuptial privilege and fall outside the bounds of definable and enforceable duty of care. Certain conduct may also be regarded as 'consensual' involving the 'give and take' and subtle ebb and flow of married life." *Id.* at 555, 388 A.2d at 961. A careful reading of this language will disclose that the court has not defined nor delineated that marital conduct which will not be the basis of a cause of action.

74. Brown v. Brown, 80 Mass. Adv. Sh. 1779, 1781, 409 N.E.2d 717, 719 (1980), *quoting* Merenoff v. Merenoff, 76 N.J. 535, 558, 388 A.2d 951, 963 (1978). Apparently, the court did not address this issue because a full trial is necessary to establish certain facts not yet in the record. When addressing this issue of whether or not the defendant's behavior was within the "privileged or consensual aspects of married life," the *Brown* court stated: "Whether the same may be said of the case before us depends on facts not yet established." Brown v. Brown, 80 Mass. Adv. Sh. 1779, 1781, 409 N.E.2d 717, 719 (1980). The court then reversed and remanded the case to the superior court. *Id.*

Perhaps the court in *Brown* had a notion of implied consent in mind when it spoke of the "privileged or *consensual* aspects of married life."[75] Due to the relation of the parties, there is an obvious necessity for some substantive limitations upon allowing tort action between spouses.[76] To avoid every touching from being a battery, or every motion an assault, "[t]here would be a considerable amount of express or implied consent due to the fact of the marital relation, and even where there was a lack of actual consent the relation would license much conduct."[77] This notion of consent would render all the "ordinary frictions of wedlock"[78] non-actionable.

One such area that may not give rise to a cause of action between spouses may be simple domestic negligence.[79] Based on this theory, certain kinds of claimed injuries arising from activities which are a part of the common occurrences of regular household life would not be amenable to the law of torts and thereby escape judicial action.[80] Ex-

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75. Brown v. Brown, 80 Mass. Adv. Sh. 1779, 1781, 409 N.E.2d 717, 719 (1980), *quoting* Merenoff v. Merenoff, 76 N.J. 535, 558, 388 A.2d 951, 963 (1978) (emphasis added). By the use of the word consensual, the *Brown* court seems to be implying that within the marriage relationship there are notions of implied consent. This theory of consent is necessary in order to avoid the bringing of trivial marital claims, and it is generally agreed that some concept is needed to limit the liability of spouses. *See* McCurdy, *Torts Between Persons in Domestic Relation*, 43 HARV. L. REV. 1030, 1055 (1930).

76. *See* McCurdy, *Torts Between Persons in Domestic Relation*, 43 HARV. L. REV. 1030, 1055 (1930).

77. *Id.*

78. W. PROSSER, *supra* note 1, at § 122 (4th ed. 1971). Dean Prosser uses this phrase to describe the everyday exigencies associated with married life.

79. In *Merenoff* the court discussed this concept to some extent. Again, the court failed to detail any examples of what their theory entails. As a result, the position of spouses is hardly improved. Few courts have discussed the concept of simple domestic negligence at great length. However, commentators calling for the abolition of the immunity have recognized that need for such a concept. *See, e.g.*, McCurdy, *Personal Injury Torts Between Spouses*, 4 VILL. L. REV. 303, 338 (1959). There the author states: "Acts that were reasonable in view of the close relation, and carelessness in the operation of the home or in common activities, should be distinguished from conduct not so referrable and which would be actionable if the parties were not husband and wife." *Id.*

80. *See* Merenoff v. Merenoff, 76 N.J. 535, 555, 388 A.2d 951, 961 (1978). Most courts and commentators agree that there is necessary some substantive limitations on causes of actions between spouses. *See, e.g.*, McCurdy, *Torts Between Persons in Domestic Relation*, 43 HARV. L. REV. 1030, 1055 (1930). *See also* Brown v. Brown, 80 Mass. Adv. Sh. 1779, 409 N.E.2d 717 (1980). The concept of simple domestic negligence would bar recovery for all injuries which arise out of those activities common to household existence. This would allow courts to limit liability between spouses to those injuries which arise from activities that involve "an unusual risk of injury . . . if not performed with reasonable care. . . ." Merenoff v. Merenoff, 76 N.J. 535, 559, 388 A.2d 951, 963 (1978). Put another way, if the activity giving rise to injury between spouses is not one involving an unreasonable risk of harm, simple domestic negligence would bar recovery. In addition to limiting liability, domestic negligence would render picayune or frivolous marital claims not actionable. The question that emerges in light of *Brown* is whether failing to shovel the driveway is an activity that involves an unreasonable risk of harm. The *Brown* court does not address this issue but does say that certain conduct between spouses may not be tortious because of the "mutual

amples of certain injuries which may fall within the rubric of "simple domestic negligence" may be such things as one spouse leaving shoes out where the other spouse could and does stumble over them in the dark, "or if one spouse spills coffee on the other while they are both still sleepy."[81]

It may also be that the *Brown* court is implying some notions of assumption of the risk[82] within the marital relationship. In the case of negligence, since husband and wife "are engaged in a common enterprise, for common benefit, often with common control, each should bear the risk the other takes in the ordinary conduct of the domestic establishment."[83] Under this view, only those acts which are outside the scope of the marital relationship could give rise to a cause of action.[84]

A look at how other jurisdictions have dealt with the problem of what conduct between spouses is not actionable may be helpful. In *Beaudette v. Frana,*[85] the Minnesota Supreme Court abandoned interspousal immunity and observed that within the marriage relationship, both intentional and unintentional contact occurs, that is hardly shared by strangers. The court noted that risks of intentional contact in marriage are so great that spouses should be denied recovery unless the contact was clearly excessive.[86] In *Beaudette,* a wife sued her husband

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concessions implied in the marital relationship." Brown v. Brown, 80 Mass. Adv. Sh. 1779, 409 N.E.2d 717, 718 (1980), *quoting* Lewis v. Lewis, 370 Mass. 619, 629-30, 1351 N.E.2d 526, 532 (1976).

81. RESTATEMENT (SECOND) OF TORTS § 895F, Comment h (1979). The drafters of the Restatement address two major issues in this concern. First, they state that the concept of consent to antenuptial physical contact has a much broader scope of application within the marital relationship. Second, the drafters believe that the intimacy of the family relationship may necessitate some relaxation in the application of the reasonable care doctrine. Thus, the examples cited in the text would not be treated as negligence.

82. Assumption of the risk is defined as meaning "that the plaintiff, in advance, has given his consent to relieve the defendant of an obligation of conduct toward him and to take his chances of injury from a known risk from what the defendant is to do or leave undone." W. PROSSER, *supra* note 1, at § 68 (4th ed. 1971). It must be noted that in Massachusetts, assumption of the risk is only available as a defense to causes of action arising prior to January 1, 1974. After that date the defense no longer applies. MASS. GEN. LAWS ANN. ch. 231, § 85 (West Supp. 1980). *See* note 99 and accompanying text *infra.*

83. McCurdy, *Torts Between Persons in Domestic Relation,* 43 HARV. L. REV. 1030, 1055 (1930). For the basics of assumption of risk, *see* Hildebrande v. Minyard, 16 Ariz. App. 583, 494 P.2d 1328 (1972); Winterstein v. Wilcom, 16 Md. App. 130, 293 A.2d 821 (1972); Rush v. Commercial Realty Co., 7 N.J. Misc. 337, 145 A. 476 (1929).

84. *See* McCurdy, *Torts between Persons in Domestic Relation,* 43 HARV. L. REV. 1030, 1055 (1930). Applying the notions of consent and assumption of the risk to marriage and the view that marriage is entered into consensually, it is not unreasonable to hold that only those acts which are outside the scope of ordinary marital conduct are subject to liability in tort. *Id.*

85. 285 Minn. 366, 173 N.W.2d 416 (1976).

86. *Id.* at 373, 173 N.W.2d at 420. In *Beaudette* the court stated that:

> There is an intimate sharing of contact within the marriage relationship, both intentional and unintentional, that is uniquely unlike the exposure among strangers. The risks of intentional contact in marriage are such that one spouse should not recover damages from

claiming damages for personal injuries resulting from the husband's negligent driving of an automobile in which she was a passenger.[87] Summary judgment was entered against plaintiff because of the then existing rule of interspousal immunity.[88] On appeal, the court abrogated, prospectively, the absolute defense of interspousal immunity for injuries occurring between spouses which arise out of motor vehicle accidents.[89]

Courtney v. Courtney[90] was a case in which a wife sued her husband seeking damages for personal injuries she suffered when the automobile, which he was driving and in which she was a passenger, overturned.[91] In reaffirming their rejection of interspousal immunity, the Oklahoma Supreme Court noted that "[t]he meaning of such statutes as our Married Woman's Act and the judicial interpretations thereof have sometimes been misconstrued as allowing a wife the same rights against her husband that a stranger would have, but statements to that effect are erroneous."[92] The Oklahoma court further stated that carrying this premise to its logical conclusion could result in a wife suing her husband for such things as an "uninvited kiss."[93] The court in *Courtney* felt most jurisdictions would refuse to allow such absurd actions to be maintained, but that it would be "equally absurd" to deny the wife a remedy for a serious injury to her merely because there is dif-

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the other without substantial evidence that the injurious contact was plainly excessive or a gross abuse of normal privilege.

Id.

The court went on to say that the risks of negligent conduct are so usual, that in most cases the trial court would instruct the jury as to the injured spouse's "peculiar assumption of the risk." *Id.* It appears that no other courts have come to such a result, but some courts and commentators share the belief that marital relations are unlike those of strangers. *See, e.g.*, Merenoff v. Merenoff, 76 N.J. 535, 388 A.2d 951 (1978); McCurdy, *Torts Between Persons in Domestic Relation*, 43 HARV. L. REV. 1030 (1930).

87. Beaudette v. Frana, 285 Minn. 366, 367, 173 N.W.2d 416, 417 (1969).

88. *Id.*

89. *Id.* at 373, 173 N.W.2d at 420. *Beaudette* is strikingly similar to Lewis v. Lewis, 370 Mass. 619, 351 N.E.2d 526 (1976). In both *Lewis* and *Beaudette*, the doctrine of interspousal immunity was partially rejected for personal injury claims between spouses arising out of motor vehicle accidents. However, the *Beaudette* court went one step further than *Lewis* in holding that a spouse should be denied recovery against the other spouse unless the conduct complained of is clearly excessive. The *Lewis* court made no mention of the standards of conduct between spouses and based its decision mainly on three grounds. First, that the public policy arguments in favor of retaining the immunity are unconvincing. Second, that the immunity is inconsistent with modern society's principles and realities. Third, the Massachusetts married woman's act does not directly forbid tort suits between spouses. *Id.*

90. 184 Okla. 395, 87 P.2d 660 (1938).

91. *Id. Courtney*, like *Beaudette* and *Lewis*, is another example of the difficulty courts have had defining conduct that will not give rise to a cause of action between spouses. It should be noted, however, that *Beaudette* was the most helpful by defining a "clearly excessive" standard of conduct which will give rise to a cause of action between husband and wife.

92. Courtney v. Courtney, 184 Okla. 395, 403, 87 P.2d 660, 668 (1938).

93. *Id.*

ficulty in differentiating between various kinds of contact.[94] The court recognized that the rights of married persons are affected by the reciprocal rights and obligations inherent in the marriage relationship.[95]

Even in *Courtney* though, the court spoke of "the mutual concessions attending their relationship and implied in the marriage contract."[96] Again, the question which naturally arises is where do the "mutual concessions implied in the marital relationship"[97] and the "privileged or consensual aspects of married life"[98] exceptions leave the married couple? Perhaps the following guidelines may be helpful: (1) if the injury is the result of simple domestic negligence or flows from the "ordinary frictions of wedlock" notions of implied consent may operate to obviate a cause of action; (2) conversely, if the injury arises from conduct not usually attributed to marital partners, the lack of implied consent will result in a viable cause of action.

IV. PROBLEMS ATTENDING THE TOTAL ABROGATION OF THE DOCTRINE OF INTERSPOUSAL IMMUNITY

Concomitant with the abandoning of interspousal immunity in Massachusetts are some problems which the courts will have to address. One such problem is the potential for fraudulent and collusive suits be-

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94. *Id.* In referring to the absurdity of allowing a wife to sue her husband for an "uninvited kiss," the *Courtney* court said:

> We believe that all courts would shrink from opening their doors to the absurdities accompanying such a doctrine, but it would be equally absurd to refuse a remedy to a wife who has been shot by her husband merely because of the difficulty in drawing the exact line of demarcation between assault with a gun and assault by a kiss.

Id.

95. *Id.* at 403, 87 P.2d at 669. In recognizing this principle, the court reaffirmed its reliance upon Fiedler v. Fiedler, 42 Okla. 124, 140 P.2d 1022 (1914).

96. Courtney v. Courtney, 184 Okla. 395, 403, 87 P.2d 660, 669 (1938). After taking notice of the "mutual concessions," the court moved to a discussion of implied consent and assumption of risk but declined to discuss them at that time. For a discussion of these concepts *see* notes 79-84 and accompanying text *supra*. Instead, the court deferred discussion of these issues by asserting that:

> If the foreboding of those who see in the modification of the marital status consequences destructive of our social institutions are realized in experience, the matter is within the control of the Legislature, and we may well assume that succeeding generations will be as wise as we of this or preceeding generations. It is not necessary for us to determine what remains of the marital status as it existed at common law. It must be true that when a man and woman marry, their reciprocal rights and duties are different toward each other than toward third persons. The extent of the difference under the existing law must be developed by time and experience.

184 Okla. 395, 404, 87 P.2d 660, 669 (1938), *quoting* Wait v. Pierce, 191 Wisc. 202, 209 N.W. 475 (1926).

97. Brown v. Brown, 80 Mass. Adv. Sh. 1779, 1779, 409 N.E.2d 717, 718 (1980), *quoting* Lewis v. Lewis, 370 Mass. 619, 629-30, 351 N.E.2d 526, 532 (1976).

98. Brown v. Brown, 80 Mass. Adv. Sh. 1779, 1781, 409 N.E.2d 717, 719 (1980), *quoting* Merenoff v. Merenoff, 76 N.J. 535, 558, 388 A.2d 951, 963 (1978).

tween spouses. Insurers argue that the trend to eliminate interspousal immunity has created "cakewalk liability."[99] By this the insurers mean that suits between spouses are not truly adversarial. Since the plaintiff and defendant are husband and wife, they both stand to gain if recovery against the insurer is had. Therefore, the only real contest is between the insurance company and the spouses.[100]

In addition to insurance carriers, many courts also find eradication of the immunity as creating a great potential for fraudulent and collusive suits.[101] In the recent decision of *Raisen v. Raisen,*[102] a wife sued her husband and his insurer for damages arising out of his operation of an automobile in an allegedly negligent manner so as to cause her injury. In *Raisen,* the Florida Supreme Court upheld the immunity, and in addressing the issue of fraud and collusion said:

> [I]f the lawsuit is not adversary and there is no real conflict of interest between the spouses ... there is a great probability of fraudulent or collusive claims. This is particularly true where the defendant spouse is insured and both spouses will benefit if the plaintiff spouse wins the lawsuit and enforces the claim against the insurance company. Under such circumstances, it is unrealistic to think that the defendant spouse will do all within his or her power to defeat the claim.[104]

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99. Casey, *The Trend of Interspousal and Parental Immunity-Cakewalk Liability,* 45 INS. COUNSEL J. 321 (1978). By "cakewalk liability" Mr. Casey means that there is truly no contest in interfamilial suits. The basis for this argument is that family members do not want to prevail over each other in court, particularly where the insurance company is destined to pay if the suit is won. *See* note 100 and accompanying text *infra.*

100. Casey, *The Trend of Interspousal and Parental Immunity-Cakewalk Liability,* 45 INS. COUNSEL J. 321 (1978). Mr. Casey states that:

> Our adversary system is developing a cakewalk (no contest) syndrome in parental and interspousal suits. During the pendency of suits of this kind, the true party litigants usually live in close family relationship. Thus, a new adversary system is developing and the only real contestants are the plaintiff and defendant jointly against the insurance carrier. The abrogation of interspousal . . . immunity results in verdicts which are really shared by the party litigants.

Id. at 321.

This position touches on the policy argument that if the immunity is abandoned, the natural and probable result is an increase in fraudulent and collusive suits by spouses against insurers. A contrary view is explored below. *See* notes 106-26 and accompanying text *infra.*

101. In upholding the doctrine of interspousal immunity, the courts in the following cases have cited as support for their decision the proposition that interspousal immunity is necessary to prevent fraud and collusion: Burns v. Burns, 111 Ariz. 178, 526 P.2d 717 (1974); Thomas v. Herron, 20 Ohio St. 2d 62, 253 N.E.2d 772 (1969); Lyons v. Lyons, 2 Ohio St. 2d 243, 208 N.E.2d 533 (1965); Smith v. Smith, 205 Or. 286, 287 P.2d 572 (1955); Rubalcava v. Gisseman, 14 Utah 2d 344, 384 P.2d 389 (1963).

102. 379 So. 2d 352 (Fla. 1980).

103. *Id.* at 353.

104. *Id.* at 355. The reasoning of the *Raisen* court is typical of most courts that have upheld the immunity as necessary to prevent fraud and collusion. Similarly, this view parallels that of the insurance companies. *See* notes 99-100 and accompanying text *supra.*

Even those courts that have abrogated or limited the immunity agree that the issues of fraud and collusion are difficult to resolve.[105]

Concededly, there is a possibility of spurious claims in interspousal cases but, the mere threat of such suits should not bar *all* actions between spouses. If the courts were to close the door to all lawsuits which merely present a *possibility* of fraud or collusion, it is unlikely that many civil claims would get to court, particularly where insurance companies are involved.[106] Moreover, the efficacy of the judicial process is supposed to ferret out the fraudulent claims from the meritorious ones.[107] This is the very essence of the judicial function.[108]

Although the potential for fraudulent and collusive suits exists in interspousal actions, there also exist several methods that courts could, and most likely should, adopt that will reduce the probability of these suits from succeeding. One method that could be adopted to reduce the probability of a fraudulent suit from succeeding is to "[impose] a burden of proof commensurate with the dimensions of fraud perceived in the particular case or situation."[109] For example, the burden of proof in a typical civil action is that a party must prove the elements of his claim by a "preponderance of the evidence."[110] However, if fraud or collusion is suspected in a civil case, such as one between spouses, the court could adopt a tougher standard of proof such as "clear and con-

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105. *See* Klein v. Klein, 58 Cal. 2d 692, 376 P.2d 70 (1962); Beaudette v. Frana, 285 Minn. 366, 173 N.W.2d 416 (1969); Immer v. Risko, 56 N.J. 482, 267 A.2d 481 (1970); Rupert v. Stein, 90 Nev. 397, 528 P.2d 1013 (1974). In *Immer*, the New Jersey Supreme Court abandoned the immunity for injuries arising out of motor vehicle accidents, but not before conceding that "there is a possibility of fraud or collusion in every negligence action where the tortfeasor is insured. The degree of danger depends upon the relationship of the parties. The closer the parties are to each other, the greater is the danger. . . . In the family context, the danger is the greatest of all." Immer v. Risko, 56 N.J. 482, 490, 267 A.2d 481, 485 (1970).

106. *See generally* Shook v. Crabb, 281 N.W.2d 616 (Iowa 1979); Merenoff v. Merenoff, 76 N.J. 535, 388 A.2d 951 (1978); Immer v. Risko, 56 N.J. 482, 267 A.2d 481 (1970). *See also* McCurdy, *Personal Injury Torts Between Persons in Domestic Relation*, 43 HARV. L. REV. 1030 (1930).

107. *See, e.g.*, Klein v. Klein, 58 Cal. 2d 692, 376 P.2d 70 (1962) (Plaintiff's claim for injuries due to husband's negligence in maintaining slippery boat deck held meritorious); Freehe v. Freehe, 81 Wash. 2d 183, 500 P.2d 771 (1974) (Plaintiff's claim for injuries due to wife's negligent maintenance of a tractor held meritorious).

108. The underlying policy reason usually expressed by courts which believe the judicial process will succeed in exposing the bad claims is that "[w]e ought not to deny what should be due the many for fear that the judicial process cannot weed out the spurious claims of a few." Cohen v. Kaminetsky, 36 N.J. 276, 283, 176 A.2d 483, 487 (1961).

109. Aiello v. Knoll Golf Club, 64 N.J. Super. 156, 160-61, 165 A.2d 531, 535 (1960). In *Aiello*, the court required the "clear and convincing" standard applied in order to prove a parol gift of land. This imposition of a higher burden of proof is commensurate with the potential for fraud in suits alleging parol gifts of land. This case sufficiently lends support to the proposition that where there is a greater potential for fraud, a higher burden of proof should be imposed. For a general discussion of burden of proof, *see* C. MCCORMICK, HANDBOOK OF THE LAW OF EVIDENCE §§ 339-40 (2d ed. 1972).

110. C. MCCORMICK, *supra* note 109, at § 339 (2d ed. 1972).

vincing" evidence.[111] This is the standard most courts require to prove civil fraud,[112] and this standard has been useful in many recent cases to "forestall trumped-up prayers for relief. . . ."[113] By imposing the more difficult burden of proof, the probability of fraudulent or collusive suits succeeding should dramatically decrease, thereby eliminating fraud and collusion as reasons for the maintenance of interspousal immunity.

Another method that courts could implement to reduce the chances of fraudulent or collusive suits from succeeding is to allow insurance companies to acknowledge their presence in the lawsuit.[114] This would enable the insurance company to treat the insured defendant-spouse as a hostile witness.[115] The defendant-spouse, being a hostile witness, could then have his credibility attacked to show "that the husband and wife may be scheming to gain a recovery against the insurance carrier."[116]

Jurisdictions which have abolished the immunity do not appear to be experiencing a deluge of actions between spouses.[117] If, as opponents to the abolition say, removal of the immunity will make recovery in tort actions between spouses as simple as walking into court and getting a judgment, without a real contest, why have the majority of jurisdictions that have limited or abolished the immunity yet to experience such abuses? There are several answers to this question.

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111. *Id.* § 340. For cases using that standard, *see* Aiello v. Knoll Golf Club, 64 N.J. Super. 156, 165 A.2d 531 (1960); Sommers v. Zuck, 139 N.J. Eq. 245, 50 A.2d 648 (1947).

112. *See* Holley Coal Co. v. Globe Indus. Co., 186 F.2d 291 (4th Cir. 1950) (suit for fraud concerning employee's fidelity bond); Breyard v. Griffin, 89 Ariz. 42, 358 P.2d 155 (1961) (election fraud). *See generally* C. MCCORMICK, *supra* note 109, at § 340 (2d ed. 1972).

113. Aiello v. Knoll Golf Club, 64 N.J. Super. 156, 159, 165 A.2d 531, 534 (1960). *See* Sarte v. Pidoto, 129 N.J. Super. 405, 324 A.2d 48 (1974) ("clear and convincing" evidence required to recover support from putative father).

114. Ford, *Interspousal Liability for Automobile Accidents in the Conflict of Laws: Law and Reason Versus the Restatement,* 15 U. PITT. L. REV. 397, 421-23 (1954). By "acknowledging their presence" it is meant that the jury would be informed that the insurance company was defending the action and that it is ultimately liable.

115. *Id.* at 423. It is here that Ford states that "[t]he few states that have permitted this procedure have apparently found the law of evidence adequate to deal with the problem of collusion in a manner that gives maximum protection to all concerned." *Id.* For further analysis *see* Lassiter, *Direct Actions Against the Insurer,* 1949 INS. L. J. 414; Leigh, *Direct Actions Against Liability Insurers,* 1949 INS. L.J. 634.

116. Merenoff v. Merenoff, 76 N.J. 535, 555, 388 A.2d 951, 961 (1978); Note, *Torts-Immunity from Liability-Doctrine of Interspousal Immunity-Married Woman's Property Act of 1893-Pre Marital Tort-Separate Property,* 13 DUQ. L. REV. 156 (1974).

117. *See* Ford, *supra* note 114, at 421. *See also* Richard v. Richard, 131 Vt. 98, 105, 300 A.2d 637, 641 (1972). In abandoning the immunity for injuries arising out of motor vehicle accidents, the *Richard* court said:

> Despite the doleful prediction by many courts that the permitting of tort actions between husband and wife would result in a flood of litigation, there has been nothing to show that in the states which have permitted such action the courts are deluged with a greater volume of litigation than in the states which deny such action.

Id.

First, if insurance companies are fearful of collusive or fraudulent actions, they can limit the scope of coverage or make appropriate adjustments in premiums.[118] Moreover, most insurance policies include a provision which gives the insurer the right to disclaim liability when there is a lack of cooperation by the insured.[119] This lack of cooperation may be evidenced by contradictory or inconsistent statements.[120]

Second, the existence of collusion may be established through prompt and effective investigation by insurance companies.[121] If the facts are quickly established and recorded, any deviation from them at a later date may be indicative of an attempt at fraud or collusion. If this is the case, an insurer would be well advised to file a liability disclaimer.[122]

Third, it is important to note that any attempt at collusion, even one that fails, is punishable as a criminal offense.[123] When the ample resources of an insurance company, intimidation by cross-examining counsel and the likelihood of a criminal charge are weighed against the slight chance of recovering in a fraudulent interspousal suit, it becomes apparent that few married couples would be willing to venture into a risk-ridden court battle.

In light of today's modern scientific investigative procedures and the liberal interpretation given broad based discovery rules, it can hardly be said that the threat of fraudulent or collusive claims justifies a denial of any recovery that would otherwise be compensable if it were not for the marriage.[124] Furthermore, the trial court has much discretion when instructing a jury on the credibility of witnesses and the amount of weight to be given their testimony.[125] The testimony of both the husband and wife is vulnerable to impeachment at trial on the grounds of bias, in-

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118. *See* Shook v. Crabb, 281 N.W.2d 616, 620 (Iowa 1979).

119. Virtually all insurance policies contain a provision which permits cancellation of the policy when fraud is evidenced. *See* Sorensen v. Sorensen, 369 Mass. 350, 364, 339 N.E.2d 907, 915 (1975). In abrogating parent-child immunity, the *Sorensen* court said: "[T]he insurance company will not be without resources to defend itself against collusion. Under provisions ordinarily included in an insurance policy, the insurance company has the right to disclaim liability when there is a lack of cooperation with the insurance company on the part of the insured." *Id.*

120. *Id.* This lack of cooperation could also be evidenced in a more obvious way, such as through the insured party giving false statements to the insurance company. In *Sorensen* the court said that "deliberate and willful falsification of material facts violates the term of the policy." *Id.*

121. *Id.* at 365, 339 N.E.2d at 915.

122. *Id.* The *Sorensen* court was quick to note that "[t]he parent is usually represented by counsel provided by the insurance company. Such counsel is ever alert to protect the interests of the insurance company and ready to expose any attempts at collusive and fraudulent conduct." *Id.*

123. *See, e.g.*, MASS. GEN. LAWS ANN. ch. 176D, § 3 (West Supp. 1980).

124. *See* Rupert v. Stienne, 90 Nev. 397, 401-02, 528 P.2d 1013, 1016 (1974). In *Rupert*, the court said "[p]hotography, scienific investigative procedures, pretrial discovery, cross exam, etc., are usually adequate safeguards against the fabricated claim." *Id.* at 402, 528 P.2d at 1016.

125. *See* Brooks v. Robinson, 259 Ind. 16, 22, 284 N.E.2d 794, 797 (1972) (suit by wife against husband for injuries sustained in auto accident held maintainable). The *Brooks* court said "[t]he trial court's responsibility, indeed, its duty, is to properly instruct the jury on the credibility of witnesses and the rules governing the weight of evidence will remain unchanged . . . it cannot be presumed that the juries will check their common sense at the courtroom door." *Id.*

terest and prejudice.[126] To adopt the view that interspousal lawsuits result in fraudulent or collusive claims necessarily requires acceptance of the blanket assumption that our court system is wholly incapable and without means to deal with such litigation.

A second problem of fundamental concern that is created by the abolition of interspousal immunity lies in determining what standard of care must be applied to the spouses. Should the ordinary duty of "reasonable care under all the circumstances,"[127] applicable to strangers, apply to husband and wife? At least one court that has abolished the immunity for personal injuries arising out of negligence apparently believes that it should.[128]

Merenoff v. Merenoff[129] is illustrative of the fact that courts may not feel the need to adopt a special standard of care. In *Merenoff,* the Supreme Court of New Jersey abolished the immunity for personal injuries between spouses without adopting a standard of conduct requiring more than a breach of reasonable care.[130] However, some commentators disagree with the retention of the ordinary standard of care for spouses. They have indicated that the "intimacy of the family relationship may also involve some relaxation in application of the concept of reasonable care, particularly in the confines of the home."[131] Such a reduced standard would hold one spouse liable to the other only where the offending spouse was grossly negligent or had engaged in willful, wanton misconduct.[132]

In abrogating interspousal immunity, Massachusetts should "adopt a

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126. *Id.*

127. W. PROSSER, *supra* note 1, at § 32 (4th ed. 1971).

128. Merenoff v. Merenoff, 76 N.J. 535, 388 A.2d 951 (1978); Immer v. Risko, 56 N.J. 482, 267 A.2d 481 (1970).

129. 76 N.J. 535, 388 A.2d 951 (1978).

130. *Id.* at 559, 388 A.2d at 963. For the facts and holding of *Merenoff, see* notes 72-73 and accompanying text *supra.* In reference to the standard of care which should apply, the court said:

> We do not discern against this background a need to adopt a special standard of care different from the ordinary duty of reasonable care under all the circumstances. In effect, the ordinary standard of care as between married people, correctly and fairly applied, will reflect the root fact and realities of married life.

Id. The court further stated, however, "[i]f time reveals flaws in this approach, we will not hesitate to select a . . . standard of care, adequate to meet the problem." *Id.*

131. RESTATEMENT (SECOND) OF TORTS § 895F, Comment h (1979).

132. In defining an interspousal standard of care, it is useful to consider by analogy the standards endorsed by commentators and courts in the area of parent-child immunity. In rejecting parent-child immunity, some commentators have adopted the standard of the "reasonably prudent parent." *Id.* § 895G, Comment k. In so doing, however, they have recognized the existence of parental discretion and thus require that the conduct of the parent be "palpably unreasonable" before imposing liability. *Id.* This "palpably unreasonable" requirement appears, in effect, to endorse a reduced standard of care. Such a standard is properly applicable to the interspousal relationship, for it seems patently illogical to hold any family member to the same standard of care as ordinary strangers. After all "[i]t is a matter of common knowledge that the conduct of husband and wife toward each other generally is different from that of strangers." McCurdy, *Torts Between Persons in Domestic Relation,* 43 HARV. L. REV. 1030, 1055 (1930).

uniform standard of liability which would require more than a breach of ordinary care."[133] This would not only have the added effect of discouraging many frivolous claims that arise out of the daily interactions of husband and wife, but it would also protect the marriage relationship from needless tensions that would otherwise be present with the ordinary standard of care imposed.[134] Without the imposition of a reduced standard of care, the abolition of interspousal immunity may, in some cases, have a "chilling effect"[135] upon the marital relationship.

In *Brown v. Brown,*[136] the Massachusetts Supreme Judicial Court seemed to be leaning toward an approach other than imposing a strict standard of care as a means of limiting the types of actions spouses may bring against each other. Relying on its language in *Lewis v. Lewis,*[137] the court in *Brown* stated that "conduct, tortious between strangers, may not be tortious between spouses because of the mutual concessions implied in the marital relationship."[138] Apparently what the court is saying is that implicit in the marriage vows are agreements to endure certain types of conduct which would otherwise be tortious. The flaw in this theory is that no definitive statement is provided by the court as to what constitutes those mutual concessions. Spouses cannot be sure, on the basis of *Brown,* for what degree of conduct they will be held legally liable. Apparently, the court will develop this concept on a case-by-case basis,[139] but the better approach is to adopt a reduced standard of liability that would hold spouses liable only for conduct that is clearly abusive.

CONCLUSION

Massachusetts has taken a major step in the right direction in allowing suits between spouses seeking recovery of damages for personal injuries. Interspousal immunity is an anachronism that does not promote

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133. Immer v. Risko, 56 N.J. 482, 491, 267 A.2d 481, 486 (1970), *citing* Cohen v. Kaminetsky, 36 N.J. 276, 176 A.2d 483 (1961).

134. This argument implies that if the reduced standard of care is imposed upon spouses when the immunity is discarded, this will promote tranquility. This is due to the fact that spouses will only be legally accountable to each other for those injuries that are clearly not within, or attributable to, the marital relationship.

135. By this it is meant that husbands and wives may have to alter their behavior patterns for fear of judicially imposed reprisals. This could result in an undue burden on the relationship in that spouses will, in effect, have to be extra diligent in their interactions with each other. The reason for this extra effort is that there is a greater likelihood of injury between spouses who live and share virtually everything together, than there is between strangers whose sole acquaintance is often attributable to the harm inflicted.

136. 80 Mass. Adv. Sh. 1779, 409 N.E.2d 717 (1980).

137. 370 Mass. 619, 351 N.E.2d 526 (1976).

138. Brown v. Brown, 80 Mass. Adv. Sh. 1779, 1779, 409 N.E.2d 717, 718 (1980), *quoting* Lewis v. Lewis, 370 Mass. 619, 629-30, 351 N.E.2d 526, 532 (1976).

139. Brown v. Brown, 80 Mass. Adv. Sh. 1779, 1781, 409 N.E.2d 717, 719 (1980).

the fundamental tenet of our judicial system: to afford a remedy for every cognizable wrong.

When cases similar to *Brown v. Brown*[140] reach the Supreme Judicial Court of Massachusetts, the court should be very specific in its description of what conduct will give rise to a cause of action between spouses. Furthermore, the court should adopt a standard of liability in all interspousal actions which requires "more than a breach of ordinary care."[141]

Finally, procedures such as the adoption of a higher burden of proof, revealing of the insurance company's status in the case, delimiting of the scope of coverage, use of disclaimers, and prompt and effective investigation by insurers, should be adopted and incorporated into every lawsuit between spouses. If these procedures are adopted, insurance companies have nothing to fear from interspousal lawsuits.

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140. 80 Mass. Adv. Sh. 1779, 409 N.E.2d 717 (1980).

141. Immer v. Risko, 56 N.J. 482, 491, 267 A.2d 481, 486 (1970), *citing* Cohen v. Kaminetsky, 36 N.J. 276, 176 A.2d 483 (1961).

United States v. Mendenhall: DEA Airport Search and Seizure

In 1974, the Drug Enforcement Administration (DEA) initiated an airport surveillance program designed to intercept drug traffickers at our nation's airports.[1] Since this time, the federal courts have been besieged with litigation challenging the propriety of search and seizures performed by DEA agents at these airports.[2] However, courts have generally given deference to DEA expertise in ferreting out illicit drug traffic, and have therefore not strictly scrutinized the constitutional questions presented by DEA procedures.[3] This kind of judicial respect is difficult to comprehend, especially when one examines the methodology of DEA searches and seizures.

Without question, the most constitutionally suspect DEA procedure is their use of the drug-courier profile.[4] This profile is a DEA-created

1. Detroit Metropolitan Airport was the site of the first Drug Enforcement Administration investigative program in 1974. It has since proliferated to more than twenty major airports around the country. *See* Kadish & Bronfman, *Drug Courier Characteristics: A Defense Profile,* 15 TRIAL 47, 48 (May 1979). *See also* Government's Petition for Certiorari at 2-3 n.1, United States v. Mendenhall, 596 F.2d 706 (6th Cir.), *cert. granted,* 444 U.S. 822 (1979).

2. Cases that have challenged DEA searches and seizures would include: United States v. Smith, 574 F.2d 882 (6th Cir. 1978); United States v. Ballard, 573 F.2d 913 (5th Cir. 1978); United States v. Canales, 572 F.2d 1182 (6th Cir. 1978); United States v. Pope, 561 F.2d 663 (6th Cir. 1977); United States v. Lewis, 556 F.2d 385 (6th Cir. 1977), *cert. denied,* 434 U.S. 1011 (1978); United States v. Gill, 555 F.2d 597 (6th Cir. 1977); United States v. Craemer, 555 F.2d 594 (6th Cir. 1977); United States v. McCaleb, 552 F.2d 717 (6th Cir. 1977); United States v. Westerbann-Martinez, 435 F. Supp. 690 (E.D.N.Y. 1977); United States v. Dewberry, 425 F. Supp. 1336 (E.D. Mich. 1977); United States v. Chambliss, 425 F. Supp. 1330 (E.D. Mich. 1977); United States v. Floyd, 418 F. Supp. 724 (E.D. Mich. 1976); United States v. Van Lewis, 409 F. Supp. 535 (E.D. Mich. 1976).

3. This phenomenon has been especially apparent in recent years. *See, e.g.,* Vasquez v. United States, 612 F.2d 1338 (2d Cir. 1979); United States v. Price, 599 F.2d 494 (2d Cir. 1979); United States v. Rico, 594 F.2d 320 (2d Cir. 1979). These cases exemplify the growing trend of the federal courts to defer to the "trained eye" of the DEA agent in constructing criminal activity out of seemingly innocent behavior.

4. Typically, a court will acknowledge that use of the profile alone does not provide constitutionally sufficient grounds for stopping the suspect. It will then discuss the special training of the agent and validate the stop as reasonable under the circumstances. *See* note 3 *supra.*

tool which enables the agent to construct a hypothesis of criminal activity on the part of the airline traveler out of a combination of innocent events. It consists of "such elements as round trips of short duration between cities delineated as major drug centers, purchasing tickets with cash (and particularly small bills), no baggage except carryon items, deplaning last and, in general, nervous or unusual behavior."[5] Secondary characteristics of the profile include making a telephone call immediately after arrival, use of a taxicab rather than being met by family or friends, a false phone number given to the airline reservation service and association with a known narcotics dealer.[6] This profile is informal and unwritten and there is a tendency for the components of the profile to change from case to case.[7]

The use of the drug-courier profile as a basis for stopping the airline traveler and soliciting consent to conduct a strip-search survived judicial scrutiny, despite the fact that the practice defies traditional fourth amendment[8] analysis. In *United States v. Mendenhall,*[9] the United States Supreme Court was called upon to resolve some of the troubling constitutional questions posed by such airport encounters. However, the *Mendenhall* decision failed to meaningfully address several aspects of DEA airport procedures.

This Comment will demonstrate that, with regard to airport search and seizures, the *Mendenhall* decision fails to bring the often questionable practices of the DEA under constitutional control. Because of its reluctance to interfere with an effective means of dealing with elusive criminal activity, the Court has rendered a decision which is difficult to reconcile with established fourth amendment principles. This Comment will focus upon the Court's analysis of the DEA stop and its treatment of issues relating to consent. The article will then suggest reasons for the Court's cursory treatment of important constitutional questions and assess the effect this decision may have on our future expectations of privacy.

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5. Vasquez v. United States, 612 F.2d 1338, 1350 (2d Cir. 1979), Government's Petition for Certiorari at 3 n.2, United States v. Mendenhall, *quoting* 596 F.2d 706 (6th Cir.), *cert. granted,* 444 U.S. 822 (1979).

6. *See* Kadish & Bronfman, *supra* note 1, at 48. Note that this last element, association with known narcotics dealers, is probably the most logical element among those in the profile, and yet is still invalid as a basis for reasonable suspicion. *See* Sibron v. New York, 392 U.S. 40 (1968).

7. *See* United States v. Westerbann-Martinez, 435 F. Supp. 690, 697-98 (E.D.N.Y. 1977).

8. The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. amend. IV.

9. 100 S. Ct. 1870 (1980).

I. STATEMENT OF THE CASE

The defendant, Sylvia Mendenhall, was a 22 year old black woman with an eleventh grade education.[10] Two DEA agents operating out of District Metropolitan Airport in Detroit observed the defendant deplaning from a flight which originated in Los Angeles. The agents determined that Mendenhall fit their drug-courier profile and therefore decided to investigate. They approached her, identified themselves, and asked to see her identification and airline ticket.[11] Mendenhall complied, producing her driver's license as well as an airline ticket issued in another name.[12] After some brief questioning, she was asked to accompany one of the agents to the airport DEA office. At the office, Mendenhall was asked to submit to a strip-search and was told that she had the right to refuse if she wished.[13] When a policewoman arrived and asked her to remove her clothes, the defendant protested, voicing her concern about catching her next flight.[14] She was then advised that if she was not carrying narcotics there would be no problem. Mendenhall complied and began to disrobe. Subsequently, two packages were discovered in her undergarments, one of which appeared to contain heroin.[15] She was then arrested for possession of heroin.[16]

The defendant moved to suppress the evidence, challenging the validity of the airport encounter.[17] The Federal District Court for the Eastern District of Michigan denied the defendant's motion and held that the agent's conduct amounted to a permissible investigative stop based on facts justifying a suspicion of criminal activity.[18] The court further found that Mendenhall voluntarily consented to a search.[19] The Sixth Circuit Court of Appeals reversed, finding that there was no valid consent.[20] The United States Supreme Court granted certiorari to determine whether Mendenhall's fourth amendment rights were violated.[21]

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10. United States v. Mendenhall, 100 S. Ct. 1870, 1872 (1980).
11. *Id.* at 1871.
12. *Id.* at 1871-72.
13. *Id.* at 1872.
14. *Id.*
15. *Id.*
16. *Id.*
17. United States v. Mendenhall, No. 6-8028 (E.D. Mich. Oct. 18, 1976). Sylvia Mendenhall was then convicted of possession of a dangerous controlled substance with intent to distribute in violation of 21 U.S.C. § 841(a)(1) (1970). She was sentenced to eighteen months in prison followed by three years of special parole. *See* Brief in Opposition to Petition for Certiorari at 11, United States v. Mendenhall, 596 F.2d 706 (6th Cir.), *cert. granted,* 444 U.S. 822 (1979).
18. *Id.*
19. *Id.*
20. 596 F.2d 706 (6th Cir. 1979).
21. 100 S. Ct. 1870, 1872 (1980).

II. THE STOP

A. *Why Fourth Amendment Analysis?*

The plurality decision in *Mendenhall* raises more questions than it answers concerning the circumstances justifying an investigative stop. This is because the Court was divided on the question of whether a stop ever occurred. Justices Stewart and Rehnquist determined that no stop occurred for fourth amendment purposes.[22] The concurring opinion of Justices Powell, Burger, and Blackmun assumed *arguendo* that a stop did take place but found that there was no fourth amendment problem because Mendenhall consented to both the stop and the subsequent search.[23] The different approaches used by the Court present an analytical problem to lower federal courts charged with deciding the propriety of DEA airport stops. Nevertheless, one thing is clear: regardless of the analysis employed, the end result is a judicial endorsement of DEA airport procedures.[24]

In deciding the validity of the stop in *Mendenhall,* the Court relied upon the landmark case of *Terry v. Ohio.*[25] In *Terry,* a plain-clothes policeman observed three men who appeared to be "casing" a store for a hold-up. When the officer approached them and asked what they were doing, one of the suspects "mumbled something." The officer then spun the suspect around, frisked him, and retrieved a handgun from his person.[26] The Court's decision that this action was constitutional marked the first time a search and seizure was justified on less than probable cause. As such, the decision was necessarily limited. Specifically, the *Terry* Court held that when a policeman observes unusual conduct which suggests the existence of criminal activity, *and* the person observed is reasonably believed to be armed and dangerous, the officer may conduct a limited "pat-down" search for the safety of himself and others.[27]

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22. It is significant that Justices Stewart and Rehnquist entertained the question of whether a fourth amendment seizure took place at all when DEA agents first approached and questioned Sylvia Mendenhall, because neither of the courts below considered the issue. It is not customary for the Court to consider the issue raised for the first time at the final appeal. *Id.* at 1875 n.5, *citing* Adickes v. Kress & Co., 398 U.S. 144, 147 n.2 (1970).

23. *Id.* at 1880 (Powell, Burger & Blackmun, JJ., concurring).

24. That this has, indeed, been the practical effect of the decision is demonstrated by the subsequent federal court case, United States v. Fry, 622 F.2d 1218 (5th Cir. 1980). This case noted that *Mendenhall* still leaves a question as to which is the proper mode of analysis for legitimizing a DEA stop: (1) take it out of the fourth amendment or (2) look to the reasonableness of the stop in light of the governmental interest. The *Fry* court confessed that it found no violation of the fourth amendment because the result would be the same under either approach. *Id.* at 1220-21.

25. 392 U.S. 1 (1968).

26. *Id.* at 7.

27. *Id.* at 24.

Justices Stewart and Rehnquist argued that, according to *Terry*, a person is seized only when his freedom is restrained by means of physical force or show of authority.[28] While the Justices have accurately reproduced language from the *Terry* decision,[29] they have too narrowly construed the breadth of fourth amendment protection. *Terry* was expressly limited to protective searches.[30] Any attempt to extrapolate more from the decision must recognize, at least, that the *Terry* Court endorsed a broad construction of the fourth amendment. It noted that "the fourth amendment governs all intrusions by agents of the public upon personal security."[31] Thus, Justices Stewart and Rehnquist relied upon a limited decision, ignoring the thrust of the *Terry* opinion. This conclusion is born out by an examination of *Terry* and its progeny.

Terry was the first case to extend the scope of fourth amendment analysis to encompass detentions that were somewhat less intrusive than a full arrest.[32] The decision applied a balancing test to this new category of seizures in which the government interest was weighed against the individual privacy interest.[33] The Court obviously intended that this test be applied to the police officer's initial decision to approach an individual. It explicitly stated:

> The danger in the logic which proceeds from the distinctions between a . . . "stop" and an "arrest," or "seizure" of the person . . . is twofold. . . . It seeks to isolate from constitutional scrutiny the *initial stages of contact* between the policeman and the citizen. And by suggesting a rigid all-or-nothing model of justification and regulation under the Amendment, it obscures the utility of limitations upon the scope, *as well as the initiation* of police action as a means of constitutional regulation.[34]

While *Terry* held that a suspect may be seized for the purpose of con-

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28. Justices Stewart and Rehnquist concluded that no restraint could be found because the events took place in a public concourse and because the agents wore no uniforms, displayed no weapons, and merely requested information. United States v. Mendenhall, 100 S. Ct. 1870, 1877 (1980).

29. *See* Terry v. Ohio, 392 U.S. 1, 19 n.16 (1968).

30. The *Terry* Court was concerned with an officer's self-protection against potentially dangerous criminals, and therefore conceded a need for limited investigative stops to detect weapons. *Id.* at 30.

31. *Id.* at 18 n.15. This point was explicitly stated only a year after the *Terry* decision in Davis v. Mississippi, 394 U.S. 721 (1969). In *Davis*, the Court extended fourth amendment protection to all intrusions "whether they are termed 'arrests' or 'investigative detentions.' " *Id.* at 726-27.

32. *See* Note, *Fourth Amendment Search and Seizures:* Brown v. Texas, 7 AM. J. CRIM. L. 385 (1979). *See also* Justice Brennan's discussion of the significance of *Terry* in Dunaway v. New York, 442 U.S. 200, 207 (1979).

33. The *Terry* Court, *quoting* Camara v. Municipal Court, 387 U.S. 523, 534-37 (1967), stated: "there is 'no ready test for determining reasonableness other than by balancing the need to search [or seize] against the invasion which the search [or seizure] entails.' " Terry v. Ohio, 392 U.S. 1, 21 (1968).

34. *Id.* at 17 (emphasis added).

ducting a frisk if the officer has both reasonable suspicion of criminal activity *and* reasonable belief that the suspect is armed,[35] the case of *Adams v. Williams*[36] bifurcated this analysis. In *Adams*, the Supreme Court of the United States set up a two-tiered analysis for determining the propriety of a stop and frisk. The Court first considered whether the brief stop of a suspicious individual, in itself, was reasonable under the circumstances.[37] Once this first inquiry was answered affirmatively, the *Adams* Court asked if the officer had reasonable suspicion that the suspect was armed.[38] In *Adams,* the pat-down search was upheld because there was reasonable suspicion to stop and *then* to search for weapons.[39]

Three years later, in *United States v. Brignoni-Ponce,*[40] the Court acknowledged what it had ignored in *Adams*, that is, that *Terry* had expressly reserved ruling on the question of purely investigative stops.[41] *Brignoni-Ponce* was limited to searches by Immigration agents for illegal aliens near the border. In disapproving of roving border stops, the Court said, "the fourth amendment applies to all seizures of the person, including seizures that only involve brief detentions short of traditional arrest."[42] This is significant because it extended fourth amendment analysis, applying the lesser reasonable suspicion standard of *Terry,* to investigative stops where there was no reason at all to believe the suspect was dangerous.[43]

In 1979 two landmark decisions reaffirmed that reasonable suspicion, supported by *Terry's* requirement of "specific articulable facts," is necessary to justify an investigative stop. First, the Court invalidated random "license checks" in *Delaware v. Prouse.*[44] The Court specifically held that random stops of motor vehicles were unconstitutional absent reasonable suspicion of criminal activity or the existence of observ-

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35. *See* text accompanying note 27 *supra.*

36. 407 U.S. 143 (1972). In *Adams,* a police officer received information from an unidentified informant of unproven reliability that a man fitting a certain description could be found sitting in a nearby vehicle with a loaded handgun on his person. The officer acted on the tip and seized the weapon. The Court upheld the search and seizure even though it was performed on less than probable cause. Still, fourth amendment analysis was applied to the officer's decision to approach the suspect. The encounter was justified because the officer was found to have had at least a reasonable suspicion of criminal activity.

37. *Id.* at 146.

38. *Id.* at 148.

39. *Id.* at 148, 149. *See also* W. RINGEL, SEARCHES AND SEIZURES, ARRESTS & CONFESSIONS, 13.7 (2d ed. 1979).

40. 422 U.S. 873 (1975).

41. United States v. Brignoni-Ponce, 422 U.S. 873, 880-81 (1975). *See also* W. RINGEL, *supra* note 39, at 13.8.

42. United States v. Brignoni-Ponce, 422 U.S. 873, 878 (1975).

43. W. RINGEL, *supra* note 39, at 13.8.

44. 440 U.S. 648 (1979). In *Prouse,* the Court stated that the governmental interest in performing random license checks was no greater than that asserted on behalf of the roving border searches in *Brignoni-Ponce. Id.* at 657.

able motor vehicle violations. The next important decision followed soon after *Prouse.* In *Brown v. Texas*[45] a suspect was stopped in a high crime area for no articulable reason. After refusing to identify himself to the police officer, the suspect was convicted of violating a Texas statute requiring disclosure of such information upon demand.[46] The Court reaffirmed *Terry* and *Brignoni-Ponce* and explicitly held that a street stop for the sole purpose of obtaining identification was a detention requiring reasonable suspicion of criminal activity based on objective facts.[47]

In *Mendenhall,* Justices Stewart and Rehnquist acknowledged the force of the *Brown* decision. They maintained, however, that the facts of *Mendenhall* were distinguishable.[48] They stated that the seizure in *Brown* did not occur until the defendant attempted to leave and met with physical resistance from the questioning officers.[49] It is perhaps understandable that this interpretation is offered no textual support, as it is nowhere to be found in the *Brown* decision. In *Brown* the Court stated that the seizure occurred when the officer detained the suspect in order to elicit information and in no way did the Court consider the physical resistance to the officers as being germane to the seizure.[50]

B. The Meaning of Reasonable Suspicion

It is clear that an officer must have "reasonable suspicion, based on objective facts, that the individual is involved in criminal activity" prior to detaining a suspect for questioning.[51] The question still remains whether in *Mendenhall* such reasonable suspicion was present. The most obvious starting point is with the drug-courier profile. The

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45. 443 U.S. 47 (1979).

46. *Id.* at 49.

47. *Id.* at 50. *Brown,* a unanimous decision, seemed to cement the reasonable suspicion test as the appropriate means of evaluating a policeman's decision to initiate an encounter. The sweep of the decision caused at least one commentator to conclude that *Brown* was an example of the Court's intention to refrain from taking that "long step down the totalitarian path." *See* Note, *Fourth Amendment Search and Seizures:* Brown v. Texas, 7 AM. J. CRIM. L. 385, 392 (1979), *quoting* Terry v. Ohio, 392 U.S. 1, 38 (1968). It would seem, in light of the *Mendenhall* decision, the author's conclusion was premature.

48. United States v. Mendenhall, 100 S. Ct. 1870, 1878 (1980). Justices Stewart and Rehnquist attempted to justify their incongruous treatment of the stop in *Mendenhall* by insisting that, unlike the defendant in *Brown,* Sylvia Mendenhall was free to walk away. However, the decision to answer questions and not to walk away sounds very much like a question of consent. If so, there is a governmental burden of proving that Sylvia Mendenhall's actions were voluntary. *See* Schneckloth v. Bustamonte, 412 U.S. 218, 222 (1973), *citing* Bumper v. North Carolina, 391 U.S. 543, 548 (1968). This problem is best saved for later discussion, however, because consent is logically after the fact. Put another way, consent to remain and answer questions cannot be a reason to remove the stop from fourth amendment analysis. Rather, it is an exception to what would otherwise be an illegal stop. *See* notes 65-67 and accompanying text *infra.*

49. United States v. Mendenhall, 100 S. Ct. 1870, 1878 (1980).

50. Brown v. Texas, 443 U.S. 47, 52 (1979).

51. *Id.* at 51.

Mendenhall plurality never had the occasion to consider the constitutionality of the profile. Justices Stewart and Rehnquist asserted that the encounter did not constitute a fourth amendment stop.[52] Therefore, the Justices never applied the reasonable suspicion standard to the *Mendenhall* facts. The concurring opinion, while acknowledging that the drug-courier profile cannot substitute for reasonable suspicion of criminal activity, held that the facts as presented by DEA Agent Anderson constituted reasonable suspicion.[53] However, an examination of these facts makes it clear that Agent Anderson was relying on the drug-courier profile.

Without exception all federal courts, including those that have upheld DEA search and seizures, have condemned the use of the drug-courier profile as being constitutionally insufficient to warrant an investigative stop.[54] Accordingly, it becomes necessary to inquire whether there were any significant facts in *Mendenhall* aside from those characterized by this profile.[55] The facts related by the agent, and relied upon by the concurring Justices were as follows:

> The agents observed respondent as she arrived in Detroit from Los Angeles . . . [she] appeared very nervous . . . [and] deplaned only after the other passengers had left the aircraft . . . once inside the terminal [she] scanned the entire gate area and walked "very, very slowly" towards the baggage area . . . she claimed no baggage. Instead she asked a skycap for directions to the Eastern Airline ticket counter located in a different terminal. . . . Although she carried an American Airline ticket for a flight from Detroit to Pittsburgh, she asked for an Eastern Airline ticket . . . Agent Anderson testified that drug couriers frequently travel without baggage and change flights en route to avoid surveillance. On the basis of these observations, the agents stopped and questioned the respondent.[56]

Two things are obvious: (1) nothing in the foregoing description

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52. *See* notes 22, 28 & 48 and accompanying text *supra*.

53. United States v. Mendenhall, 100 S. Ct. 1870, 1880 (1980).

54. *See, e.g.*, United States v. Ballard, 573 F.2d 913 (5th Cir. 1978) (which held that profile characteristics are insufficient to create reasonable suspicion and, absent specific articulable facts, the stop based on the profile cannot be justified); United States v. Westerbann-Martinez, 435 F. Supp. 690, 698 (E.D.N.Y. 1977) (which stated that the drug-courier profile "is too amorphous and unreliable to be of any help"); United States v. Floyd, 418 F. Supp. 724 (E.D. Mich. 1976) (which held that the existence of a number of characteristics consistent with the drug-courier profile did not amount to sufficient articulable suspicion to justify even a limited identification stop). Even the United States Supreme Court, in a decision rendered immediately after *Mendenhall*, was forced to invalidate a DEA arrest where the appellate court decision to affirm the conviction rested explicitly on the fact that the defendant appeared to fit the drug-courier profile. Reid v. Georgia, 100 S. Ct. 2752 (1980). The lesson to be learned from this is that the reasonableness of the stop can be maintained by reference to the elements of the profile, as long as it is not actually invoked by name.

55. *See* notes 4-7 and accompanying text *supra*.

56. United States v. Mendenhall, 100 S. Ct. 1870, 1882 (1980).

added anything to the profile, and (2) none of this was inconsistent with perfectly innocent behavior. What might not be obvious is that, in fact, Sylvia Mendenhall's behavior should have, in the eyes of a seasoned airline traveler, negated whatever suspicions may have initially arisen. In his dissent, Justice White points out that an experienced observer would not infer that Mendenhall was traveling a long distance without luggage, or was changing tickets to avoid detection. Rather, it should have been plain that she was already ticketed through to Pittsburgh on a different airline.[57] In testimony not reproduced in the *Mendenhall* decision, Agent Anderson admitted that this possibility had never entered his mind. He also did not take the time to check the flight schedules to see if a stopover was necessary and whether switching airlines would be faster and, therefore, logical.[58] Because Agent Anderson was acting "only on his inchoate and unparticularized suspicion or 'hunch,' "[59] he saw only what he chose to see.[60] He did not draw "specific reasonable inferences which he is entitled to draw from the facts in light of his experience."[61]

C. *The Stop: Summing Up*

If one accepts the initial argument that precedent requires fourth amendment analysis of the stop in *Mendenhall,* then several issues which the Court avoided must be resolved. In order to establish reasonable suspicion in *Mendenhall,* one must either rely on the drug-courier profile, or discover additional facts sufficient to save the stop. Clearly, the drug-courier profile will not give rise to a reasonable suspicion of criminal activity. Furthermore, the *Mendenhall* opinion does not, on its face, provide any facts beyond those enumerated by the profile. Those facts not reproduced in the opinion would, in fact, negate any reasonable criminal inference. The Court's reversal of the decision of the Sixth

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57. *Id.* at 1887 (White, J., dissenting).

58. Transcript of Suppression Hearing (testimony of Agent Anderson), *reprinted in* Brief in Opposition to Petition for Certiorari, Index at 3 & 11, United States v. Mendenhall, 596 F.2d 706 (6th Cir.), *cert. granted,* 444 U.S. 822 (1979).

59. 100 S. Ct. 1870, 1887, *quoting* Terry v. Ohio, 392 U.S. 1, 27 (1968).

60. On cross-examination at the suppression hearing, Agent Anderson testified that virtually anything would have aroused his suspicions:

> Q. One of the things you consider significant is . . . when somebody does not go downstairs to get their luggage and merely goes off on the upper level, is that right?
> A. It can be.
> Q. But you consider that more significant than when someone goes down the escalators to the baggage area?
> A. No. . . . As I say, it can be. It depends on what they do. Either way, it could be significant. . . .

See Transcript of Suppression Hearing (testimony of Agent Anderson), *reprinted in* Brief in Opposition to Petition for Certiorari, Index at 15, United States v. Mendenhall, 596 F.2d 706 (6th Cir.), *cert. granted,* 444 U.S. 822 (1979).

61. 100 S. Ct. 1870, 1887 (1980), *quoting* Terry v. Ohio, 392 U.S. 1, 27 (1968).

Circuit Court of Appeals is not amenable to easy explanations.[62] To fully appreciate the Court's decision in *Mendenhall,* it is necessary to probe the still-evolving philosophy of the Court regarding the elements of consent which, in turn, must then be viewed within the context of the governmental interest.

III. CONSENT RECONSIDERED

In any given police-citizen encounter, the citizen may agree to comply with any directive of the officer, regardless of its propriety. It is well established that this consent on the part of the citizen may remove an otherwise illegal search or seizure from the purview of the fourth amendment.[63] The leading case defining the parameters of valid consent is *Schneckloth v. Bustamonte.*[64] *Schneckloth* is a landmark case. Its significance lies, in part, in the fact that it expressly rejected the contention that knowledge of the right to refuse consent was essential to its validity.[65] This represented a dramatic departure from the prior position of the federal and state courts,[66] and is a position which is still criti-

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62. 100 S. Ct. 1870 (1980). The reversal of the decision is, perhaps, not that surprising. From 1972 to 1976 alone, the Supreme Court reversed sixteen consecutive federal appellate holdings on search and seizure issues. In eleven of those cases, it explicitly upheld the law enforcement activities found illegal by the Courts of Appeals. This has caused one author of several fourth amendment commentaries to ask, "What's going on here?" Miles, *The Ailing Fourth Amendment: A Suggested Cure,* 63 A.B.A. J. 365, 367 (1977).

63. *See, e.g.,* Cambell v. United States, 151 F.2d 605 (6th Cir. 1945); United States v. Shules 65 F.2d 780 (2d Cir. 1933); DeLapp v. United States, 53 F.2d 627 (8th Cir.), *cert. denied,* 284 U.S. 684 (1931).

64. 412 U.S. 218 (1973).

65. Prior to *Schneckloth,* waiver of one's fourth amendment rights was viewed in the same manner as waiver of any other constitutional right. It required an "intentional relinquishment of a known right or privilege." W. RINGEL, *supra* note 39, at 9.3, *quoting* language from Johnson v. Zerbst, 304 U.S. 458 (1938). *Schneckloth* abandoned the waiver of constitutional rights standard. Writing for the majority, Justice Stewart was very clear that their reason for doing so was a practical one. He argued that the waiver standard should not be extended to the constitutional guarantee against unreasonable searches and seizures "because fourth amendment rights have nothing whatever to do with promoting the fair ascertainment of truth at a criminal trial." Schneckloth v. Bustamonte, 412 U.S. 218, 241-42 (1973). Justice Stewart, then, was only concerned with satisfying "the legitimate *need* for [consent-based] searches." *Id.* at 227 (emphasis added). He further stated that an officer may have no other "means of obtaining important and reliable evidence." *Id.* Obviously, the *Schneckloth* rationale justifies itself only after the fact. It is precisely because the consent-based search is such an effective law enforcement tool that the court should look hard and long at the issue. To afford consent-based searches or seizures only minimal constitutional safeguards will only encourage police to utilize what is probably the easiest means to achieve their ends, regardless of its constitutional sufficiency. That this has, indeed, become the case is born out by the fact that, next to stop-and-frisks, consent searches are the most prevalent form of warrantless searches. W. RINGEL, *supra* note 39, at 9.2.

At any rate, the test emerging from the *Schneckloth* revision addresses the "totality of circumstances," but relegates "knowledge" from the status of being a requisite to effective consent to that of being only one among many factors to be considered in deciding whether the consent was voluntary. 412 U.S. 218, 227 (1973).

66. Before *Schneckloth,* there existed a consensus among both state and federal courts that consent to search is a waiver of fundamental rights, and must therefore be knowing and intelligent. Miles, *Decline of the Fourth Amendment: Time to Overrule* Mapp v. Ohio?, 27 CATH. U. L.

cized today.[67] Nevertheless, the holding of *Schneckloth* is quite clear and it makes the concurring opinion of the Justices in *Mendenhall* superficially appealing. Since the State need not prove that the suspect was aware of her right to refuse to provide information, to accompany the agents, and to be searched, and since she did not resist, her actions must be deemed voluntary.

There are two problems with this conclusion. First, with regard to the issue of knowledge, it goes beyond the intent of *Schneckloth*. The *Schneckloth* decision did not remove the issue of knowledge from the proper analysis of consent, it simply indicated that knowledge would no longer be the *sin qua non* of a valid consent.[68] Knowledge of the right to refuse consent still remained as one factor to be considered in evaluating whether the consent was, in fact, voluntary. The Court in *Mendenhall* did not even consider the issue of knowledge within this lesser context.[69]

Another more compelling problem is presented by Sylvia Mendenhall's protest, prior to submitting to a strip-search, that she had a plane to catch.[70] Such a statement might permit an interpretation that this was an expression of resistance. Thus, while she was complying with the agent's request, she was acting against her will.[71] At the very least, the

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REV. 9, 19 (1977). For a pre-*Schneckloth* application of the waiver standard to fourth amendment rights, *see, e.g.*, Rosenthal v. Henderson, 389 F.2d 514 (6th Cir. 1968); United States v. Elliot, 210 F. Supp. 357 (D. Mass. 1962); United States v. Martin, 176 F. Supp. 262 (S.D.N.Y. 1959). *See also* Bumper v. North Carolina, 391 U.S. 543 (1968). Although *Bumper* was a third party consent case, it cited with approval language in United States v. Elliot, 210 F. Supp. 357 (D. Mass. 1962) that consent must constitute "an understanding, intentional, and voluntary waiver by the defendant of his fundamental rights under the Fourth Amendment." *Id.* at 360.

67. Even after the *Schneckloth* revision, some lower courts have refused to accept a lower standard of consent. *See, e.g.*, United States v. Abbot, 546 F.2d 883, 885 (10th Cir. 1977), in which the court decided the issue of consent without a single reference to *Schneckloth*. Instead, it employed an early Tenth Circuit precedent which held that consent must be intelligently given and that the courts must indulge every reasonable presumption against the waiver of fundamental constitutional rights. *See also* State v. Johnson, 68 N.J. 349, 346 A.2d 66 (1975) which held that knowing consent was required as a matter of state constitutional law; Case v. State, 519 P.2d 523 (Okla. Crim. 1974) which held that state law required Miranda warnings in order for consent to be voluntary once the defendant is under arrest; United States v. Willie Johnson, No. C.R. 78-262A (N.D. Ga. 1978) where the court invalidated consent, recognizing the testimony of a clinical psychologist that some persons are "passive-dependent" personalities and cannot distinguish between arrest situations and those where they are merely being questioned and need not answer.

68. 412 U.S. 218, 234 (1973).

69. The Court found that the knowledge issue was obviated by the fact that the officers informed Mendenhall that she did not have to consent. United States v. Mendenhall, 100 S. Ct. 1870, 1879 (1980). However, she was not told that if she did not wish to comply with the agents' requests, her refusal could not be a basis for drawing adverse inferences. Neither could it be used against her in a criminal trial. *Id. See also* United States v. Prescott, 581 F.2d 1343 (9th Cir. 1978).

70. 100 S. Ct. 1870, 1879 (1980).

71. When one examines the testimony not reproduced in the Court's opinion, the argument that she was disrobing against her will becomes more compelling. Officer Mercier testified that the defendant repeatedly stated she had a plane to catch, while the text of the opinion suggests that she only made one such protest. Furthermore, Officer Mercier never told Mendenhall that if she did not wish to go through with the strip-search, she could stop at any time without fear of recrimination. Brief in Opposition to Petition for Writ of Certiorari at 4, United States v. Mendenhall, 596

statement is not responsive to a request to strip and is, therefore, ambiguous. Ambiguous conduct will not support a consent-based search.[72] Consequently, the Court should have resolved the ambiguity. Instead, the Justices relied on testimony at the trial court level which showed that Mendenhall did what was asked of her. At best, these facts can only be construed as acquiescence to the authorities.[73] Her consent should, therefore, have been rendered invalid.[74]

While the concurrence failed to consider knowledge as a factor relevant to determining the existence of valid consent, the opinion of Justices Stewart and Rehnquist obscured the issue by framing consent in terms of freedom in its most mechanical sense. However, an examination of the facts reveals that there is no basis for concluding that Sylvia Mendenhall could have reasonably believed that she was free to leave.[75]

The only testimony reproduced in the decision which sheds any light on the state of mind of any of those present was that of DEA Agent

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F.2d 706 (6th Cir.), *cert. granted,* 444 U.S. 822 (1979); Brief of Respondent at 52, United States v. Mendenhall, 100 S. Ct. 1870 (1980).

72. The United States Supreme Court held in Bumper v. North Carolina, 391 U.S. 543, 548-49 (1968) that when the asserted manifestation of consent is not demonstrably clear, the ambiguous conduct may only indicate mere acquiescence to lawful authority. Such acquiescence will not support a search based on the party's alleged consent, regardless of the lack of overt coercion.

It would seem that Mendenhall's expression of concern about missing her plane, if not demonstrative of the desire to leave and the belief that she could not, is at least sufficiently ambiguous to bring the *Bumper* rule into effect.

73. Indeed, testimony at the suppression hearing, not reproduced in the opinion, indicates that Sylvia Mendenhall did not act freely and voluntarily. After Agent Anderson testified that he observed her to be nervous upon deplaning he stated:

> [I] then told her that . . . I was a federal narcotics agent. She became quite shaken, extremely nervous. She had a hard time speaking. I handed her her ticket back and her driver's license back. She had a difficult time getting these back into her purse, and at that time I asked her to accompany me and agent Myhills to our office.

See Transcript of Suppression Hearing (testimony of Agent Anderson), *reprinted in* Brief in Opposition to Petition for Certiorari, Index at 11 & 12, United States v. Mendenhall, 596 F.2d 706 (6th Cir.), *cert. granted,* 444 U.S. 822 (1979).

It is difficult to see how any behavior by Mendenhall, given her above-described emotional condition, could be considered voluntary. Her initial nervousness could have been due to unfamiliarity with plane travel, or perhaps because she was three weeks pregnant. Brief of Respondent at 33, United States v. Mendenhall, 100 S. Ct. 1870 (1980). Whatever the reason, it is (1) not grounds to stop and interrogate someone and (2) a condition which can only be aggravated by such confrontation to the point that voluntariness becomes highly questionable. The situation brings to mind the impossible command issued by the King of Hearts: "Give your evidence . . . and don't be nervous, or I'll have you executed on the spot." *See* C. DODGSON, ALICE IN WONDERLAND 111 (1865).

74. United States v. Mendenhall, 100 S. Ct. 1870, 1889 (1980) (White, J., dissenting), *citing* Bumper v. North Carolina, 391 U.S. 543, 548-49 (1968); Johnson v. United States, 333 U.S. 10 (1948); Amos v. United States, 225 U.S. 313 (1921). Justice White points out in his dissent that the government cannot rely on Mendenhall's mere acquiescence to the officer's request to accompany him as proof of the consent required to remove this from a fourth amendment seizure situation. *See also* note 72 *supra* regarding acquiescence.

75. *See* note 71 and accompanying text *supra.*

Anderson. Anderson admitted that he had no intention of letting Mendenhall walk away had she attempted to do so.[76] Justices Stewart and Rehnquist dismissed this as irrelevant except to the extent that Anderson's intentions might have been conveyed to the defendant.[77] Even accepting this characterization as true, it is misleading in that it ignores two important points: (1) the admission certainly colors whatever argument the government might make in meeting its burden of proving that Mendenhall's remaining was an act of voluntary compliance, and (2) it attempts to shift the burden to the defendant. Thus, they imply that it is Mendenhall's burden to prove that she somehow intuited Agent Anderson's intentions. This is manifestly unwise judicial policy. To ignore the illegal intentions of a police officer when they are known to the Court, and to require the defendant to prove her awareness of that intent at the time, can only encourage the kind of police improprieties which the fourth amendment was designed to prevent.[78]

IV. BALANCING INDIVIDUAL AND GOVERNMENTAL INTERESTS

In deciding the propriety of police activity with respect to the fourth amendment, courts will engage in a balancing of the various interests involved.[79] *Terry v. Ohio*[80] established that in situations where the constitutionality of a seach or seizure is governed by a standard less than probable cause,[81] the court must balance the individual's privacy interest against the governmental interest in detecting crime.[82] After balancing these interests, the court may then determine the reasonableness of the intrusion.[83]

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76. Mendenhall v. United States, 100 S. Ct. 1870, 1889 n.13 (1980).

77. *Id.* at 1877 n.6.

78. In point of fact, it has been the practice of many lower courts to emphasize the good faith of the officer as a crucial factor in deciding whether the fruits of a consent-based search should be excluded from evidence. *See* W. RINGEL, *supra* note 39, at 13.9.

79. *See* note 33 *supra*.

80. 392 U.S. 1 (1968).

81. Absent exceptional circumstances, probable cause is required for warrantless searches and seizures that exceed the minimally intrusive threshold. Probable cause denotes a degree of certainty or probability. Brinegar v. United States, 338 U.S. 160, 175 (1949). "[I]t exists where the facts and circumstances within [the arresting officers'] knowledge and of which they had reasonably trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has been or is being committed." Draper v. United States, 358 U.S. 307, 313 (1959), *citing* Carroll v. United States, 267 U.S. 132, 162 (1924). The assessment is to be judged against an objective standard, that is, from the perspective of a reasonably prudent police officer confronted with all the then known facts. Terry v. Ohio, 392 U.S. 1, 21, 22 (1968).

82. This proposition has been advanced in all investigative stop cases since *Terry*. *Terry* was the first case to indicate that "specific articulable facts" indicating a "reasonable suspicion of criminal activity" may suffice in those encounters that are truly minimally intrusive. The reasonableness of the stop is determined by balancing the degree of intrusion against the governmental interest served in making the stop. *See* notes 32 & 33 and accompanying text *supra*.

83. *See* W. RINGEL, *supra* note 39, at 1.15-1.18, where the author notes that balancing-test cases to date indicate that questions of reasonableness turn on which justices are doing the balanc-

A. The Nature of the Intrusion

When evaluating the kind of intrusion presented by DEA airport stop procedures, several factors should be kept in mind. First, the airport stop is not a chance sidewalk encounter between policeman and citizen. It is a calculated interference with a class of people who do not present an immediate danger to either the police or to passersby.[84] These individuals are obviously enroute from one place to another, are frequently in a hurry, and are very often disoriented. A police stop under such circumstances is at least as significant an imposition as that proscribed by *Delaware v. Prouse*.[85] While *Prouse* was specifically limited to random automobile stops, the *ratio decidendi* is nonetheless applicable. The investigative disposition of the police officer, devoid of articulable facts supporting a reasonable suspicion of criminal activity, is insufficient to justify a sometimes frightening interference with the traveler's freedom of movement.[86]

Aside from the fact that DEA stops can be frightening and disruptive to the already disoriented airline traveler, there are compelling jurisprudential reasons in support of a stricter standard of suspicion as a prerequisite to stop. The most obvious among these is the fact that the freedom to travel has been regarded as a fundamental right since 1867.[87] As such, it can be argued that interstate travelers should not have to present identification or explain their purposes at the whim of the DEA agent.[88]

Another more general consideration in support of a stricter standard of suspicion is suggested by what is referred to as the individual's right to privacy. A literal reading of the fourth amendment provides no basis for establishing a right of privacy. Yet, historically, Anglo-American concerns and social practices leading to the adoption of the Bill of Rights, and in particular the fourth amendment, suggest such an im-

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ing. The balancing test in no way resembles a mathematical formula, and the decision to utilize the approach does not guarantee a predictable result.

84. This is apparent inasmuch as the suspect deplaning from his or her flight has already passed through a metal detector, and would have been frisked prior to boarding had the electronic device been triggered. *See, e.g.,* United States v. Bell, 464 F.2d 667 (2d Cir. 1972); United States v. Mitchell, 352 F. Supp. 38 (E.D.N.Y. 1972), *aff'd mem.* 486 F.2d 1397 (2d Cir. 1973); United States v. Lopez, 328 F. Supp. 1077 (E.D.N.Y. 1971).

85. 440 U.S. 648 (1979).

86. *Id.* at 657.

87. The right to travel was first recognized in 1823 in Corfield v. Coryell, 6 F. Cas. 546 (C.C.E.D. Pa. 1823). The Supreme Court acknowledged this right as being fundamental over one hundred years ago in Crandall v. Nevada, 73 U.S. (6 Wall.) 35, 43, 44 (1867). The Court has continued to uphold this right in recent times. *See, e.g.,* Dunn v. Blumstein, 405 U.S. 330, 338 (1972); Shapiro v. Thompson, 394 U.S. 618, 633-38 (1969); United States v. Guest, 383 U.S. 745, 757 (1966). Furthermore, it is established that when fundamental rights are involved, the courts should strictly scrutinize alleged infringements. *See generally* Skinner v. Oklahoma, 316 U.S. 535 (1942).

88. *See* Kadish & Bronfman, *supra* note 1 at 49.

plied right.[89] Furthermore, it has been argued that the procedural safeguards of probable cause and the warrant requirement express, in negative form, the liberty guaranteed by "the right to be secured."[90]

Of course, it is well established that whatever protection the fourth amendment might be said to afford attaches to the individual. The Court held in *Katz v. United States*[91] that the fourth amendment protects people, not places.[92] The *Katz* Court intentionally used somewhat nebulous language so that future decisions might build upon that case.[93] However, the Burger Court has chosen to restrict rather than expand the scope of the *Katz* decision.[94] This is best evidenced by the fact that in some of the earliest decisions by the Burger Court, the majority Justices did not look to the individual's constitutionally "justifiable" expectation of privacy.[95] Rather, they looked to the individual's "reasonable" expectations of privacy, thereby implying that the expectations of contemporary Americans, and not the Constitution, should be the guide.[96]

Some commentators have suggested that Americans are becoming desensitized to the prospect of ever increasing governmental surveillance.[97] It is difficult to decide whether the Court is effecting or merely reflecting this trend. Nevertheless, there is no denying that the kind of privacy which we may "reasonably" expect is diminishing.[98]

B. The Expanding Governmental Interest

It would be unrealistic to expect the Court to apply the probable cause standard in reviewing the propriety of the DEA stops.[99] Courts

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89. O'Brien, *Reasonable Expectations of Privacy: Principles and Politics of Fourth Amendment-Protected Privacy,* 13 NEW ENGLAND L. REV. 662, 665 (1978).

90. *Id.* The inference that a right to privacy *must* exist was probably best expressed by Justice Brandeis in Olmstead v. United States, 277 U.S. 438 (1928). He said: "the makers . . . of our Constitution . . . conferred, as against the Government, the right to be let alone — the most comprehensive of rights and the most valued by civilized men." *Id.* at 478 (Brandeis, J., dissenting).

91. 389 U.S. 347 (1967). In *Katz,* the Court decided that affixing an electronic "bug" to a public telephone booth violated the defendant's fourth amendment rights. *Id.* at 350-53.

92. *Id.* at 351.

93. Yackle,*T he Burger Court and the Fourth Amendment,* 26 KAN. L. REV. 335, 357 (1978).

94. *Id.* at 358.

95. *Katz* held that the defendant had a "justifiable expectation of privacy" when he entered the phone booth. Katz v. United States, 389 U.S. 347, 351-53 (1967).

96. *See* Yackle, *supra* note 93, at 361, *citing* United States v. Dionisio, 410 U.S. 1, 14 (1973); Couch v. United States, 409 U.S. 322, 336 (1973).

97. *See, e.g.,* Yackle, *supra* note 93; O'Brien, *supra* note 89.

98. *Mendenhall* is but a recent example of the current trend. Witness the fact that, in 1974, the Court dismissed for want of a substantial federal question a case wherein the petitioner complained that the police had spied on him in a public toilet. *See* Piatak v. Ohio, 42 U.S.L.W. 3685 (Ohio Ct. App.) (excerpt of unreported opinion), *appeal dismissed,* 419 U.S. 810 (1974).

99. This assessment is based on the fact that traditional fourth amendment analysis is very near death. *See* Miles, *From* Terry *to* Mimms*: The Unacknowledged Erosion of Fourth Amend-*

understandably balk at the prospect of freeing criminals for the sake of promoting constitutional integrity. Thus, over the years the federal courts have wrestled with an apparent lack of probable cause, and yet upheld searches on such general considerations as a community's reputation for crime[100] and the epidemic use of handguns nationwide.[101]

The need for replacing a static, traditional conception of probable cause with a dynamic, flexible model which is tailored to the particular encounter involved is superficially appealing. The problem with this, as evidenced by *Mendenhall,* is that the individual, more often than not, comes out on the losing end.[102] In trying to determine why this should be so with regard to airport searches, it becomes necessary to evaluate the problem which is sought to be alleviated, as perceived by the Court.

The federal courts are understandably concerned about the incidence of drug trafficking at major airports. It is perhaps because the problem seems so insurmountable that the courts give deference to the "trained eye of the agent."[103] The courts have also recognized the exigency presented by the fact that the suspected drug trafficker, if not stopped, will soon disappear from the airport.[104] However, the courts have failed to consider that the DEA agent is *only* concerned with drug trafficking, and consequently tends to view everyone as a potential dealer. Furthermore, the argument that the suspected drug trafficker may soon disappear is unpersuasive. Given the nature of airport surveillance, the entire class of people observed by the agent is subject to this argument. Finally, it is in the self-interest of the DEA to initiate as many encounters as

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ment Protections Surrounding Police-Citizen Confrontations, 16 AM. CRIM. L. REV. 127 (1978). *But see* Dunaway v. New York, 442 U.S. 200 (1979) (prohibiting investigative detentions which resemble but are not declared full arrests on less than probable cause). *See also* Comment, Dunaway v. New York: *Fourth Amendment Protections Against Unreasonable Searches and Seizures Closely Guarded,* 6 OHIO NORTH. L. REV. 618 (1980), wherein the commentator prematurely concluded that *Dunaway* indicates a trend towards limiting fourth amendment exceptions to the narrow circumstances presented by Terry v. Ohio, 392 U.S. 1 (1968).

100. *See, e.g.,* United States v. Magda, 547 F.2d 756 (2d Cir. 1976), *cert. denied,* 434 U.S. 878 (1978); People v. DeBour, 40 N.Y.2d 210, 352 N.E.2d 562, 586 N.Y.S.2d 375 (1976).

101. *See, e.g., In re* H.B., 75 N.J. 243, 381 A.2d 759 (1977).

102. *See, e.g.,* Ahern, *Privacy and Property: Can They Remain After Judicial Personality is Lost?,* 11 CREIGHTON L. REV. 1077, 1086 (1978); Leslie, People v. DeBour: *The Graduation of Fourth Amendment Doctrine in the Context of Street Detentions,* 38 OHIO ST. L. J. 409, 436 (1977); Comment, United States v. Chadwick *and the Lesser Intrusion Concept: The Unreasonableness of Being Reasonable,* 58 B.U. L. REV. 436, 459 (1978).

103. The federal courts have consistently maintained that the circumstances surrounding the search and seizure "are to be viewed through the eyes of a reasonable and cautious police officer on the scene, guided by his experience and training. . . ." United States v. Price, 599 F.2d 494, 501 (2d Cir. 1979), *quoting* United States v. Oates, 560 F.2d 45, 61 (2d Cir. 1977); United States v. Magda, 547 F.2d 756, 758 (2d Cir. 1976), *cert. denied,* 434 U.S. 878 (1978).

104. *See* United States v. Vasquez, 612 F.2d 1338, 1342 (2d Cir. 1979); United States v. Oates, 560 F.2d 45, 59 n.10 (2d Cir. 1977); United States v. Price, 559 F.2d 494, 500 (2d Cir. 1979); United States v. Magda, 547 F.2d 756, 759 (2d Cir. 1976).

possible because the continued existence of the airport surveillance program is determined by its usefulness.

None of these considerations are mentioned in *Mendenhall.* Instead, the Court has reaffirmed its faith in the DEA by stating that:

> The public has a compelling interest in detecting those who would traffic in deadly drugs for profit. Few problems affecting the health and welfare of our population, particularly our young, cause greater concern . . . many drugs may be easily concealed. As a result, the obstacles to detection of illegal conduct may be unmatched in any other area of law enforcement. To meet this pressing concern the Drug Enforcement Administration since 1974 has assigned highly skilled agents . . . [who] have developed "drug-courier profiles" that describe the characteristics generally associated with narcotics traffickers.[105]

Another reason why the governmental interest is on the favorable end of the sliding scale is the fact that, depending on which statistics one analyzes, the drug-courier profile often appears to work. The use of the profile has resulted in an impressive encounter-arrest ratio.[106] This has not been the case at every airport, however. The record at LaGuardia Airport, for example, shows only a modest rate of predictability.[107] Therefore, statistics as to accuracy of the profile are still inconclusive.

Of course, any discussion of the success of the drug-courier profile misses the constitutional point. While a high rate of predictability may demonstrate the profile to be an effective law enforcement tool, it is conceptually after the fact.[108] As Justice Oakes observed in his dissenting opinion in *United States v. Vasquez,*[109] some objective standard or rule, rather than the keen eye of the agent, should be employed to govern the exercise of discretion to stop.[110] Each time the agent justifies

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105. United States v. Mendenhall, 100 S. Ct. 1870, 1881 (1980).

106. At Detroit Metropolitan Airport, for example, agents searched 141 persons in 96 encounters during the first eighteen months of the DEA's operation there. Agents found controlled substances in 77 of the encounters which led to 122 arrests. The accuracy of the profile for encounters, then, was about 80 percent. These figures are slightly misleading, however, as they reflect searches following stops based on information from airline ticket agents, tips, and independent police work. *See* United States v. Van Lewis, 409 F. Supp. 535, 539 (E.D. Mich. 1976).

107. According to DEA Special Agent Whitmore, the arresting agent in *Vasquez, Price, Rico,* and many other cases decided in Federal District Court for the Eastern District of New York, the DEA team at LaGuardia Airport attained only a 60 percent success rate in their encounters. *See* United States v. Rico, 594 F.2d 320, 326 (2d Cir. 1979).

108. This point was apparently lost on the Government when it chose to preface its argument before the Court by insisting that, "this case presents questions of exceptional importance to a major and highly successful law enforcement program. . . . Its success in interdicting the flow of narcotics is documented." *See* Petitioner's Brief for a Writ of Certiorari at 11, United States v. Mendenhall, 100 S. Ct. 1870 (1980).

109. 612 F.2d 1338 (2d Cir. 1979).

110. *Id.* at 1352 (Oakes, J., dissenting).

the stop and search by the subsequent arrest, the case "smells of wisdom born of the event."[111] Nevertheless, it is apparent that the Court in *Mendenhall* could not resist the temptation to view the reasonableness of the seizure from a utilitarian standpoint.[112] Under such analysis the airline traveler must submit to the DEA encounter because those in society wishing to see an end to drug trafficking presumably outnumber the individuals who will be subject to DEA investigation.

CONCLUSION

With the Court's decision in *Mendenhall,* one thing becomes very clear: the governmental interest in "detecting those who would traffic in deadly drugs for personal profit"[113] provides the DEA with a definite advantage in the balancing of interests under fourth amendment analysis. Consequently, as long as the Court utilizes sliding scale analysis when reviewing airport search and seizures, the airline traveler's fourth amendment protection will always be subrogated to the posited governmental interest.[114] While the fourth amendment is supposed to protect persons, not places,[115] it is now evident that the Court will define the person's reasonable expectation of privacy based upon the nature of the place where that privacy is invaded.

The ramifications of *Mendenhall* extend well beyond the airport terminal. The decision indicates that the Court will characterize most investigatory stops as modest intrusions upon personal privacy.[116] The opinion also indicates that the majority of the Court will no longer attempt an exhaustive inventory of the "totality of circumstances" when evaluating alleged consent, despite the mandates of *Schneckloth v.*

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111. *Id.* at 1352 n.8 (Oakes, J., dissenting).

112. Utilitarianism approves or disapproves of every action according to the tendency which it appears to have to augment or diminish the happiness of the party whose interest is in question. J. BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION 2 (Oxford ed. 1907). Sidgewick defines utilitarianism as "the ethical theory, that the conduct which, under any given circumstances, is objectively right, is that which will produce the greatest amount of happiness on the whole. . . ." H. SIDGEWICK, THE METHODS OF ETHICS 411 (7th ed. 1907).

113. United States v. Mendenhall, 100 S. Ct. 1870, 1875 (1980).

114. The fallacy of the decision in *Mendenhall* is perhaps best stated by Professor Amsterdam in the following observation about the effect of the sliding scale: "To say that the police may accost citizens at their whim and [then] may retain them upon reasonable suspicion, is to say, in reality, that the police may accost and detain citizens at their whim." Amsterdam, *Perspectives on the Fourth Amendment,* 58 MINN. L. REV. 349, 395 (1974).

115. Katz v. United States, 389 U.S. 347, 351 (1967). *See* note 95 and accompanying text *supra.*

116. *But see* Dunaway v. New York, 442 U.S. 200 (1979). *See also* note 99 *supra.*

Bustamonte[117] and *Bumper v. North Carolina.*[118] In any event, the Court will not meaningfully consider the possibility of implied coercion to be among those circumstances.

Finally, *Mendenhall* encourages the judicial abdication of constitutional duties in deference to the trained eye of the specialized law enforcement officer. It should not be surprising, then, if other forms of specialized law enforcement look to *Mendenhall* for direction and begin to design profiles appropriate to their areas of specialization. Attempts to promote universally accepted governmental interests must, of course, have the cooperation of the judiciary if they are to succeed. But if individual privacy rights are to retain a near-competitive status, traditional fourth amendment analysis cannot be abandoned.

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117. 412 U.S. 218 (1973).
118. 391 U.S. 543 (1968).

RECENT DEVELOPMENT

Evolution of the Coconspirator Exception to the Hearsay Rule in the Federal Courts

According to the law of evidence, the hearsay rule precludes the admission of statements made out of court.[1] The coconspirator exception to this rule provides that such hearsay will be admissible if made by a coconspirator of a party.[2] Since the enactment of the Federal Rules of Evidence,[3] the law pertaining to the coconspirator exception has been radically altered. Specifically, the three elements of the common law coconspirator exception which have been modified by the federal courts are: (1) the requirement that independent, non-hearsay evidence demonstrate the existence of a conspiracy;[4] (2) the standard of proof needed to establish this foundation;[5] and (3) the extent of the judge's and jury's respective roles in finding the existence of a conspiracy before admitting or considering the coconspirator's declarations.[6] In *United States v. Petrozziello*,[7] the First Circuit Court of Appeals was the first court to alter these common law elements when it applied the Federal Rules of Evidence. In *Petrozziello*, the First Circuit dispensed with the independent foundation requirement,[8] raised the standard of proof of the existence of a conspiracy by adopting the civil test of "preponderance of the evidence,"[9] and entrusted the trial judge alone

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1. FED. R. EVID. 802. The hearsay rule is defined and discussed more fully in Section I *infra*.
2. FED. R. EVID. 801(d)(2)(E). Note that the Federal Rules define coconspirator statements as "not hearsay" rather than an exception to the hearsay rule. The practical effect is the same for purposes of this article and it will be referred to as an exception. *See* note 57 *infra*.
3. The Federal Rules of Evidence were approved on January 2, 1975 and became effective on July 2, 1975. Pub. L. No. 93-595, § 1, Jan. 2, 1975, 88 Stat. 1929 (1975).
4. *See* notes 102-19 and accompanying text *infra*.
5. *See* notes 88-101 and accompanying text *infra*.
6. *See* notes 60-87 and accompanying text *infra*.
7. 548 F.2d 20 (1st Cir. 1977).
8. 548 F.2d at 22-23.
9. *Id.* at 23.

with decisions regarding the admissibility of coconspirator declarations.[10]

This Recent Development will present a brief historical perspective of the hearsay rule in Section I, including the development of the coconspirator exception up to the enactment of the Federal Rules of Evidence. In Section II, the impact of the Federal Rules upon the coconspirator exception will be studied, focusing on the different approaches concerning the standard of proof, the independent foundation requirement, and the respective functions of the judge and jury. Section III will address the recent developments in the law of coconspirator declarations, including the requirement that the judge's ruling on the admissibility of the evidence must be timed so that the defense counsel will be allowed to produce evidence in rebuttal to the prosecutor's proof of conspiracy.[11] Also examined will be the renewed interest in the requirement that the declarant be proven a member of the conspiracy,[12] the advent of a two-step admissibility ruling now being used in some circuits,[13] and the extent to which a judge's ruling on admissibility need be explicitly on the record.[14]

I. History and Background

Dean McCormick defined hearsay as "testimony in court, or written evidence, of a statement made out of court, the statement being offered as an assertion to show the truth of the matters asserted therein. . . ."[15] The rationale espoused for excluding hearsay evidence from the jury centers on three main problems: the lack of an oath by the out of court declarant; the lack of personal appearance at trial by the declarant; and the inability of opposing counsel to cross examine the declarant.[16] The oath requirement is considered vital to ensure truthful testimony because its ceremonial and religious nature is believed to impress upon the witness a moral duty to speak truthfully and instill awareness of criminal sanctions.[17] The personal appearance of the declarant is necessary for the jury to observe his demeanor. Without an oath or personal appearance, the credibility of evidence cannot be evaluated by the

10. *Id.* at 22-23.
11. *See* notes 145-52 and accompanying text *infra*.
12. *See* notes 132-36 and accompanying text *infra*.
13. *See* notes 120-31 and accompanying text *infra*.
14. *See* notes 137-44 and accompanying text *infra*.
15. C. McCormick, Handbook on the Law of Evidence § 246 (2d ed. 1972). Similarly, the Federal Rules define hearsay as a "statement, other than one made by the declarant while testifying at the trial or hearing offered to prove the truth of the matter asserted." Fed. R. Evid. 801(c). "Statement" is defined as "(1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by him as an assertion." Fed. R. Evid. 801(a).
16. C. McCormick, *supra* note 15, § 245.
17. *Id.*

jury with the same objectivity as testimony which contains such safeguards.[18] The need for cross examination, however, is probably the most important reason for excluding hearsay evidence. The dangers in having no opportunity to cross examine have been explained as the inability to uncover infirmities in the declaration, such as defects in the declarant's perception, sincerity, memory and transmission.[19] Some evidence, even though hearsay, is admissible if it has other particular qualities which ensure reliability; thus, the hearsay rule has many exceptions.[20]

A. The Coconspirator Exception

At common law, statements of coconspirators were considered an exception to the hearsay rule in both the civil and criminal settings.[21] The exception has been succinctly defined as: "[A]ny act or declaration by one co-conspirator committed in furtherance of the conspiracy and during its pendency is admissible against each and every co-conspirator provided that a foundation for its reception is laid by independent proof of the conspiracy."[22]

In *Anderson v. United States*,[23] the rationale for the coconspirator exception was explained to have grown from a concept of agency law which holds that a principal is bound by the deeds of his agent acting within the scope of his authority.[24] The analogy is that a coconspirator has acted as an agent of the defendant, or as a partner in crime, so the defendant is bound by the statements of his coconspirator acting in fur-

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18. *Id.*

19. G. LILLY, AN INTRODUCTION TO THE LAW OF EVIDENCE 159 (1978). There has also been suggested a formidable argument that hearsay may deprive a criminal defendant of the constitutional right to confront witnesses. *See* Baker, *The Right to Confrontation, the Hearsay Rules, and Due Process — A Proposal for Determining When Hearsay May be Used In Criminal Trials*, 6 CONN. L. REV. 529 (1974); Davenport, *The Confrontation Clause and the Co-conspirator Exception In Criminal Prosecutions: A Functional Analysis*, 85 HARV. L. REV. 1378 (1972). *Cf.* Bruton v. United States, 391 U.S. 123 (1968) (admission of codefendant's confession at joint trial was held to deprive defendant of right to confrontation despite limiting instructions).

20. FED. R. EVID. 803 enumerates twenty-four exceptions to the hearsay rule which apply irrespective of the declarant's availability. FED. R. EVID. 804 lists five more exceptions which may only be invoked when the declarant is unavailable. FED. R. EVID. 801(d) defines two broad groups of statements as "not hearsay."

21. At common law it was not a requirement that conspiracy be formally charged to invoke the coconspirator exception. The doctrine applied to all types of joint ventures. *See* Anderson v. United States, 417 U.S. 211, 218 & n.6 (1974). This view was carried into the Federal Rules. *See* S. REP. NO. 93-1277, 93d Cong., 2d Sess. 24, *reprinted in* [1974] U. S. CODE CONG. & AD. NEWS 7051, 7073. The exception also applies in civil cases. *See* South-East Coal Co. v. Consolidation Coal Co., 434 F.2d 767 (6th Cir. 1970) (coconspirator exception applicable in civil anti-trust action).

22. Levie, *Hearsay And Conspiracy — A Reexamination of the Co-conspirators' Exception To The Hearsay Rule*, 52 MICH. L. REV. 1159, 1161 (1954).

23. 417 U.S. 211 (1974).

24. *Id.* at 211 n.6.

therance of the conspiracy.[25] Nonetheless, this logic was referred to as a "fiction" and was expressly rejected by the Advisory Committee when it formulated the Federal Rules of Evidence.[26] Another reason for the exception, once propounded by Wigmore, is that coconspirator declarations are admissible because they are as inherently reliable as declarations against interest.[27] This view has been criticized for ignoring certain self-serving motives of various conspirators.[28]

It has been proposed that the real reason the coconspirator exception developed is because there is a very great probative need for it.[29] Conspiracy is an unlawful agreement and by its very nature is difficult to prove. Such proof lies in showing a subjective meeting of the minds.[30] Direct proof of this is impossible, and a written document memorializing the illicit event is not likely to be found.[31] As a result, coconspirator declarations are admitted out of necessity.[32] This conclusion was tacitly supported by the Advisory Committee. The Advisory Committee revealed that it was recommending the exception even though no formally acknowledged policy supported it.[33]

B. Mechanics of the Coconspirator Exception

The common law coconspirator exception developed along similar lines in both the federal and state court systems. Three elements formed the admissibility threshold for the hearsay statements of coconspirators: first, it must be shown that there was a conspiracy; second, that the defendant and the declarant were members of that conspiracy; and third, that the declarations proffered were made in furtherance of the conspiracy and during its pendancy.[34] These second and third requirements were not troublesome, and were usually found without dif-

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25. *Id. See also* Van Riper v. United States, 13 F.2d 961 (2d Cir.), *cert. denied sub nom.*, Ackerson v. United States, 273 U.S. 702 (1926).

26. ADVISORY COMM. NOTE, FED. R. EVID. 801(d)(2) (1976).

27. 4 J. WIGMORE, EVIDENCE § 1080a (3d ed. 1940).

28. The conspirator's interest is likely to lie in misleading the listener into believing the conspiracy stronger with more members (and different members) and other aims than in fact it has. It is no victory for common sense to make a belief that criminals are notorious for their veracity the basis for law.

Levie, *supra* note 22 at 1165-66.

29. *Id.* at 1163-66.

30. *Id.* at 1160.

31. *Id.*

32. Although courts do not freely admit that coconspirator statements are admitted out of necessity, some critical authors have. *See* R. LEMPERT & S. SALTZBURG, A MODERN APPROACH TO EVIDENCE 378 (1977) ("A possible explanation for the exception in the circumstances, and perhaps a justification, is that the exception makes it easier to secure criminal convictions"); Levie, *supra* note 22 at 1164-67. *See also* United States v. Gil, 604 F.2d 546, 549 (7th Cir. 1979).

33. ADVISORY COMM. NOTE, FED. R. EVID. 801(d)(2) (1976).

34. *See, e.g.*, Carbo v. United States, 314 F.2d 718, 735-39 (9th Cir. 1963), *cert. denied*, 377 U.S. 953 (1964).

ficulty if the first requirement was met. It is this first requirement, foundational proof of the existence of a conspiracy, that generated a controversy at common law and remains a problem today under the Federal Rules of Evidence.[35]

The requirement of proving the existence of a conspiracy raises three distinct issues which provide the framework for analyzing the problem. The first issue is the quantum of proof needed to demonstrate the existence of a conspiracy. Prior to the enactment of the Federal Rules of Evidence, the majority of circuits required the prosecution to establish a prima facie case of conspiracy before the exception would apply.[36] Three circuits required that the conspiracy be proven by a preponderance of the evidence, which was designed to require a greater showing than the prima facie standard.[37] There were other standards in use also, including "substantial evidence,"[38] but no circuit required that the existence of a conspiracy be shown beyond a reasonable doubt.[39]

The second obstacle to the admission of coconspirator declarations is the necessity of proving the existence of the conspiracy by independent, non-hearsay evidence. Until recently,[40] this requirement was universally accepted by the federal courts,[41] and was countenanced by the Supreme Court shortly before the Rules were enacted.[42] The Court first spoke on

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35. *Compare* Glasser v. United States, 315 U.S. 60, 74-75 (1942) (establishing the firm rule that a conspiracy must be proven by independent, non-hearsay evidence before the coconspirator exception can apply) *with* United States v. Martorano, 557 F.2d 1, 12 (1st Cir.), *rehearing denied*, 561 F.2d 406 (1st Cir. 1977), *cert. denied*, 435 U.S. 922 (1978) (proclaiming that the new Federal Rules of Evidence overrule *Glasser*, thus sanctioning bootstrapping).

36. *See* United States v. Cravero, 545 F.2d 406, 418-19 (5th Cir. 1976); United States v. Wixom, 529 F.2d 217, 220 (8th Cir. 1976); United States v. McDaniel, 538 F.2d 408 (D.C. Cir. 1976); United States v. Bradley, 455 F.2d 1181, 1189 (1st Cir. 1972); United States v. Cox, 449 F.2d 679, 688 (10th Cir. 1971); South-East Coal Co. v. Consolidation Coal Co., 434 F.2d 767, 779 (6th Cir. 1970); United States v. Cortwright, 528 F.2d 168, 171 (7th Cir. 1970); Carbo v. United States, 314 F.2d 718, 737 (9th Cir. 1963), *cert. denied*, 377 U.S. 953 (1964); Krulewitch v. United States, 336 U.S. 440, 453 (1949).

37. *See* United States v. Trowery, 542 F.2d 623, 627 (3d Cir.), *cert. denied*, 430 U.S. 917 (1976); United States v. Jones, 542 F.2d 186, 203 (4th Cir.), *cert. denied*, 426 U.S. 922 (1976); United States v. Torres, 519 F.2d 723, 725 (2d Cir. 1975).

38. *See* United States v. Dixon, 562 F.2d 1138, 1141 (9th Cir. 1977) which declares that the quantum of evidence needed is "substantial independent evidence" but then defines this standard as "enough to make a *prima facie* case."

39. *Accord* Lego v. Twomey, 404 U.S. 477, 482-84 (1972), ruling that the decision at this stage is merely on admissibility and not guilt or innocence (admission of a confession). *Contra* Bergman, *The Coconspirator's Exception: Defining the Standard of the Independent Evidence Test Under the New Federal Rules of Evidence*, 5 HOFSTRA L. REV. 99 (1976) (arguing for the reasonable doubt standard).

40. *See* United States v. Petrozziello, 548 F.2d 20, 23 (1st Cir. 1977); United States v. Martorano, 557 F.2d 1, 12 (1st Cir.), *rehearing denied*, 561 F.2d 406 (1st Cir. 1977), *cert denied*, 435 U.S. 922 (1978).

41. *See* Glasser v. United States, 315 U.S. 60, 74-75 (1942).

42. The requirement was recently reinforced by the Supreme Court in United States v. Nixon, 418 U.S. 683, 701 & n.14 (1974).

the issue in *Glasser v. United States*,[43] where the need for independent evidence was explained in this oft-quoted passage: "[D]eclarations [of co-conspirators] are admissible . . . only if there is proof *aliunde* that he is connected with the conspiracy. . . . Otherwise, hearsay would lift itself by its own boostraps to the level of competent evidence."[44]

The third aspect in the admission of coconspirator evidence is the relationship between the judge and jury and their respective roles in determining the admissibility of the declarations. Traditionally, the two shared the task and the evidence would be admitted in the following sequence. Initially, the judge would make a threshold finding[45] of whether the prosecution had properly laid the foundation and met its burden by proving the existence of the conspiracy by independent evidence.[46] If this determination was in favor of the prosecution, the judge would instruct the jury as to the statements they were about to hear. These instructions would caution the jury from considering the extrajudicial statements unless they were satisfied that the existence of a conspiracy had been proven by independent evidence, and by the standard employed in the jurisdiction.[47] Alternatively, if the judge found that the prosecution had not adequately laid the foundation then he would either: (1) instruct the prosecutor to align his proof in such a manner that the foundation would be laid;[48] or (2) conditionally admit the evidence subject to the foundation being shown later, instructing the

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43. 315 U.S. 60 (1942).

44. *Id.* at 74-75.

45. *See* United States v. James, 576 F.2d 1121, 1127 (5th Cir. 1978), *modified en banc*, 590 F.2d 575 (5th Cir.), *cert. denied*, 442 U.S. 917 (1979); United States v. Geaney, 417 F.2d 1116, 1120 (2d Cir. 1969). *cert. denied sub nom.*, Lynch v. United States, 397 U.S. 1028 (1970).

46. The judge would make such a ruling either *sua sponte* or upon objection. *See* United States v. James, 576 F.2d 1121, 1127-29 (5th Cir. 1978), *modified en banc*, 590 F.2d 575 (5th Cir.), *cert. denied*, 442 U.S. 917 (1979).

47. *See* United States v. Apollo, 476 F.2d 156, 163 (5th Cir. 1973). Although the ideal was to instruct the jury to decide the admissibility of the declarations by the applicable lower standard (prima facie, preponderance or substantial evidence tests), as a practical matter they were often told to apply the reasonable doubt standard. The prevalent instruction given at this time demonstrates the confusion: "Whenever it appears *beyond a reasonable doubt* from the evidence in the case that a conspiracy existed, and that a defendant was one of the members, then the statements thereafter knowingly made . . . may be considered by the jury as evidence in the case. . . ." E. DEVITT & C. BLACKMAR, FEDERAL JURY PRACTICE AND INSTRUCTIONS § 27.06 (1977) (emphasis added). The rationale for using the reasonable doubt standard in determining the admissibility is unclear and contrary to the Supreme Court's holding in Lego v. Twomey, 404 U.S. 477, 482-87 (1972). Instructing the jury to use the higher test does not, however, prejudice the defendant in any way, and may have been used by trial judges simply to avoid confusing the jury with additional standards of measurement. A dichotomy existed, though, since the judge was expected to be able to discriminate between the various standards in making his preliminary decision.

48. "The trial judge has wide discretion in supervising the order of proof in a conspiracy case." United States v. Turner, 528 F.2d. 143, 162 (9th Cir. 1975) (per curiam, separate opinion, Kilkenney, J.).

jury accordingly;[49] or (3) exclude any further evidence and instruct the jury to disregard any statements already heard.[50] If the judge decided to exclude the evidence on this basis and the prejudicial effect could not be overcome, a mistrial would be declared.[51]

Even after the judge was satisfied that the foundation had been laid, the jury still had the task of deciding the *true* admissibility of any statements; they were instructed not to consider the statements until they too were convinced of the existence of a conspiracy.[52] Thus, the trial judge had a strong hand in determining the admissibility, but the jury had a second bite at the apple.[53]

The problems that were encountered by this complicated scenario are numerous. In many cases, instructions were given at every step, confusing the jury with evidentiary problems while obscuring important issues.[54] The belief that jury instructions could eliminate the prejudicial effect of improperly admitted hearsay evidence has been labeled "unmitigated fiction" by the Supreme Court.[55] Moreover, many conspiracy cases involve multiple defendants in which evidence is offered against only one. In such a case, the jury is instructed to consider the coconspirator declarations against the one defendant but disregard it as to others who were not shown to be members of the conspiracy at the critical time (*i.e.* during pendancy and furtherance). Judge Learned Hand called such a task an exercise in mental gymnastics which would be beyond anyone's ability.[56] In sum, the common law coconspirator exception was confusing and mechanically complex. To a large extent, this confusion remained even after the enactment of the Federal Rules of Evidence.

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49. Ideally, the jury would receive such instructions at the time of reception and again at the close of the evidence. United States v. James, 576 F.2d 1121, 1127 (5th Cir. 1978), *cert. denied*, 442 U.S. 917 (1979).

50. "These declarations must be carefully and clearly limited by the court at the time of their admission and the jury instructed as to such declarations and the limitations put upon them." Lutwak v. United States, 344 U.S. 604, 619 (1953).

51. United States v. Geaney, 417 F.2d. 1116, 1120 (2d Cir. 1969), *cert. denied sub nom.*, Lynch v. United States, 397 U.S. 1028 (1970).

52. *Id.*

53. The jury could find the evidence inadmissible even after the judge had found it admissible and not consider the statements, or it could find the evidence admissible but give it little weight for poor credibility. *See* J. WEINSTEIN & M. BERGER, WEINSTEIN'S EVIDENCE ¶ 104[05] at p. 104-44.9 (1979).

54. "[The trial judge] ruled on the admissibility of the evidence as it came in. In addition, the trial court repeatedly gave instructions to the jury as to how the evidence was to be *considered* by them." United States v. Knight, 416 F.2d 1181, 1185-86 (9th Cir. 1969) (emphasis in original).

55. Krulewitch v. United States, 336 U.S. 440, 453 (1949); *accord,* Bruton v. United States, 391 U.S. 123, 129 (1968) holding that limiting instructions are ineffective to clear away the prejudice of the confession of a codefendant at a joint trial.

56. *See* Nash v. United States, 54 F.2d 1006, 1007 (2d Cir. 1932).

II. IMPACT OF THE FEDERAL RULES

The coconspirator exception to the hearsay rule was preserved by the Federal Rules of Evidence in Rule 801.[57] The new rule essentially restates the common law with respect to the two elements of pendancy and furtherance of the conspiracy, but did not codify the requirement of independent foundation.[58] This alone, however, was not the basis for all the changes in the law which followed. In addition to Rule 801, Rule 104,[59] which governs preliminary questions of admissibility, was also adopted and modified the common law in several respects.

A. Judicial Determinations of Admissibility under Rule 104

Under Rule 104, the judge alone decides preliminary questions of admissibility.[60] Before the adoption of the Federal Rules, the jury had a prominent role in deciding admissibility, particularly where coconspirator statements were concerned.[61] Although the question had been raised only infrequently, a minority of circuits delegated the task of determining the admissibility of coconspirator statements to the judge alone even before the Federal Rules were enacted.[62] These courts reasoned that since it was the trial judge's duty to apply all technical rules of evidence, such as witness competency or hearsay exceptions, the trial judge

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57. Rule 801 of the Federal Rules provides in pertinent part:

(d) Statements which are not hearsay. A statement is not hearsay if —...

(2) Admission by party-opponent. The statement is offered against a party and is . . .

(E) a statement by a coconspirator of a party during the course and in furtherance of the conspiracy.

FED. R. EVID. 801.

58. *See* section II. C. *infra.*

59. Rule 104 provides:

PRELIMINARY QUESTIONS

(a) Questions of admissibility generally. Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court, subject to the provisions of subdivision (b). In making its determination it is not bound by the rules of evidence except those with respect to privileges.

(b) Relevancy conditioned on fact. When the relevancy of evidence depends upon the fulfillment of a condition of fact, the court shall admit it upon, or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition.

(c) Hearing of jury. Hearings on the admissibility of confessions shall in all cases be conducted out of the hearing of the jury. Hearings on other preliminary matters shall be so conducted when the interests of justice require or, when an accused is a witness, if he so requests. . . .

FED. R. EVID. 104.

60. FED. R. EVID. 104(a).

61. *See. e.g.,* United States v. James, 590 F.2d 575, 578 (5th Cir.) (en banc), *cert. denied,* 442 U.S. 917 (1979); United States v. Honneus, 508 F.2d 566, 576-77 (1st Cir. 1974).

62. *See* United States v. Trowery, 542 F.2d 623, 627 (3d Cir.) (per curiam) *cert. denied,* 429 U.S. 1104 (1977); United States v. Jones, 542 F.2d 186, 203 (4th Cir.) *cert. denied,* 426 U.S. 922 (1976); United States v. Geaney, 417 F.2d 1116, 1120 (2d Cir. 1969), *cert. denied sub nom.,* Lynch v. United States, 397 U.S. 1028 (1970).

should also properly decide whatever preliminary issues of fact were necessary to determine admissibility.[63] The remainder of circuits held it to be a shared task because the admissibility of the evidence depended on the same determination of fact which coincides with ultimate guilt.[64]

In *United States v. Petrozziello*,[65] the issue of judge-jury interaction was first entertained after the adoption of the Federal Rules. Without elaborating its reasoning, the First Circuit held that Rule 104(a) applied to delegate the task of deciding the admissibility of coconspirator statements to the trial judge alone.[66] Despite the lack of scholarly examination of the Rule,[67] the First Circuit's interpretation was well received[68] and is now universal.[69]

In *United States v. Enright*,[70] the issue of admissibility under Rule 104 was addressed in terms of the common law concepts of competency (under Rule 104(a)),[71] and conditional relevancy (under Rule 104(b)).[72] The question is important in two respects. First, if the evidence is admitted conditionally under Rule 104(b), the jury will have a hand in deciding its admissibility,[73] and second, there will be a need for instructions and limitations on the evidence as with the common law pro-

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63. The courts felt the application of the technical rule was best made by a trained legal mind. United States v. Jones, 542 F.2d 186, 203 (4th Cir.), *cert. denied*, 426 U.S. 922 (1976); *see also* United States v. James, 590 F.2d 575, 579 (5th Cir.) (en banc), *cert. denied*, 442 U.S. 917 (1979); United States v. Geany, 417 F.2d 1116, 1120 (2d Cir. 1969), *cert. denied, sub nom.*, Lynch v. United States, 397 U.S. 1028 (1970).

64. *See* United States v. Geaney, 417 F.2d 1116, 1120 (2d Cir. 1969), *cert. denied sub nom.*, Lynch v. United States, 397 U.S. 1028 (1970); Carbo v. United States, 314 F.2d 718, 736-37 (9th Cir. 1963).

65. 548 F.2d 20 (1st Cir. 1977).

66. *Id.* at 22-23.

67. *But cf.* United States v. Enright, 579 F.2d 980 (6th Cir. 1978).

68. United States v. Santiago, 582 F.2d 1128 (7th Cir. 1978); United States v. Bell, 573 F.2d 1040 (8th Cir. 1978); United States v. Andrews, 585 F.2d 961 (10th Cir.1978).

69. United States v. Grassi, 616 F.2d 1295 (5th Cir. 1980); United States v. Slade, 627 F.2d 293 (D.C. Cir. 1980); United States v. Vinson, 606 F.2d 149 (6th Cir. 1979); United States v. Eubanks, 591 F.2d 513 (8th Cir. 1979); *See also* note 62 *supra,* for cases holding to a judge-only determination before the rules, and note 68 *supra,* for the remainder of circuits.

70. 579 F.2d 980 (6th Cir. 1978).

71. *See* United States v. Geaney, 417 F.2d 1116, 1120 (2d Cir. 1969), *cert. denied sub nom.*, Lynch v. United States, 397 U.S. 1028 (1970).

72. *Competency* is used here as a term of art which describes whether a particular piece of evidence fits into a technical rule of evidence. It must be carefully distinguished from *relevancy* which describes the probative value of the evidence. Although the drafters of the Federal Rules did not visibly make this distinction, it is obvious that they intended to continue the common law tradition. S. SALTZBURG & K. REDDEN, FEDERAL RULES OF EVIDENCE MANUAL 37 (1977); *See also* C. MCCORMICK, EVIDENCE § 53 (2d ed. 1972), and J. WEINSTEIN & M. BERGER, WEINSTEIN'S EVIDENCE ¶ 104[01], at 104-09, 104-10 (1979).

73. Rule 104(b) comprises what was previously known as conditional relevancy under the common law. ADVISORY COMM. NOTE, FED. R. EVID. 104(b).

cedure.[74] The Advisory Committee notes rely, *inter alia*, on section fifty-three of McCormick's treatise to explain Rule 104(a).[75] In that section, McCormick speaks only of preliminary questions of fact which underlie the technical rules of evidence.[76] At common law, preliminary questions of fact relating to technical rules were made by the judge alone. It is evident merely from the Advisory Committee's sources, without making a deeper analysis into the concepts of competency and relevancy, that Rule 104(a) was intended to deal with preliminary questions of fact which exclusively pertain to the technical rules of evidence, and that Rule 104(b) solely refers to matters of conditional relevancy.[77]

The admissibility of coconspirator statements is best viewed as a question of competency under Rule 104(a) since the underlying condition of fact (existence of a conspiracy) determines whether the statement fits into the technical exception to the hearsay rule. Questions of competency are to be distinguished from questions of relevancy. In matters of conditional relevancy the underlying fact determines the probative value of the evidence.[78] Because they are probative, the hearsay statements of the declarant are relevant whether a conspiracy existed or not, but they are not competent until the conspiracy is proven.[79] Despite

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74. *Id. See also* United States v. James, 590 F.2d 575, 579 (5th Cir.) (en banc), *cert. denied*, 442 U.S. 917 (1979).

75. The Advisory Committee states:

> **Subdivision (a).** The applicability of a particular rule of evidence often depends upon the existence of a condition. . . . In each instance the admissibility of evidence will turn upon the answer to the question of the existence of the condition. Accepted practice, incorporated in the rule, places on the judge the responsibility for these determinations. McCormick, § 53 . . .

ADVISORY COMM. NOTE, FED. R. EVID. 104.

76. C. MCCORMICK, EVIDENCE at 124-25 & n.99 (2d. ed. 1972).

77. S. SALTZBURG & K. REDDEN, FEDERAL RULES OF EVIDENCE MANUAL 36-39 (1977).

78. C. MCCORMICK, EVIDENCE at 124-25 & n.99 (2d ed. 1972); S. SALTZBURG & K. REDDEN, FEDERAL RULES OF EVIDENCE MANUAL 39 (1977).

79. The current trend is to view admissibility as a single concept and the traditional common law distinctions are becoming obscured:

> However, many times witnesses are in possession of both hearsay testimony of co-conspirators and evidence that independently tends to prove the existence of the conspiracy. Given the myriad of difficulties that surround the availability of witnesses, it is just impractical in many cases for a court to comply strictly with the preferred order of proof by taking the testimony of such witnesses piecemeal, waiting until a conspiracy is fully proved by independent evidence, and than recalling from their normal pursuits, those who testify to hearsay declarations of co-conspirators.
>
> As a concession to such practical impediments that arise during a trial, the court is vested with considerable discretion to admit particular items of evidence "subject to connection". . . .

United States v. Jackson, 627 F.2d 1198, 1218 (D.C. Cir. 1980) (citations omitted). However, the competency concept still survives, although it may have lost its traditional name:

> A rule that puts the admissibility of coconspirator statements in the hands of the jury does not avoid the danger that the jury might convict on the basis of these statements without first dealing with the admissibility question. . . . We are therefore convinced that the preliminary questions of conditional relevance envisioned by Rule 104(b) are those which present no danger of prejudice to the defendant. They are questions of probative force rather than evidentiary policy.

this, for a time trial judges in some circuits continued to instruct the jury after the determination had been made.[80] However, the trend now is to completely eliminate instructions to the jury concerning admissibility and instead insist upon a clear determination by the judge on the record early in the trial.[81]

Also of significance here is the conflict between the sixth amendment right to a jury trial[82] and the procedure under Rule 104(a). The sixth amendment traditionally required that a criminal defendant is entitled to a jury determination of all questions of fact.[83] However, the Supreme Court relaxed the application of the sixth amendment in *Lego v. Twomey*.[84] There, the Court was concerned with whether the judge should decide the factual question of whether a confession was made voluntarily. The Court held that the hearing judge should properly make this determination since the issue only related to the admissibility of the confession, not its truth.[85] The Court also held that the appropriate standard of proof which the judge should apply is the preponderance of the evidence test, rejecting the argument for a reasonable doubt standard because the question at this stage is not one of guilt or innocence but only admissibility.[86]

In contradistinction to the sixth amendment, Rule 104(a) has permitted trial judges to make factual determinations that are identical to the ultimate question of guilt or innocence. Where conspiracy is charged, the conflict becomes apparent: the judge must make a threshold finding under Rule 104(a) that the prosecutor has proven the existence of a conspiracy and that the defendant was a member. The fact that this determination is made merely to establish the admissibility of evidence, or that it is made under a lower standard of proof than what the jury will use when deciding ultimate guilt, is of little consolation to the defendant since the judge's determination is plain for all to see and the jury cannot be insulated from such influence.

In sum, the broad application of Rule 104(a) allows the trial judge to

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United States v. James, 590 F.2d 575, 579 (5th Cir.) (en banc), *cert. denied*, 442 U.S. 917 (1979) (citation omitted).

80. Following habit and displaced case law, trial judges continued to give standard jury instructions without realizing that the judge's determination on admissibility was final. This did not stop until jury instruction handbook authors caught on and rescinded their old instructions. *See, e.g.*, E. DEVITT & C. BLACKMAR, *supra* note 47, especially the 1979 pocket-part.

81. United States v. Bell, 573 F.2d 1040, 1049 (8th Cir. 1978); *contra* United States v. Lutz, 621 F.2d 940, 947 (9th Cir. 1980).

82. In pertinent part, the sixth amendment provides: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury. . . ." U.S. CONST. amend. VI (1791).

83. Lego v. Twomey, 404 U.S. 477, 486 (1972).

84. *Id.*

85. *Id.* at 489-90.

86. *Id.* at 487-89.

make factual determinations which coincide with the ultimate question of guilt or innocence. In criminal trials, such an extension of the judge's factfinding role exceeds the narrow holding in *Lego* and must be carefully weighed against the Supreme Court's warning therein.[87]

B. Standard of Proof

Rule 801(d)(2)(E) contains four prerequisites which must be met before the coconspirator exception can be applied. They are: (1) a statement;[88] (2) by a coconspirator of a party; (3) during the course of a conspiracy; and (4) in furtherance of the conspiracy.[89] Although proof of the existence of a conspiracy is not an expressed requirement, it may be implied since a court must necessarily find that a conspiracy existed before a declarant can qualify as a coconspirator.[90]

Prior to the enactment of the Federal Rules of Evidence, a prima facie case of conspiracy had to be shown before the statements of an alleged coconspirator would be admitted.[91] In *United States v. Petrozziello*,[92] the First Circuit examined the prima facie case standard in light of Rule 104 and found that the new rule prescribes a higher test.[93] The court held that the civil standard of preponderance of the evidence[94] should be used in future cases. This new standard was adopted for several reasons. First, under Rule 104(a) the judge alone decides preliminary fact issues necessary to determine preliminary questions of

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87. The Court noted that:

> [C]oerced confessions are forbidden in part because of their "probable unreliability." However, it had been settled . . . that the exclusion of unreliable confessions is not the purpose that a voluntariness hearing is designed to serve. . . . The sole issue in such a hearing is whether a confession was coerced. Whether it be true or false is irrelevant; indeed, such an inquiry is forbidden.

Id. at 484-85 n.12 (citations omitted).

88. "Statement" is defined as "(1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by him as an assertion." FED. R. EVID. 801(a).

89. FED. R. EVID. 801(d)(1)(E).

90. *See* United States v. Gil, 604 F.2d 546, 547 (7th Cir. 1979) ("the existence of a conspiracy [though not expressed] is an obvious necessary precondition before the Rule comes into play").

91. *See* note 36 *supra*. There were several other standards of proof used in the federal courts: United States v. Armedo-Sarmiento, 545 F.2d 785, 795 (2d Cir. 1976) (ample other evidence), *cert. denied*, 430 U.S. 917 (1976); United States v. Papia, 560 F.2d 827, 835 (7th Cir. 1977) (sufficient independent evidence); United States v. Johnson, 467 F.2d 804, 807 (1st Cir. 1972), *cert. denied*, 410 U.S. 909 (1973) (credible and sufficient); Dennis v. United States, 346 F.2d 10, 16 (10th Cir. 1965), *rev'd on other grounds*, 384 U.S. 855 (1966) (some evidence aliunde).

92. 548 F.2d 20 (1st Cir. 1977).

93. *Id.* at 23.

94. Initially, the First Circuit expressed its new test as "if it is more likely than not that the declarant and the defendant were members of a conspiracy when the hearsay statement was made, and that the statement was in furtherance of the conspiracy, the hearsay is admissible," United States v. Petrozziello, 548 F.2d 20, 23 (1st Cir. 1977), but then explained the test as the ordinary civil standard of preponderance of the evidence. United States v. Martorano, 557 F.2d 1, 11 (1st Cir.), *rehearing denied*, 561 F.2d 406 (1st Cir. 1977), *cert. denied*, 435 U.S. 922 (1978).

admissibility, a decision which is conclusive since the jury no longer participates in the decision.[95] Second, the new rule uses the word "determine" which imports a higher standard of proof, since "finding a prima facie case" is not the same as "determining that a conspiracy existed."[96] Third and last, since under Rule 104(a) the judge may consider hearsay and other inadmissible evidence in making the determination on admissibility, a higher standard is implicit.[97]

The preponderance of evidence standard has been followed in five other circuits,[98] with only the Ninth Circuit still maintaining a prima facie test.[99] Additionally, it should be kept in mind that there are other evidentiary standards in operation.[100] Three circuits now utilize a two-step admission procedure which involves the application of two separate standards of proof at two different times.[101]

C. *Independent Evidence Requirement*

As stated previously,[102] the requirement that the existence of a conspiracy be proven is implicit in Rule 801(d)(2)(E). What cannot be implied, however, is the common law requirement that the conspiracy be shown by evidence independent of the hearsay statement itself seeking admission.[103] This portion of the common law was not carried into the rules, and nothing in the legislative history indicates whether its deletion was intentional or oversight.[104]

The common law requirement of independent foundation was ex-

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95. United States v. Petrozziello, 548 F.2d 20, 23 (1st Cir. 1977).

96. *Id.*

97. *Id.*

98. The following circuits have adopted the preponderance standard from *Petrozziello: Fifth Circuit:* United States v. James, 576 F.2d 1121, 1130 (5th Cir. 1978), *modified en banc,* 590 F.2d 575, *cert. denied,* 442 U.S. 917 (1979); *Sixth Circuit:* United States v. Enright, 579 F.2d 980, 983-84 (6th Cir. 1978); *Eighth Circuit:* United States v. Bell, 573 F.2d 1040, 1043 (8th Cir. 1978); *Tenth Circuit:* United States v. Petersen, 611 F.2d 1313, 1327 (10th Cir. 1979); *District of Columbia Circuit:* United States v. Gantt, 617 F.2d 831, 845-46 (D.C. Cir. 1980). The remaining circuits also adopted the preponderance standard by other sources: *Second Circuit:* United States v. Torres, 519 F.2d 723, 725 (2d Cir. 1975); *Third Circuit:* United States v. Trowery, 542 F.2d 623, 627 (3d Cir. 1976), *cert. denied,* 429 U.S. 1104 (1977); *Fourth Circuit:* United States v. Jones, 542 F.2d 186, 203 (4th Cir. 1976); *Seventh Circuit*: United States v. Santiago, 582 F.2d 1128, 1132 (7th Cir. 1978).

99. United States v. Batimana, 623 F.2d 1366, 1368-69 (9th Cir. 1980).

100. *See* note 91 *supra.*

101. They are the Second, Fifth and District of Columbia Circuits. *See* notes 120-31 and accompanying text *infra.*

102. *See* note 90 and accompanying text *supra.*

103. *See* notes 41-44 and accompanying text *supra.*

104. *See, e.g.,* ADVISORY COMM. NOTE, FED. R. EVID. 801(d)(2)(E), and the Report of the Senate Committee on the Judiciary, FED. R. EVID. 801(d)(2)(E), S. REP. NO. 93-1277, 93d Cong. 2d Sess. 24 (1974), *reprinted in,* [1974] U.S. CODE CONG. & AD. NEWS 7051, 7073, which relate the intent to include all common law characteristics of the coconspirator exception in the Rule, but are silent as to the independent foundation requirement.

pressed by the Supreme Court in *Glasser v. United States.*[105] In *Glasser*, the court held that unless the conspiracy is shown first by independent, non-hearsay evidence, the hearsay statements will bootstrap their own admission.[106] In other words the Supreme Court admonished trial courts not to use hearsay to prove the admissibility of hearsay. In *United States v. Martorano*[107] the First Circuit was presented with a conspiracy case tried shortly after the Federal Rules of Evidence became effective.[108] While arguing in favor of the admission of certain coconspirator declarations, the prosecutor referred to the actual statements he sought to have admitted as their own foundational proof of conspiracy over the objection of the defendant. Noting that this was plainly contrary to the Supreme Court's ruling in *Glasser*, the First Circuit reasoned that Rule 104(a) explicitly contemplated this event since it provides that the judge is "not bound by the rules of evidence"[109] in making the determination, and the rule therefore overrules *Glasser.*[110] The court said, however, that the *Glasser* teaching against bootstrapping should remain as a warning to trial judges and serve as a reminder that such evidence ordinarily has little credibility.[111] This view has not been accorded a warm reception.[112] Only the Sixth Circuit, in *United States v. Vinson,*[113] has followed this rule, and *Glasser's* prohibition against bootstrapping has been upheld in light of the new rules in seven other circuits.[114]

One court which recognized the apparent conflict between *Glasser* and the Federal Rules resolved the issue for its circuit.[115] The Fifth Circuit reasoned that because Rule 104(a) permits the judge to consider hearsay and other inadmissible evidence in determining admissibility, it does not also mean to say that the judge may consider the very hearsay

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105. 315 U.S. 60 (1942).

106. *Id.* at 74-75.

107. United States v. Martorano, 557 F.2d 1 (1st Cir.), *rehearing denied,* 561 F.2d 406 (1st Cir. 1977), *cert. denied,* 435 U.S. 922 (1978).

108. *Id.*

109. FED. R. EVID. 104(a).

110. 557 F.2d at 12.

111. *Id.*

112. *But see* United States v. James, 590 F.2d 575, 592 (5th Cir.) (Tjoflat, J., concurring), *cert. denied,* 442 U.S. 917 (1979).

113. 606 F.2d 149, 151-53 (6th Cir. 1979).

114. United States v. Tilton, 610 F.2d 302, 306 (5th Cir. 1980); United States v. Cambindo Valencia, 609 F.2d 603, 631 (2d Cir. 1979); United States v. Schoenhut, 576 F.2d 1010, 1027 (3d Cir. 1978); United States v. McPartlin, 595 F.2d 1321, 1357 (7th Cir. 1979); United States v. Rios, 611 F.2d 1335, 1340-41 & n.8 (10th Cir. 1979); United States v. Macklin, 573 F.2d 1046, 1048 & n.2 (8th Cir. 1978); United States v. Haldeman, 559 F.2d 31, 118 & n.246 (D.C. Cir. 1976) (decided before rules became effective, but considered as persuasive authority).

115. United States v. James, 590 F.2d 575 (5th Cir.) (en banc), *cert. denied,* 442 U.S. 917 (1979).

itself seeking admission.[116] Moreover, in *United States v. Macklin*,[117] the Eighth Circuit called the *Martorano* response "unwarranted and . . . not contemplated in the enactment of Rule 104."[118] In the majority of circuits, then, the *Glasser* doctrine survives under Rule 104 because courts view it as providing an important safeguard against unreliability.[119]

In summary, the enactment of the Federal Rules of Evidence has resulted in a distinctive change in the common law coconspirator exception. The judge now makes the decision on admissibility in every circuit where before this was a jury question in most. Additionally, in all circuits except the ninth, the judge's determination on admissibility has been raised from the prima facie test to the preponderance of the evidence test. One area, however, has been left in a state of flux in the wake of the Federal Rules. Although most circuits still adhere to the common law requirement that a conspiracy be proven by independent, non-hearsay evidence before the exception can be invoked, two circuits have rejected this approach and now allow bootstrapping.

III. Recent Developments in Coconspirator Evidence

The federal courts have continued to fine-tune the coconspirator exception within their respective circuits. These modifications have resulted in the rule's overall diverse development. Specifically addressed has been the concept of a two-step ruling; a renewed interest in the requirement that the declarant be connected to the conspiracy; the requirement that an explicit ruling by the judge be on the record; and the timing of the admissibility ruling.

A. The Two-Step Ruling

In *United States v. Jackson*,[120] the Court of Appeals for the District of Columbia Circuit recently adopted the view that a two-step ruling is needed in the admission of coconspirator statements. Reasoning that the trial judge should make the sole determination as to admissibility, the court held that the situation should be looked at twice: once when the statements are offered and again at the close of the evidence.[121] The

116. *Id.* at 581.
117. 573 F.2d 1046 (8th Cir. 1978).
118. *Id.* at 1048 n.2.
119. For a list of the circuits which adhere to *Glasser*, *see* cases cited in note 114 *supra*.
120. 627 F.2d 1198 (D.C. Cir. 1980).
121. *Id.* at 1218-19.

District of Columbia Circuit's reasoning was based on a line of cases[122] which balanced the ideal order of proof against the impracticability of duplicative testimony and witness inconvienence. In this regard, such a procedure is sensible since the judge must first rule on conditional admissibility and then consider, at the close of the prosecution's case, whether the necessary foundation was laid to justify the earlier conditional admission.[123] Simultaneously, the judge must consider whether the prosecution has produced sufficient evidence, through both the independent evidence and the coconspirator's declarations, to submit the question to the jury for a ruling on guilt.

By adopting this two-step procedure, the District of Columbia Circuit presumes that all cases involving coconspirator statements present complex order of proof scenarios.[124] This, however, is not the case; seven other circuits have seen no need for two distinct rulings,[125] and the ones that have indicate its use is proper primarily in cases where conditional admissibility is necessary.[126] A second ruling where one is sufficient serves to blur the process that *Jackson* itself stands to clarify.[127] Where the two-step ruling is utilized, two different standards of proof are applied to determine whether the foundational elements have been met. On first examination, when the statements are introduced, the judge need only be convinced that a conspiracy existed by "substantial evidence."[128] At the close of the evidence the judge makes two further determinations. First, whether the prosecutor has adequately "connected up" any foundational elements needed to support the earlier conditional admission. Second, whether the prosecutor has shown that the combined foundational proof and the admitted declarations are sufficient to provide a basis for the jury to conclude guilt.[129] Here a more

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122. United States v. Grassi, 616 F.2d 1295, 1300-01 (5th Cir. 1980); United States v. Gantt, 617 F.2d 831, 845 (D.C. Cir. 1980); United States v. Petersen, 611 F.2d 1313, 1330-31 (10th Cir. 1979); United States v. Stanchich, 550 F.2d 1294, 1299 (2d Cir. 1977).

123. 627 F.2d at 1220.

124. *Id.* at 1218.

125. United States v. Thompson, 621 F.2d 1147, 1153 (1st Cir. 1980); United States v. Provenzano, 620 F.2d 985, 1000 (3d Cir. 1980); United States v. Kendricks, 623 F.2d 1165, 1167-68 & n.5 (6th Cir. 1980); United States v. Baykowski, 615 F.2d 767, 771 (8th Cir. 1980); United States v. Batimana, 623 F.2d 1366, 1368-69 (9th Cir. 1980); United States v. Anderson, 611 F.2d 504, 511 (4th Cir. 1979); United States v. McPartlin, 595 F.2d 1321, 1327 (7th Cir. 1979) (Pell, J., concurring).

126. United States v. Geaney, 417 F.2d 1116, 1120 (2d Cir. 1969). *cert. denied sub nom.*, Lynch v. United States, 397 U.S. 1028 (1970); United States v. James, 590 F.2d 575, 580 (5th Cir.) *en banc., cert. denied,* 442 U.S. 917 (1979); *cf.* United States v. Tilton, 610 F.2d 302 (5th Cir. 1980) (this most recent case from the Fifth Circuit does not even mention the two-step procedure).

127. United States v. Jackson, 627 F.2d 1198, 1218 (D.C. Cir. 1980).

128. *Id.* at 1219-20. Substantial evidence is described as "more than a scintilla. It is such evidence as a reasonable mind would accept as adequate to support a conclusion." United States v. Petersen, 611 F.2d 1313, 1330 n.1 (10th Cir. 1979).

129. *See* United States v. Petersen, 611 F.2d 1313, 1330 (10th Cir. 1979), United States v. Jackson, 627 F.2d 1198, 1219-20 (D.C. Cir. 1980).

rigid standard variously expressed as "whether . . . the jury . . . might fairly conclude guilt beyond a reasonable doubt,"[130] or "at least enough to take the question to the jury,"[131] is required.

B. Evidence of the Declarant's Connection to the Conspiracy

At common law it was required that the declarant be shown to be a member of the conspiracy as well as the defendant. Since reference to this precondition had been made only fleetingly in past cases, the Second Circuit Court of Appeals concluded, in *United States v. Cambindo Valencia*,[132] that proof of the declarant's involvement in the conspiracy had been taken for granted. The Second Circuit held that not only must the declarant be proven a member of the conspiracy by evidence independent of any hearsay, but that a preponderance of the evidence must indicate the same.[133]

This renewed interest in the requirement of proof of the declarant's connection illuminates what may be expected in conspiracy trials in the future. In two respects, the requirement makes the job tougher on the prosecutor. First, he may no longer simply "assume"[134] the declarant's involvement; second, he will be required to prove the existence of a conspiracy by independent evidence. The Second Circuit has taken a harsher attitude toward conspiracy than prosecutors have historically enjoyed.[135] Consequently, this is another step away from the pro-bootstrapping view of the First and Sixth Circuits.[136]

C. Requirement of an Explicit Ruling on Admissibility

In *United States v. Bell*,[137] the Eighth Circuit Court of Appeals prescribed the procedure to be followed by trial courts when admitting coconspirator evidence. The court made it clear that Rule 104(a) and 801(d)(2)(E) require the trial judge to make an explicit finding on the record regarding admissibility. This was coupled with a direction to trial courts to cease instructing the jury concerning the admissibility of coconspirator evidence.[138]

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130. *See* United States v. Jackson, 627 F.2d 1198, 1219 (D.C. Cir. 1980).

131. *See* United States v. James, 590 F.2d 575, 589 (5th Cir.) (en banc), *cert. denied*, 442 U.S. 917 (1979).

132. 609 F.2d 603 (2d Cir. 1979); *accord* United States v. Watkins, 600 F.2d 201, 204-05 (9th Cir. 1979).

133. 609 F.2d 603, 630 (2d Cir. 1979). The court also found that the judge's ruling, though not explicitly on the record, could be inferred, contrary to United States v. Bell, 573 F.2d 1040, 1044 (8th Cir. 1978). *See* notes 137-44 *infra*.

134. 609 F.2d 603, 630 (2d Cir. 1979).

135. Learned Hand once called conspiracy "that darling of the modern prosecutor's nursery." Harrison v. United States, 7 F.2d. 259, 263 (2d Cir. 1925).

136. *See* notes 102-19 and accompanying text *supra*.

137. 573 F.2d 1040 (8th Cir. 1978).

138. *Id.* at 1044.

In *United States v. Lutz*,[139] however, the Ninth Circuit recently rejected this view,[140] holding that the jury must still be instructed as to the admissibility of evidence.[141] Further, an explicit ruling by the judge need not be visible on the record if it is reasonably indicated by the instructions to the jury that such a finding was reached.[142] This view is not in accord with the majority of circuits which hold that the defendant is entitled to a clear-cut ruling on admissibility and that such a ruling is to be a final decision by the judge.[143] The holding in *Lutz*, in effect, is a step backward from the thrust of Rule 104(a) which connotes a finality to the judge's determination on admissibility.[144]

D. Timing of the Admissibility Ruling

In *United States v. Ciampaglia*,[145] the First Circuit again broke new ground in the area of the coconspirator exception. At a trial for conspiracy to commit mail fraud and conceal the property of a bankrupt, the district court did not allow defense counsel to present evidence in rebuttal to the prosecutor's proof of the existence of a conspiracy.[146] The appeals court stated that the weighing of the defendant's evidence when determining admissibility is implicit in the preponderance standard.[147] Therefore, the trial judge's ruling should be timed and postponed to a point in the trial after the defendant has had the opportunity to disprove the existence of a conspiracy.

A different result was reached by the Eighth Circuit in *United States v. Baykowski*.[148] Noting that *United States v. Bell*[149] required the judge to make the ruling on admissibility at the close of all the evidence, the court in *Baykowski* still did not find error in a trial where the judge ruled at the close of the government's case when the defendant did not have the opportunity to rebut the prosecutor's proof.[150] The Court held that this was only a minor deviation from the prescribed procedure which did not affect the substantial rights of the parties,[151] especially

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139. 621 F.2d 940 (9th Cir. 1980).
140. *Id.* at 947.
141. *Id.*
142. *Id.* The court would reverse only if the evidence were insufficient to support the judge's conclusion.
143. *See* United States v. Petrozziello, 548 F.2d 20, 23 (1st Cir. 1977), and notes 60-87 and accompanying text *supra*.
144. FED. R. EVID. 104(a).
145. 628 F.2d 632 (1st Cir.), *cert. denied*, 101 S. Ct. 365 (1980).
146. *Id.* at 637.
147. *Id.* at 638.
148. 615 F.2d 767 (8th Cir. 1980).
149. 573 F.2d 1040 (8th Cir.1978).
150. 615 F.2d 767, 772 (8th Cir. 1980). The court also held that the instructions given to the jury concerning admissibility were not error. *Id.*
151. *Id.* at 771.

since the error was not objected to at trial.[152] Nevertheless, the Ninth Circuit's holding in *Baykowski* is at odds with the views of other circuits. Timing of the admissibility ruling is crucial to ensuring that a conspiracy is truly proven by a preponderance of the evidence.

V. CONCLUSION

The coconspirator exception to the hearsay rule has undergone many changes in the wake of the Federal Rules of Evidence. Among these are the elevated standard of proof and the requirement that the judge alone determine the admissibility of coconspirator declarations. These particular steps are beneficial to defendants as they will keep potentially prejudicial evidence from the hearing of the jury. It has been contended that these gains traded away a significant portion of the defendant's sixth amendment right to a jury trial,[153] but the trend has been generally recognized as one in favor of the defendant. Additionally, the tolerance of bootstrapping by the First and Sixth Circuits, has been viewed as fostering an atmosphere of easy convictions and fueling a fire under anxious prosecutors. This feeling is not new, having been fearfully expressed as early as 1925.[154]

There has been a trend to debate the mystical pros and cons of the procedures involved in the admission of coconspirator statements, such as the merits of a two-step ruling and various standards of proof. This has been done at the expense of focusing on clearly defining the issues which most directly affect the defendant's constitutional rights. In the final analysis, one thing is clear: the federal courts have not uniformly applied the coconspirator exception. This stems from the fact that none have clearly examined their reasoning for the exception's existence. Before further random modification is effectuated, each of the federal circuit courts should reassess the theoretical underpinnings of the exception and define what they expect the coconspirator exception to accomplish.

MICHAEL J. TREMBLAY

152. *Id.* at 772.
153. *See* notes 82-87 and accompanying text *supra*.
154. *See* Harrison v. United States, 7 F.2d 259, 263 (2d Cir. 1925).

BOOK REVIEW

CHURCH COURTS AND THE PEOPLE DURING THE ENGLISH REFORMATION 1520-1570
By R. Houlbrooke. Oxford University Press.
1979. Pp. 304. $29.00

Can two court systems, with overlapping jurisdiction exist together in a single State? In the United States, the existence of a federal system makes that a question which even today evokes emotional, if not violent, reactions.[1] The long struggle to establish a common law in England was part of larger philosophical and institutional changes wrought by the rise of the Nation-State. Can two court systems exist horizontally or side by side? Clearly the answer is yes, as law and equity have done so, more or less successfully, for several hundred years. But, there is a third species of competing court systems, governmental versus private dispute settlement. Yet, the concept of sovereignty implies a monopoly in the State. Is not a private court system inconsistent with such a notion?

Church courts existed in a symbiotic relationship with governmental courts through most of the last two thousand years. While there had been constant tensions and adjustment between the two, prior to the Reformation such courts played a major judicial role. The extent of this role and the relationship between the systems is summarized in Maitland's description of Church courts at the end of the 13th century:

> In the first place, the sentence of excommunication, when pronounced by the ecclesiastical courts, was enforced by the secular power with mechanical regularity and almost as a matter of course. The excommunicate was disabled from suing in the temporal courts: the contumacious excommunicate was thrown into gaol. In the second place, the canonists had acquired what they hardly aspired to elsewhere: namely, an exclusive jurisdiction over testamentary causes and over the distribution of goods intestate. On the other hand, there were two points at which the English church had been singularly unsuccessful. The *privilegium fori* [benefit of clergy] was confined within unusually narrow bounds, and secular justice kept a light hold over all disputes that touched ecclesiastical patronage.[2]

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1. U.S. seeks to penalize a Judge in Louisiana in desegregation case, New York Times, January 7, 1981, at 1.

2. F. MAITLAND, CANON LAW 58-59, *quoted in* J. CAMERON, FREDERICK WILLIAM MAITLAND AND THE HISTORY OF ENGLISH LAW 77-78 (1977).

In other words, four centuries ago some of the most intimate aspects of everyday life, including matrimony, sexual regularity, wills, reviling of neighbors, and religious orthodox, were subject to the jurisdiction of church courts. It may thus be surprising that the generally accepted view is that the modern study of church courts dates from the last decade of the nineteenth century. Thus, the famous debate between Bishop Stubbs and Maitland, about the "law" applied in church courts, began[3] and continues to[4] excite the scholarship of church courts. Stubbs took the position that "the canon law of Rome, although always regarded as of great authority in England, was not held to be binding on the courts."[5] Thus, there was really only one Law, although there were two court systems. Maitland, on the other hand argued that the Canon of Rome was authoritative and "absolutely binding statute law."[6]

Houlbrooke asserts that "the law of the Church courts was the common law[7] of Christendom, much of it supplemented by local custom or reinforced by local legislation."[8] But that is just the beginning of this book. Its purpose is "to trace in some detail the development of certain courts through the period of the Reformation,"[9] a necessary effort as Church court records are only recently widely available. It was not until 1952 that a study devoted exclusively to church courts appeared.[10] Previously most research had been based on Royal Court records. "For understanding the realities of legal relations between Church and State in pre-Reformation England, the testimony of both royal and ecclesiastical courts is equally important."[11] In this spirit Houlbrooke chose the diocesan courts not previously studied in depth. Further, because of his interest in seeing changes that occurred throughout the early Reformation, he limited his examination to dioceses where records existed for the entire period. He therefore chose Norwich, a richer, more densely populated, vigorously Protestant area, and Winchester, where Catholic recusancy was strong. Houlbrooke discusses each of the several major areas of Church court jurisdiction in separate chapters.

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3. R. HOULBROOKE, CHURCH COURTS AND THE PEOPLE DURING THE ENGLISH REFORMATION 1520-1570 (1979) at 2.

4. *See* Donahue, *Roman Canon Law in the Medieval English Church:* Stubbs vs. Maitland *Re-Examined After 75 Years in the Light of Some Records From the Church Courts,* 72 MICH. L. REV. 647 (1974).

5. J. CAMERON, *supra* note 2, at 63.

6. *Id.* at 65.

7. Whether Canon Law is more properly considered statutory or case law and the degree to which it made a difference is developed in Helmholz, *Writs of Prohibition and Ecclesiastical Sanctions in the English Courts Christian,* 60 MINN. L. REV. 1011 (1976).

8. R. HOULBROOKE, *supra* note 3, at 8.

9. *Id.* at 3.

10. *Id.* at 2.

11. Helmholz, *supra* note 7, at 1013.

Each chapter is slightly different in format. There is however no real fulfillment of the promise to study the changes in the courts over time.[12] For instance, the chapter on the punishment of incontinence concludes by comparing "the church courts of the sixteenth century" and "today's courts."[13] The chapter on testamentary administration and litigation concludes that the data available is so variable that assessment is difficult.[14] This difficulty however may be inherent in the choice of so limited a period of years. During such historically short periods there are always conflicting trends. It is only in retrospect that the dominant trend is clear. In fact, Houlbrooke's ultimate conclusions reflect this paradox of historicism. He concludes that while the Reformation ultimately weakened the Church courts, the Crown gave them new authority by closely integrating them into the administrative structure of the State.[15]

While it is stated a number of times that there were abuses of authority, there is no substantial development of who the "enemies" of the Courts were, or how they fought the church.[16] Neither is there any real development of the theme expressed in the book's title, the theme of contacts between ordinary citizens in their everyday activities and the Church courts.[17]

Despite these limitations, this book is rich in suggestive historical material. A description of probate in a 17th century text is contrasted with the actual practice at the time. There was both probate "in common form" and probate "in solemn form of law."[18] The lack of formality tolerated by the Church courts leads to serious abuses. Wills were approved for probate without examination of the circumstances of execution;[19] there was collusive litigation to deprive third parties of their claims;[20] administrators were permitted to function without authority[21] (there was one case where a wife had obtained letters of administration before her husband died);[22] and there were attempts to secret wills and file claims in intestacy.[23]

The detailed description of tithing indicates the growing developmen-

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12. R. HOULBROOKE, *supra* note 3, at 3.
13. *Id.* at 83.
14. *Id.* at 114.
15. *Id.* at 1.
16. *Cf. Id.* at 11.
17. *Id.* at 2. *Cf.* Anthropological approach taken to the Inquisition court records of 14th century France by Emmanuel Le Roy Ladurie in Montaillou (Vintage 1979).
18. R. HOULBROOKE, *supra* note 3, at 92-93.
19. *Id.* at 109.
20. *Id.* at 110.
21. *Id.*
22. *Id.* at 111.
23. *Id.* at 110.

tal restlessness present in the sixteenth century. This chapter, the longest in the book, sets out the tithing problem on a product by product basis. There is a separate discussion of grain, milled corn, hay, pasture, young of animals, fish, wood, new crops, garden produce, minerals and bricks. There is even a brief discussion of the tithing of "rakings."[24] However the "largely invisible profits of steadily growing industry and commerce could not be tithed efficiently"[25] and ultimately required an entirely new system. The Crown and common law courts were very reluctant however to interfere with tithing because the people, it was believed, found "the services thus paid for were well worth the price."[26] Nevertheless, pre-Reformation abuses were so substantial that legislative changes were eventually made. The system was slowly transformed from voluntary offerings to required taxes, and from church to secular beneficiaries.[27] In 1549 a statute was enacted exempting land previously barren from tithes on corn and hay for seven years.[28] During this period enclosure of land for grazing and textile manufacture had also begun.[29]

The references to the frequency of settlement[30] point out that while the plaintiff titheholder almost always won, the delay in obtaining payment, and the expense of litigation made litigation undesirable. Related thereto is the willingness of "sinners" and "heretics" to confess, do penance or otherwise purge themselves.[31] Obviously the penalties risked by resistance, such as loss of the offending limb or eternal damnation, were too severe.[32]

There also had developed a less well educated "secular" clergy that was in closer contact with the people than either the hierarchy or the cenobite-scholars. During the Reformation their duties shifted from dispensing the sacraments to dispensing the word of God.[33] The Crown enjoined "the teaching of the Lord's Prayer, articles of faith, and ten commandments to the young (1536); quarterly sermons and quarterly reading of the royal injunctions (1538) and the reading of homilies every Sunday (1547)."[34] The lack of learning, even illiteracy, of the clergy

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24. *Id.* at 126.
25. *Id.* at 118.
26. *Id.* at 119.
27. *Id.* at 143.
28. *Id.* at 127.
29. Just before the period under study Thomas Moore decried the enclosure movement as motivated by greed, and as a cause of stealing Utopia 46-48 (Penguin ed. 1965).
30. R. HOULBROOKE, *supra* note 3, at 43, 136.
31. *Id.* at 45, 47.
32. *See* Symposium, *Plea Bargaining and its History,* 13 LAW & SOC'Y REV. 211 (1979).
33. R. HOULBROOKE, *supra* note 3, at 173.
34. *Id.* at 200.

made these requirements impossible of fulfillment.[35] Thus began one of the major pressures for more general education of the masses.

There are discussions of sermons and patronage,[36] evolution of the concept and crime of heresy,[37] and speculations on the innate conservatism of the populace.[38] There are also three appendices setting out by year the types of litigation, the outcome if known and the correctional activity of the diocesan courts.[39] Finally, there is a bibliography of original and secondary sources of both a legal and non-legal nature.

While the book does not answer the question initially posed, it does shed light on it, and certainly is an interesting historical description of the details of the work of Reformation Church Courts. This book is worthwhile reading for those interested in civil procedure, family law, property and constitutional law.

WALTER J. KENDALL*

35. *Id.* at 202.

36. *Id.* at 191; *see* Elrod v. Burns, 427 U.S. 347 (1976).

37. R. HOULBROOKE, *supra* note 3, at 214; *see also* Goldstein, *An American Gulag? Summary Arrest and Emergency Detention of Political Dissidents in the United States,* 10 COLUM. HUMAN RIGHTS L. REV. 541 (1978).

38. R. HOULBROOKE, *supra* note 3, at 256.

39. *Id.* at 273-81.

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BOOKS RECEIVED

FEDERAL CIVIL PRACTICE. By Kent Sinclair, Jr. New York, New York: Practicing Law Institute. 1980. Pp. 1119. Kent Sinclair, Jr., who since 1976 has served as a United States Magistrate on the U.S. District Court for the Southern District of New York, has produced a one-volume guide to the rules which control civil trial and appellate practice in the federal courts. Beginning with a brief overview of the federal judicial system (structure, governing statutes and rules, jurisdiction), the book proceeds to an exposition of subject matter jurisdiction, justiability, personal jurisdiction and venue. Sinclair then analyzes the federal rules and decisional law derived from the pleadings, motion practice, and discovery through trial, appeal and Supreme Court practice. The work is compact (considering its comprehensive coverage) yet well-annotated and thorough. As such, it provides the federal litigator with a highly useful single volume reference.

THE NINTH AMENDMENT, HISTORY, INTERPRETATION, AND MEANING. By Mark N. Goodman. Smithtown, New York: Exposition Press. 1981. Pp. 74. $5.00. The ninth amendment of the United States Constitution, "The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people," has seldom been relied upon by the courts, yet its meaning, scope, and significance within the Bill of Rights certainly had purpose. Thomas Jefferson once said: "Our peculiar security is in possession of a written Constitution. Let us not make it a blank paper by construction." Mark Goodman's treatise on the "elusive ninth" seeks to uncover its genesis and meaning through an inquiry into the Constitutional Convention, the state ratifying conventions, as well as public and private correspondence during the ratification process. Goodman places particular emphasis on the crucial debate and controversy surrounding the question of whether the Bill of Rights should be included in the Constitution. The dangers of inclusion were aptly expressed by Patrick Henry: "Other essential rights — what are they? The world will say that you intended to give them up. When you go into an enumeration, the inevitable conclusion is, that what is omitted is intended to be surrendered." The debate surrounding the need to safeguard to

the people those powers not specifically delegated resulted in the enactment of the Bill of Rights with the ninth amendment as an integral and inseparable part of the document. Goodman's book is an excellent account of the genesis and meaning of the amendment, revealing how the Framers and Adopters thought and felt about the inviolable rights and truths they held self-evident. It is important reading for political scientists, lawyers, and students of American history who wish to more fully understand the guiding principles upon which our country was founded.

FOREWORD

*John Joseph Moakley**
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In 1952, Mr. Justice Jackson, writing for the Court in *FTC v. Ruberoid Co.*,[1] stated: "The rise of administrative bodies probably has been the most significant legal trend of the last century and perhaps more values today are affected by their decisions than by those of all the courts, review of administrative decisions apart."[2] Because the decisions of administrative bodies in 1980 have a far more critical effect on the social and economic values of the country than they did in 1950, the comments of Mr. Justice Jackson on this nascent branch of the law are even more appropriate today.

The Symposium on Administrative Law published by the New England Law Review is a further recognition of the importance of this area of the law in the governmental process. Moreover, the articles and notes appearing in this volume will serve a more substantive purpose than simply to entice the curiosity of legal scholars. By focusing on the deficiencies in the administrative process, they can provide the grist from which reform proposals may be legislatively crafted. Indeed, as a survey of current initiatives in the area of regulatory and administrative law will indicate, the need for further scholarship will continue to grow.

Although regulatory reform has been included in virtually every legislative agenda for a number of years, reform of the regulatory proc-

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1. 343 U.S. 470 (1952).

2. *Id.* at 487.

ess has recently become an urgent priority due, in large part, to the recognition of the macroeconomic effect of government regulation. That significant reform has not yet been achieved is merely symptomatic of the difficulty in developing consensus among the disparate political factions supporting various legislative proposals.

A number of legislative initiatives presently pending before the 97th Congress not only attempt to address procedural deficiencies, as noted in some of the Symposium articles, but also seek to alleviate the cumulative burden imposed by the regulatory bureaucracy, popularly called "the fourth branch of government." Many of these proposals are distillations of the work of prior Congresses and many provide important vehicles for future legislative compromise. On the other hand, a number of the proposals raise issues beyond procedure or economics, the resolution of which will profoundly affect the relationship of the coordinate branches of government.

I. RECENT LEGISLATION

The 96th Congress had some measure of success in enacting legislation which improved both the management of the bureaucracy and the administrative process. The "Paperwork Reduction Act of 1980"[3] provides various mechanisms which limit the ability of the government to require unnecessary or duplicative paperwork of the public. Under this Act, the Director of the Office of Management and Budget (OMB) is given authority to coordinate, to integrate and, wherever possible, to make uniform the practices by which the government collects information from the public. In addition to the establishment of a Federal Information Locator System for the use of government agencies in gathering material, agencies are now required to consider the comments of the Director of OMB in the development of any rule involving the collection of information from the public. If the Director should determine that an agency's response to his or her comments is inadequate, he or she may disapprove the rule, provided, of course, that the agency is not an independent regulatory agency.

The Regulatory Flexibility Act[4] was another piece of reform legislation enacted in 1980. This statute added chapter 6, entitled "The Analysis of Regulatory Functions," to the Administrative Procedure Act (APA).[5] Chapter 6 requires agencies, in advance of section 553 rulemaking, to develop analyses which will describe the effect of the proposed rulemaking on small businesses or small governmental units.

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3. Pub. L. No. 96-511, 94 Stat. 2812 (1980) (to be codified at 44 U.S.C. §§ 3501-3520).
4. Pub. L. No. 96-354, 94 Stat. 1164 (1980) (to be codified at 5 U.S.C. §§ 601-612).
5. 5 U.S.C. §§ 551-559, 701-706 (1976).

The analyses are subject to the notice and comment requirements of section 553. Alternatives to the proposed rule which would accomplish the same objectives, but which would minimize its adverse impact on small entities, must also be proposed. The Regulatory Flexibility Act, to a great extent, provides a procedural method to structure agency discretion and to force the agency to justify a choice from among alternatives. This approach to rulemaking moves in the direction suggested by Professor Baram in his article published in this volume.

II. CURRENT EXECUTIVE ORDERS

Emphasizing the urgency of the government's regulatory problems, President Reagan, immediately upon assuming office, appointed a Task Force on Regulatory Relief to be chaired by Vice President Bush.[6] The President also issued an executive order revising procedures by which regulatory agencies within the executive branch conduct their rulemaking activities.[7] The order is similar in many respects to one issued by President Carter at the beginning of his term of office.[8] Both administrations recognized the need for immediate steps to improve the management of the regulatory bureaucracy while reform legislation, applicable to both the executive branch and independent regulatory agencies, wended its way through Congress.

Many provisions of President Reagan's executive order mirror those of the Carter measure. Agencies, in advance of section 553 rulemaking, are required to undertake a regulatory impact analysis of each proposed rule.[9] Such analysis is intended to provide both the public and the agency a method by which the purpose of a regulation, its effects, and possible alternatives can be evaluated. During the notice and comment period, both the analysis and proposed rule are subject to review. In order to coordinate activities among the various agencies, the current order provides, as did its predecessor, for the biannual publication of a regulatory calendar containing the proposed rulemaking activities planned by the executive agencies for the coming year.[10] Using the calendar as a management tool, the Director of OMB can determine where conflict, duplication or overlap might occur, and may take corrective action.

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6. *See* President's Remarks Announcing the Establishment of the Task Force on Regulatory Relief, 17 WEEKLY COMP. OF PRES. DOC. 33-34 (Jan. 22, 1981).

7. Exec. Order No. 12,291, 46 Fed. Reg. 13,193 (1981).

8. Exec. Order No. 12,044, 3 C.F.R. 152 (1979).

9. *Compare* Exec. Order No. 12,291, sec. 3, 46 Fed. Reg. at 13,194-95 (1981) *with* Exec. Order No. 12,044, sec. 3, 3 C.F.R. at 154-55 (1979).

10. *Compare* Exec. Order No. 12,291, sec. 5(a), 46 Fed. Reg. at 13,195 (1981) *with* Exec. Order No. 12,044, sec. 2(a), 3 C.F.R. at 153 (1979).

The order issued by President Reagan differs from that of President Carter in two significant ways. The Reagan order places greater emphasis on cost-benefit analysis as an element in the evaluation of a proposed regulation.[11] Not only is the most cost-effective alternative to be used, but the condition of particular industries affected by the regulation, the national economy, and future regulatory intervention must be taken into consideration.[12] In addition, the Reagan initiative provides for greater centralization of authority in the Director of OMB to review agency compliance with the provisions of the executive order.[13]

Cost-benefit analysis should, of course, be a guiding principal in the legislative or regulatory undertaking. Yet it should also be recognized that cost-benefit is a term subject to the vagaries of interpretation, not to mention problems in quantification. Such analysis is a sufficient guide until issues of human health, safety or the environment enter into the equation. It is at this point that the question becomes political, in the generic sense of the term, and is more appropriately resolved by a legislative rather than an administrative body.

While the executive order attempts to improve upon procedural matters in the regulatory process, it is quite clear that procedure can have a substantive effect upon the outcome of the process. In delegating legislative authority to draft rules, Congress granted the various agencies broad discretion to develop responses to problems which Congress had neither the time nor the expertise to solve. The manner in which the authority was intended to be exercised was detailed in the relatively unbiased provisions of the APA. Regulatory analysis, as a new procedural tool which directs the agency to make regulatory decisions based on economic as well as specific statutory policy, limits agency discretion in a manner not envisioned by Congress in its original delegation. This does not imply that economic considerations should be extraneous to agency decisionmaking. However, unilateral imposition of this limitation without the participation of Congress can, in some instances, result in a de facto amendment of existing law. Legislative enactment of such procedural change is preferable to executive order so that the underlying policy implications can be subjected to the democratic processes of government.

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11. *See* Exec. Order No. 12,291, secs. 2 & 3, 46 Fed. Reg. at 13,193-95 (1981). In contrast, Carter's order only required that "burdens on the public [be] minimized," Exec. Order No. 12,044, sec. 1(e), 3 C.F.R. at 152 (1979), and that "an analysis of the economic consequences of each . . . [alternative be prepared, with] a detailed explanation of the reasons for choosing one alternative over the others." Exec. Order No. 12,044, sec. 3(b)(1), 3 C.F.R. at 154 (1979).

12. Exec Order No. 12,291, sec. 2(e), 46 Fed. Reg. at 13,193-94 (1981).

13. *Compare* Exec. Order No. 12,291, sec. 6, 46 Fed. Reg. at 13,196 (1981) *with* Exec. Order No. 12,044, sec. 5, 3 C.F.R. at 155-56 (1979). The Carter order is quite broad in this respect, mandating only that "[t]he Office of Management and Budget shall assure the effective implementation of this Order . . . [and] shall report . . . to the President on the effectiveness of the Order and agency compliance with its provisions." Exec. Order No. 12,044, sec. 5(c), 3 C.F.R. at 156 (1979).

The current Administration's executive order approach to procedural reform may be legally deficient in another subtle way. Arguably, communication between the Director of OMB and officials of the agency affected by the executive order may influence rulemaking decisions and thus be considered ex parte since it does not appear on the record.[14] In *Home Box Office, Inc. v. FCC*[15] the D.C. Circuit Court of Appeals held that "[i]f *ex parte* contacts ... occur, we think that any written document or a summary of any oral communication must be placed in the public file . . . immediately after the communication is received so that interested parties may comment thereon."[16] As *Home Box Office* specifically dealt with ex parte communications between private parties and agency officials,[17] the court's holding may not be technically violated by such communications between the Director of OMB and agency representatives. However, the requirement of APA section 557(c) that all grounds upon which an agency acts must be disclosed[18] is clearly not fulfilled in the latter situation. For these reasons, congressional consideration of a legislative package of reforms is of prime importance.

III. PROPOSALS AFFECTING JUDICIAL REVIEW

During the last session of Congress, Senator Dale Bumpers (D-Ark.) offered an amendment[19] to the Senate version of the Federal Courts Improvements Act of 1979[20] which generated a considerable amount of comment and controversy. In brief, the amendment directed the courts to decide all questions of law independently, without deference to agency expertise. It further provided that no presumption of validity would attach to agency regulations.[21] Although the bill never reached final passage, the so-called Bumpers amendment has been included in a number of regulatory reform proposals and has been introduced as free-standing legislation in the Senate.

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14. The APA defines ex parte communication as "an oral or written communication not on the public record with respect to which reasonable prior notice to all parties is not given. . . ." 5 U.S.C. § 551(14) (1976).

15. 567 F.2d 9 (D.C. Cir. 1977).

16. *Id.* at 57.

17. Specifically, the court in *Home Box Office* stated:

> Once a notice of proposed rulemaking has been issued . . . any agency official or employee who is or may reasonably be expected to be involved in the decisional process of the rulemaking proceeding . . . should "refus[e] to discuss matters relating to the disposition of a [rulemaking proceeding] with an interested private party, or an attorney or agent for any such party, prior to the [agency's] decision. . . ."

Id., quoting Exec. Order No. 11,920, sec. 4, 3 C.F.R. 121, 123 (1977).

18. 5 U.S.C. § 557(c) (1976).

19. *See* 125 CONG. REC. 12,145 (1979).

20. S. 1477, 96th Cong., 1st Sess., 125 CONG. REC. 12,131-41 (1979).

21. *See* 125 CONG. REC. 12,145 (1979).

A modified version of the Bumpers amendment was also contained in the regulatory reform bill reported out of the House Judiciary Committee in September of 1980. The modification came as a result of a compromise reached by the Committee and tacitly approved by the Carter Administration. It provided that a court should require all agency actions to be within the scope of the agency jurisdiction or authority "on the basis of the language of the statute or, in the event of ambiguity, other evidence of ascertainable legislative intent." The amendment further directed the courts, in making determinations on questions of law as distinguished from questions of fact under APA section 706 review, not to afford "any presumption in favor of or against agency action."[22] Versions of the modified Bumpers amendment also appear in several regulatory reform bills introduced in the 97th Congress.

The proper role of federal courts in the administrative process can most likely never be satisfactorily delineated by Congress. Standards of review imposed by the legislature are necessarily static while the actual review is dynamic, influenced almost as much by the activism of the individual judge as by the facts of the case. In the past, Congress has been reluctant to expand the role of the courts in the administrative process. Perhaps this is an implicit recognition of the legislative nature of the policy decisions made by regulatory agencies. Institutional tension created by the separation of powers naturally leads to an aggregation, rather than a dispersal, of power among the branches of government. For this reason alone the Bumpers amendment, which shifts decision-making away from both Congress and the Executive, is somewhat of an anomaly.

In the context of discussing standards for judicial review of agency rulemaking, it is important to observe how courts view their own role in the administrative process. As Professor Neely notes in his article published in this Symposium, some courts are hesitant to be "plunged in the middle of political battles." This is particularly true with such questions as the disqualification of administrators. The evolution of the political question doctrine as an element of the consideration of the justiciability of a "case or controversy" is evidence of the truth of that proposition. Yet the growing intervention of the courts in reviewing the exercise of rulemaking or adjudicatory authority by federal agencies is an undeniable phenomenon which belies the observation of judicial reluctance.

The standard of review which leads to judicial involvement in the rulemaking process was enunciated by the Supreme Court in *Citizens to Preserve Overton Park, Inc. v. Volpe.*[23] In this decision, the Court in-

22. *See* H.R. REP. NO. 1393, 96th Cong., 1st Sess. (1980).
23. 401 U.S. 402 (1971).

dicated that the judicial branch should engage in a "thorough, probing, in-depth review" of informal agency rulemaking.[24] Paralleling the development of this standard was the "hard look" doctrine, a subspecies of the *Overton Park* holding, first articulated in *Greater Boston Television Corp. v. FCC.*[25] Under this doctrine, courts may intervene not merely when procedural inadequacies are discovered or when agencies have exceeded their legislative mandates, but when they become aware, "especially from a combination of danger signals, that the agency has not really taken a 'hard look' at the salient problems, and has not genuinely engaged in reasoned decision-making."[26] A further indication of this form of judicial activism is suggested in the narrow reading of the Magnuson-Moss Act and the restricted view of the FTC's rulemaking power resulting from the decision of the Second Circuit in *Katharine Gibbs School v. FTC,*[27] as noted by Ronald Rosengarten.

In view of recent case law, it may not be necessary or even feasible to encourage further involvement of courts in the rulemaking process through such legislation as the Bumpers amendment. Congress, in delegating its legislative authority to develop rules and by regularizing the exercise of that authority through enactment of the APA, did not intend ultimately to have policy decisions made by courts. Informal, and to some extent, formal rulemaking procedures were meant to mirror the legislative process. Proposed rules were to be subject to evaluation and criticism during notice and comment periods in much the same manner as proposed legislation is debated in the halls of Congress. Once rulemaking is completed, the role of courts is to review the agency's compliance with administrative procedure, to insure the rule is within the authority of the agency, and to guard against arbitrary or capricious exercises of authority by the agency. To expand this function by inviting courts to second guess agency decisionmaking, or to deny a presumption of validity or regularity to the administrative process would clearly defeat the purpose of legislative delegation.

The modified Bumpers amendment is probably less troublesome than the original version. It would accord agency actions a presumption of validity; only in its determinations of questions of law would the agency not have the benefit of any legal presumption. Indeed, this particular modification may be redundant of existing law. As Professor Kenneth Culp Davis observed in his treatise on administrative law, courts have generally substituted their own judgment in any agency determination deemed to be a question of law, but have used the "rational basis" test,

24. *Id.* at 415.
25. 444 F.2d 841 (D.C. Cir. 1970).
26. *Id.* at 851 (footnote omitted).
27. 612 F.2d 658 (2d Cir. 1979), *rehearing denied,* 628 F.2d 755 (2d Cir. 1980).

or another more liberal standard, to review mixed questions of law and fact or questions of fact alone. Thus, deference to agency expertise or presumptions of validity are probably non-existent in judicial review of pure questions of law. As section 706 of the APA now states, "the *reviewing court shall decide all relevant questions of law,* interpret constitutional and statutory provisions, and determine the meaning of applicability of the terms of an agency."[28]

IV. THE LEGISLATIVE VETO

There has been a significant amount of support for a reform proposal known as the "legislative veto" during the 96th and 97th Congresses. The term legislative veto is actually a shorthand description of any statutory provision requiring the President or his executive officials to notify Congress of proposed actions to be undertaken pursuant to a statutory grant of authority. Once informed of the proposed action Congress may unilaterally veto the proposal, usually within a short period of time of the notification. Recently, similar veto provisions have accompanied delegations of rulemaking authority to federal agencies.[29] Other legislation would amend the APA to require agencies to submit all rules and regulations to Congress in sufficient time to allow a veto before they become effective.

The various statutory procedures for disapproving executive and administrative actions differ substantially one from another. In some instances, both houses of Congress must adopt a concurrent resolution vetoing the activity in question. Other provisions allow either one house, or even a congressional committee, to exercise this nullification power. None of the alternative procedures give the President the opportunity to veto the disapproval of Congress. This facet of the legislative veto has caused some consternation among constitutional scholars.

The constitutional issue arising from the legislative veto has not been resolved by the Supreme Court despite the fact that such provisions have existed since 1932. Approximately 203 different statutes include 318 separate provisions for reviewing or disapproving executive actions; every President from Franklin D. Roosevelt to Jimmy Carter has objected to the device on legal and constitutional grounds. President Reagan has as yet to speak officially on the legislative veto, but has indicated approval of the device during his presidential campaign.

The most serious constitutional question is raised by the presentation clause of the Constitution, which requires that "Every Order, Resolution, or Vote to which the Concurrence of the Senate and House of

28. 5 U.S.C. § 706 (1976) (emphasis added).

29. *See, e.g.*, Federal Trade Commission Improvements Act of 1980, Pub. L. No. 96-252, § 21, 94 Stat. 374, 393(1980) (to be codified at 15 U.S.C. § 57a-1).

Representatives may be necessary (except on a question of Adjournment) shall be presented to the President of the United States. . . ."[30] Most constitutional scholars would agree that any explicit check on power allocated to the branches under the Constitution, such as found in clause 3, must be narrowly construed.

In justifying its adoption, Madison argued that while clause 2 provided that all "bills" adopted by Congress would be sent to the President, clause 3 guaranteed that all "votes" or "resolutions" having the effect of law would also be presented to the chief executive. He proposed clause 3 in order to prevent the Congress from circumventing the President's veto power simply by calling a bill by a different name.

It is reasonable to conclude that a resolution of disapproval (the vehicle for the legislative veto), applied to a rule proposed by an agency pursuant to a statutory grant of authority, should not be considered "lawmaking" within the meaning and intent of clause 3. The resolution of disapproval, if adopted, does not change or amend existing statutory law, nor does it set forth standards regulating private conduct or governmental activity, the traditional attributes of law. Neither does the disapproval of a regulation make new law; the status quo is merely preserved. In this connection, it should also be noted that adoption of a resolution of disapproval does not preclude an agency from redrafting and resubmitting a rule which was previously disapproved.

The federal district courts, circuit courts of appeal, and the Supreme Court have been presented the opportunity to rule on the constitutionality of the legislative veto but have declined to do so. However, in 1977 the Court of Claims in *Atkins v. United States*[31] held the legislative veto to be constitutional. The rationale of the court is convincing and compelling. The *Atkins* case arose when a number of federal judges sued the United States when their salaries were not raised during a period of inflation. They argued that this resulted in a diminution in compensation and thus violated article III, section 1 of the Constitution.[32] Among other things, the judges argued that the Federal Salary Act of 1967 was unconstitutional in that recommendations of the President for pay increases could be disapproved by either house of Congress through a simple resolution.[33]

The Court of Claims in *Atkins* found the arguments of the plaintiffs unpersuasive. Holding that Congress may properly delegate to the President the function of fixing pay scales, the court stated that the

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30. U.S. CONST. art. I, § 7, cl. 3.

31. 556 F.2d 1028 (Ct. Cl. 1977), *cert. denied,* 434 U.S. 1009 (1978).

32. This section provides, in pertinent part, that "[t]he Judges, both of the supreme and inferior Courts, shall . . . at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office." U.S. CONST. art. III, § 1.

33. 556 F.2d at 1061-62.

delegation of a legislative function does not automatically transform it into an executive function. The court stated that, under the necessary and proper clause, Congress may select appropriate measures necessary to implement a statute, even if those measures include a congressional veto through simple resolution passed by either house. The court further held that as long as there was not an accumulation of power in one branch of government, nor an invasion of the power of another, the Constitution permits flexibility in accommodating legislation to circumstances.[34] The court's rationale in *Atkins* is quite sound and is reminiscent of the Supreme Court's argument on "constitutional necessity," fashioned initially to justify delegation of legislative authority to the executive branch.

A more recent substantive ruling on the legislative veto was rendered by the United States Circuit Court of Appeals for the Ninth Circuit in *Chadha v. Immigration and Naturalization Service,*[35] where the constitutionality of section 244(c) of the Immigration and Nationality Act of 1952 was challenged. That section provided for a one-house veto of suspensions of deportation allowed by the Immigration and Naturalization Service (INS). In this case, the deportation of plaintiff Chadha had been ordered when the House of Representatives vetoed the suspension allowed by INS. A unanimous court stated that "the statutory mechanism reviewed here violates the constitutional doctrine of separation [of powers] because it is a prohibited legislative intrusion upon the Executive and Judicial branches."[36] It is doubtful, however, that the *Chadha* case will control in assessing the constitutionality of statutory provisions permitting the veto of proposed regulations since the decision deals only with agency adjudications.

While the legislative veto, as applied to proposed rules, may pass constitutional muster the device has grave practical problems which may militate against its enactment. The legislative veto has been proposed by many thoughtful legislators as a means of bringing political accountability to the administrative process by fundamentally changing the manner in which regulatory policy is formulated. Making Congress responsible for the "lawmaking" activities of the government agencies is a popular and appealing notion. No legislator would dispute that rulemaking should be subject to the democratic processes of government by making Congress accountable for the actions of its legislative creatures. However, the issue is not merely whether the legislative veto is politically expedient or even constitutionally sound. Inquiry should continue in order to determine whether the legislative veto can correct some of the basic deficiencies of our regulatory system of government.

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34. *Id.* at 1059-61.
35. 634 F.2d 408 (9th Cir. 1980).
36. *Id.* at 420.

The Subcommittee on Rules, which I chair, conducted a number of field hearings on the legislative veto at which public witnesses appeared. The witnesses uniformly complained about the adverse effect of government regulation upon their lives and businesses. While there were some random criticisms about agencies exceeding their legislative mandates, the overwhelming number of complaints was directed at the duplication of effort required by regulatory agencies, the cumulative impact of a number of different agencies, and inherent conflicts and overlaps among agency jurisdictions. When there were complaints about a particular regulation, it was difficult to separate those complaints from criticisms of the underlying congressional policy contained in the enabling legislation itself. Although the hearings provided grounds upon which to dismiss some of the customary arguments about the legislative veto, there was no convincing evidence that the mechanism would enhance the ability of Congress to respond to the real causes of public disillusionment with the regulatory process.

Another consideration should give pause to the proponents of the legislative veto. According to roùtine legislative practice, a resolution of disapproval, by means of which a veto is accomplished, would be referred to standing committees having jurisdiction over the agency issuing the rule. Yet, the present structure of Congress which encourages a fairly rigid demarcation of committee jurisdiction would not facilitate the broad perspective necessary to assess the impact of a disapproved rule in conjunction with rules of other agencies overseen by the committees. Neither are there existing procedures to coordinate oversight among the various committees. This inefficiency in congressional oversight is reflected in such conflicts as that between the Freedom of Information Act and section 1905 of the Trade Secrets Act, as discussed in the Griffin article. It is reasonable to assume then that the legislative veto, as an additional supervisory tool used within the existing structure, would be subject to the same institutional weaknesses which now preclude the overall consideration of broad areas of regulatory policy.

This particular legislative device, generically applied to all rulemaking, may also have a subtle and insidious effect on the legislative process. As part of the arsenal of supervisory tools presently available to House and Senate subcommittees, the device might serve to strengthen the "iron triangle" or "subsystem politics" which presently exists among legislative subcomittees, regulatory agencies, and the regulated community. The relationship among the members of this triumvirate is cultivated through a close cooperation on policy matters from which the inevitable single perspective emerges. The veto power, wielded by a subcommittee, would make that "cooperation" a practical necessity, thereby insuring the maintenance of the status quo.

It is clear that politically expedient reforms, such as the legislative veto, would very likely compound the present inability of Congress to

develop a coherent regulatory policy. Rather than enabling it to focus on the larger issues inherent in government regulation, Congress would continue to find itself at the distinct disadvantage of merely responding to initiatives of the Executive. This may well mean that Congress must address its obvious institutional deficiencies before it can concentrate on problems in administrative process.

CONCLUSION

Many of the proposals mentioned above and the recommendations made by the authors of articles published in this Symposium are worthwhile legislative endeavors for members of the 97th Congress. There is, however, a far more basic reform which, if adopted, would preclude many of the problems discussed in this volume, particularly of the type raised by John Geismar in his article on the FTC and commercial speech. The reform is simple in concept but difficult in execution: Congress must be more specific in delegating its legislative authority. Admittedly, the nature of politics requires compromise and consensus which are often reached at the price of vague and imprecise statutory language. If self-discipline in the legislative process is impossible to achieve, then perhaps Congress would be forced to give better guidance to agencies if courts were to revive the doctrine that delegations of legislative authority must be accompanied by clearly discernible standards. Such a step would have the additional advantage of returning the courts to their proper sphere of inquiry, namely, compliance with statutory and constitutional law. Courts would then be freed from the selection of economic or social alternatives, which is clearly the responsibility of Congress or its statutory agents.

While providing the Executive with better tools to manage the regulatory process may improve the situation, Congress should not shift the focus or blame beyond itself. The roots of regulatory problems are nurtured in the legislative turf. Insofar as regulatory reform means redefining legislative priorities, providing consistency in the regulatory scheme, shaping national policy, and monitoring the execution of legislative mandates, the prime mover of that reform should be Congress. The first step in that process should be for Congress to provide itself with the institutional mechanism for defining national goals and for identifying and balancing conflicts and duplications among regulatory policies, programs, and rules. It is clearly a task for which legislators must seek the assistance of legal scholars.

Managing Risks to Health, Safety and Environment by the Use of Alternatives to Regulation†

Michael S. Baram, David Sandberg,***
*Dr. Larry Dufault*** and Kevin McAllister*****

The management of risks to health, safety and environment is one of the central concerns of our society. This important function has been largely delegated to federal regulatory agencies which, over the last decade, have tried to respond to the difficult mandate of managing risk under conditions of technical uncertainty by implementing complex regulatory programs. The federal government is now grappling with the design and implementation of various regulatory reforms to lessen economic burdens and to harmonize regulation with marketplace considerations, because of growing opposition to further regulation.

What has been left unpromoted as a reform thus far is the apparent but surprisingly ignored option of using *alternatives to regulation* — the use of alternative measures for the management of risks which do not require substantive rulemaking by federal agencies. This article reviews the potential of three broad classes of alternative measures: *private self-regulation,* embracing industrial standards, licensure and certification;

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† This article is adapted from the two volume report entitled *Alternatives to Regulation for the Management of Risks to Health, Safety and Environment,* prepared by Professor Michael S. Baram and several research assistants of the Program on Government Regulation at the Franklin Pierce Law Center, Concord, New Hampshire. Work on that report was sponsored by the Ford Foundation and the National Science Foundation's Technology Assessment and Risk Analysis Program. The excerpted parts contained herein were authorized by Dr. Larry Dufault, Kevin McAllister and David Sandberg under the supervision of Professor Baram, Program Director.

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compensatory remedies, including worker's compensation, "black lung" and "Price-Anderson" types of insurance, bonds, escrow and restoration funds; and *government influence,* characterized by federal procurement, information and education, and notice of possible intent to regulate. This approach is premised on the assumption that the public expects that it is the continuing and ultimate responsibility of government to manage risks to health, safety and the environment effectively, and concludes that agency reliance on the properly-structured use of alternatives to regulation is the most important reform option available.

I. PRIVATE VOLUNTARY SELF-REGULATION

A. Industrial Self-Regulation

Private industry voluntarily invests considerable resources each year in developing and revising its own "standards" for a wide range of products, materials, systems, services, processes and practices.[1] These "standards" are utilized in conjunction with and independent of (but not inconsistent with) governmental regulatory requirements.[2] Health, safety and environmental considerations constitute no small part of industry's self-regulatory structure, and therefore, industry can regulate itself. Whether industry can regulate risks more *effectively* and in the public interest is a more complex question.

Standards developed by the private sector have been classified into three groups: (1) standards created by a single firm for its own products or raw materials (often called "proprietary standards"); (2) standards created by industrial, trade or professional associations for the practices, systems, processes or raw materials of its members, sometimes with the concurrence of suppliers or other interests (often called industry or professional standard); and (3) standards created by other organizations after persons with a variety of interests have had an opportunity to participate in the formulation of the standard and reached

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1. *See* R. Hamilton, The Role of Nongovernmental Standards in the Development of Mandatory Federal Standards Relating to Safety or Health (1978) (unpublished report prepared for the Committee on Licenses and Authorizations, Administrative Conference of the United States). The report represents only the views of the author, and not necessarily those of the Conference, the Committee or the Office of the Chairman.

2. The term "standard" is used here in the sense of a descriptive technical document developed in the private sector to provide guidance to manufacturers, sellers, users and consumers of product or system. U.S. FEDERAL TRADE COMMISSION, PROPOSED RULE AND STAFF REPORT ON STANDARDS AND CERTIFICATION 8 (1978) [hereinafter cited as FTC PROPOSED RULE AND REPORT]. By these standards industry regulates many of its own practices which are not currently subject to governmental regulation.

a substantial consensus regarding the desirability and level of each proposed standard. Standards of this type can be referred to as "consensus standards."[3]

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3. *See* Hamilton, *supra* note 1, at I-1. Nongovernmental standards are developed for the most part by technical committees operating as integral parts of the various standards-writing organizations of the private sector. These committees often strive to achieve a degree of consensus within the community of private parties specially informed or affected by the proposed standard, in order to better achieve voluntary acceptance within the industry. Consensus-building also is crucial to a standard's potential incorporation into private contract, government procurement specifications, municipal building codes, and governmental regulatory programs. *See* R. Dixon, Standards Development in the Private Sector: Thoughts on Interest Representation and Procedural Fairness 2 (1978) (unpublished report prepared for the National Fire Protection Association).

Consensus or voluntary standards are formulated, for the most part, following extensive consideration and review by members of different private interests. These standards can be used as a risk management device, for example, by mandatory incorporation of the standards into law by an appropriate governmental agency, or by allowing the industry to self-enforce its standards. But standards can no longer be characterized as voluntary if the government adopts them or ensures that the private standards will be enforced. However, "voluntary standards almost inevitably became mandatory to a greater or lesser degree through adoption by government agencies for procurement or regulatory purposes, or simply through the operation of private markets and the common law. *See* FTC PROPOSED RULE AND REPORT, *supra* note 2, at 31-32; AMERICAN SOCIETY FOR TESTING AND MATERIALS (ASTM), THE VOLUNTARY STANDARDS SYSTEMS OF THE UNITED STATES OF AMERICA 7 (1975) [hereinafter cited as ASTM APPRAISAL].

The "consensus" type of private standard-setting organization is the most important model to consider, for two reasons: (1) these organizations promulgate the great majority of widely-used industrial commercial standards, and (2) they employ built-in due process safeguards which would be conditions precedent to any governmental adoption and endorsement of privately promulgated standards. *See* FTC PROPOSED RULE AND REPORT, *supra* note 2, at 17-18, 29. "Consensus procedures" are, in effect, due process protections such as notice to interested parties, opportunity to participate in the work of standards development committees, wide circulation of proposed standards for comments, balloting, consideration of minority viewpoints, and periodic review and update to take into account innovation and technological change. Other organizations, such as many trade associations, do not afford significant due process protection to such noncommercial parties as may be adversely affected by the standard promulgated. *Id.* at 30. *See also* NATIONAL BUREAU OF STANDARDS, REPORT OF THE VOLUNTARY STANDARDIZATION POLICY STUDY GROUP, No. 10391 (1970). In these instances, standards are frequently developed solely by industry members or by narrow-interest producer groups despite the fact that the standards may subsequently become widely adopted in the marketplace and have broad societal implications. *Id.*

The American National Standards Institute (ANSI) is an organization principally devoted to the promulgation of standards by the consensus process, covering products and services in such fields as construction, mechanical, electrical, metal, chemical, textile and nuclear industries. *See* FTC PROPOSED RULE AND REPORT, *supra* note 2, at 18-19 n.25; R. Hamilton, *supra* note 1, at II-7, II-8. Many ANSI standards are developed by ANSI-created American National Standards Committees; more than half of ANSI's standards were developed by the American Society for Testing and Materials. *Id.* at II-8. *See generally* ASTM APPRAISAL, *supra.* Another consensus process standards developer is the National Fire Protection Association (NFPA), which has developed approximately 250 fire safety regulations as well as special areas such as boat fuel systems and mobile home design. R. Hamilton, *supra* note 1, at II-4.

Many of the professional and technical societies also develop voluntary health, safety and environmental standards, notably the American Society of Mechanical Engineers (ASME). *Id.* at II-5. The testing laboratories, of which Underwriters Laboratories Inc. (U.L.) is best known, constitute another category of private organizations engaged in standards development. *Id.* at II-6. Virtually all of U.L.'s procedures in developing standards in construction, electrical, fire protec-

The use of such private standards as an alternative to regulation has been recognized by federal agencies,[4] but differences between private and government standard-setting have militated against adoption of private standards by agencies . A governmental agency is generally expected to weigh a wide variety of factors and make tradeoffs in reaching a regulatory decision. The factors may, for example, involve human health, environmental quality, and economic and technological feasibility;[5] whereas a private organization developing standards on the same problem will seek to achieve a consensus among its members, and this will be based on what its members perceive is economically desirable and feasible within their own, undisclosed policy frameworks.

In assessing whether the private approach should be relied on, a government agency considers whether the consensus approach results will be adequate, and does not foreclose the opportunity to intercede later with federal regulations. For risk management, the agency assessment might ask: (1) Will the results (levels of risk reduction) to be achieved by the private approach be sufficient (*i.e.* similar to what could be reached and defended by the federal agency)? (2) Will the private initiative lead to a greater degree of industrial acceptability and compliance? (3) Will the private initiative be acceptable to consumer and environmental interests, in terms of "process" and in terms of results? (4) Will deferral to private initiative (assuming adequate results) be more cost-effective, less burdensome on industry, and less chilling on competition and innovation? (5) Overall, will reliance on or adoption of private standards by the agency be legally defensible under existing statutes; will it be acceptable from a policy perspective?

Several agencies now rely on private standards sometimes as voluntary alternatives to government regulation; and in other cases by adopt-

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tion, heating, air conditioning and other fields, allow for some review by consumers and other affected interests. *See* FTC PROPOSED RULE AND REPORT, *supra* note 2, at 25-26. Trade associations such as the National Electrical Manufacturer's Association are generally limited in membership to producers. R. Hamilton, *supra* note 1, at II-6. Consequently, their standards are usually classified as industry standards (as opposed to consensus standards) and are not as acceptable to the government agency because of the greater probability of industry bias being an issue. *Id.*

4. Groups addressing the issue include the Federal Trade Commission (FTC) which propose regulations applicable to standards developers, certifiers, and persons who reference standards or certifications in marketing or products, *see* 43 Fed. Reg. 57269 (1978) (to be codified in 16 C.F.R. § 457); the Senate Antitrust and Monopoly Subcommittee which considered S. 825, a reform bill relating to implications for consumers and competition of private standards for products in 1976 and 1977, Legal Times of Washington, Dec. 4, 1978, at 10, col. 1; the Administrative Conference of the United States which recommended input from and coordination with private organizations, and use of relevant voluntary consensus standards in health and safety standard development by federal agencies, 44 Fed. Reg. 1357 (1979); and the Office of Management and Budget which encouraged the federal use of private standards, 41 Fed. Reg. 48 (1978).

5. R. Hamilton, *supra* note 1, at I-4. *See also* M. Baram, Federal Regulation of Health, Safety and Environment and the Use of Cost-Benefit Analysis (Mar. 1, 1979) (unpublished report prepared for the Administrative Conference of the United States).

ing them as regulations.[6] Reliance on private standards is extensive at the local government level as well. Such reliance on private standards is a virtual necessity because most state and local bodies lack the technical and financial ability to independently write such standards.[7] Uses of nongovernmental standards by regulatory agencies and state and local authorities seem a viable alternative means of managing at least some health, safety and environmental risks. Two conditions run through the historical use of private standards: the technologies involved are well understood as are the risks; and the potential liability (*e.g.* through product liability or other common law) is a significant enough factor to force a responsible industrial approach to reducing risks through voluntary standards. However, the historical experience offers little to support the notion that private standards would be an efficacious approach to certain risks when such conditions were not present in the past.

Opponents have contended that private standards often deny the consumer the benefits of superior or lower-cost new technology;[8] of providing public input on social costs and preferences; often deny new businesses the opportunity to enter or compete in profitable industries;[9] fail to provide adequate safety levels; inflate consumer costs; and inevitably result in deception or non-disclosure of material information.[10] Overall, criticism of the nongovernmental standards approach is that it reflects strong industry self-interest. This concern is founded upon the

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6. The Consumer Product Safety Commission (CPSC) has indicated that to the extent that private standards establish adequate safety levels for consumer products, it will not issue mandatory standards. *See* FTC PROPOSED RULE AND REPORT, *supra* note 2, at 34. The Occupational Safety and Health Administration (OSHA) asserts that it relies extensively on privately developed standards for its own regulations on workplace safety. *Id.* at 34. *See also* AMERICAN NATIONAL STANDARDS INSTITUTE, AMERICAN NATIONAL STANDARDS APPLICABLE TO SAFETY 15 (1975), which states: "The U.S. Department of Labor has to date adopted a referenced 210 ... ANSI-approved national consensus standards under the Occupational Safety and Health Act."

7. *See* R. Hamilton, *supra* note 1, at IV-1. Municipal codes regulating fire safety, electrical, building, boiler, plumbing and other practices often require conformance of service products to privately-set standards, or incorporate them by reference. *See* FTC PROPOSED RULE AND REPORT, *supra* note 2, at 32.

8. The criticism is based on the judgment that utilization of private standards results in the exclusion of innovative and lower risk systems or products which do not conform to the adopted standard, but which could serve adequately as substitutes for the standarized product or system. The argument is the same as the assumption that innovations are shifted by government regulation. Though the solution in both cases is often obvious (*e.g.*, to change a design standard to a performance standard), private industry groups may be less receptive than regulatory agencies to standards which do not stifle innovation for competitive reasons.

9. The adoption by a regulatory agency of one existing private standard over another in an area not currently subject to national regulations could immediately result in the creation of a group of conforming marketers and a reduction in competition. *See* FTC PROPOSED RULE AND REPORT, *supra* note 2, at 100. This reduction could result in higher costs to consumer and possible deceptive practices by the conforming marketers. In these instances, anti-trust problems could be handled by industrial policing entities and/or by private or governmental lawsuit. *See* R. Dixon, *supra* note 3, at 3.

10. FTC PROPOSED RULE AND REPORT, *supra* note 2, at 113.

usual lack of representation afforded to small business, labor and consumer interests in the consensus-standard development organizations.[11]

Given that the advantage of utilizing private standards as regulatory devices is the increased acquisition of invaluable technical and economic input,[12] one can see that *representation* on standard-development committees is a separate issue from *participation* in the standard-development process. One school of thought asserts that as the technical complexity of the particular health, safety or environmental risk increases, the optimum feasible representation of the interests involved decreases due to their lack of technical expertise. Proponents of this view contend that once a standard is drafted in such a technically complex area (prior to final adoption by the standard-developer), the appropriate non-expert interests should only be given the opportunity to challenge the proposed standards and force its reconsideration.[13] In less technical areas, affected small business, labor, consumer and other interests (including those represented by agencies) should be given the opportunity to participate fully throughout the standard-development process. Regardless of the technical complexity of the issue at hand, the key to minimizing industry bias in private standard-development is the utilization of strong due process safe-guards.[14] While such safeguards are now incorporated in the published practices of the more enlightened standards-development organizations, compliance with these published procedures should never be assumed. Rather, compliance would have to be established by evidence before significant weight is attributed to the standard by the governmental entity which is considering incorporating it.[15] Appropriate procedural safeguards also enhance the public credibility of private standards. It is reasonable to assume that public credibility will be further increased if the consensus standard development process includes review and approval by a "balanced" group in which no single interest is given disproportionate weight.[16]

When a government agency considers endorsing or adopting private standards, it should bear in mind that many privately-developed safety

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11. *See* R. Hamilton, *supra* note 1, at III-5; R. Dixon, *supra* note 3, at 6-7. While this criticism has significant merit, it is also true that the closed all-industry system which largely prevailed in private standards-development organizations in the not too distant past has been significantly reduced. R. Hamilton, *supra* note 1, at II-13.

12. *See* R. Dixon, *supra* note 3, at 25-31. However, there is no empirical evidence substantiating the view that non-technical persons cannot contribute significantly, early in the standard development process. The ultimate judgment as to the appropriate trade-off between cost and health and safety considerations is particularly within the province of non-technical persons. *Id.*

13. *See, e.g., In re* Rhodes, 370 F.2d 411 (8th Cir.), *cert. denied,* 386 U.S. 999 (1967); Board of Medical Examiners v. Steward, 203 Md. 574, 102 A.2d 248 (1954).

14. *See* note 3 and accompanying text *supra.*

15. *See* FTC PROPOSED RULE AND REPORT, *supra* note 2, at 159.

16. *See* R. Hamilton, *supra* note 1, at II-13.

standards have been found to be unsatisfactory in the past.[17] The regulatory agency must determine whether the trade-off between cost, and the health, safety or environmental hazard to be protected against, leads to results in the public interest. Since absolute protection from health, safety and environmental hazard is an impossibility, what is "in the public interest" is a balancing judgment to be made by the potential regulator, based on the criteria of the pertinent enabling legislation. Thus, agency adoption of a private standard must reflect that judgment.[18]

In summary, any utilization of nongovernmental consensus standards is beneficial to the extent that current technical knowledge is being fully utilized and industrial initiatives are fostered. For the most part, these standards are the product of diverse points of view obtained through elaborate procedural devices.[19] Alternatively, these standards have their origin in a system that was formerly private and industry-controlled. Early standards were developed without any regard for balanced membership or procedural safeguards.[20] The current system, by its very membership, continues to over-represent commercial interests.[21] For this reason, any consideration of the nongovernmental standards as a potential regulatory device should be made with great care.[22]

B. Licensure and Certification

Licensure is a process whereby the government uses its police power to enact certain statutes or regulations to protect the public's health,

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17. FTC PROPOSED RULE AND REPORT, *supra* note 2, at 189. The final report of the National Commission on Product Safety, in 1970, documented that privately developed safety standards are "chronically inadequate, both in scope and permissible levels of risks." U.S. NATIONAL COMMISSION ON PRODUCT SAFETY, FINAL REPORT 48 (1970).

18. The advantage of utilizing the private sector's technical expertise in formulating health, safety and environmental regulatory standards cannot be overemphasized. This expertise cannot be matched, in the majority of instances, by the technical staffs of federal, state and local regulatory authorities. *See* R. Hamilton, *supra* note 1, at III-1. In addition, the utilization of active technical standards-writing committees from the private sector is an efficient and dependable means of ensuring that standards are kept up to date with developing technology. *Id.* at VI-6.

19. *Id.* at VI-2.

20. *Id.*

21. *Id.*

22. As reflected in the FTC's proposed rules and the Administrative Conference's recommendations, there appears to be general agreement that to instill public confidence private standards should be developed with at least the following procedural safeguards: (1) reasonable notice to interested or affected persons; (2) an opportunity by those persons to participate in the developmental process; (3) consideration to minority points of view and objections; (4) standard development by a consensus considerably more than a simple majority of the developmental committee and the subsequently affected interests; (5) the right of appeal for minorities; (6) adequate record maintenance; and (7) access to the process by the public. *Id.* II-12.

safety and welfare.[23] Licensing boards, generally consisting of established members of the profession, are organized as a result of a statute, and certain basic requirements must be followed by the board as dictated by that statute.[24] The purpose of licensing is to uphold the standards of a profession, with the risk reduction benefits accruing to the ultimate recipient of the professional services.

Certification, on the other hand, is a voluntary process whereby a licensed person seeks, on the basis of special education and experience, to additionally qualify for a specific designation recognized by society as marking his higher level of specialization within a profession. While certification, in contrast to licensure, does not carry with it any legal power, it does indicate to the public an attainment higher than that of the average practitioner. The potential for prestige and economic success is the incentive for certification.

For many years courts have held that a choice of an occupation was a privilege, not a right, and therefore was not protected by the fourteenth amendment. For example, in *Barsky v. Board of Regents,*[25] a physician's license was suspended because he was held in contempt of Congress, a sanction which had nothing to do with his capabilities as a physician.[26] Despite this, the licensing board decision was upheld by the United States Supreme Court. However, the Supreme Court has now abandoned the *Barsky* doctrine, even for cases where the license right has not vested. In *Schware v. Board of Bar Examiners,*[27] the Court reversed the New Mexico Board of Examiners' decision to refuse a law school graduate permission to take the bar examination on grounds of lack of good moral character. His right to take the exam was held to be protected by the fourteenth amendment.[28]

The Supreme Court has set due process boundaries on the police

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23. Licensing is a means of controlling a profession initially by limiting entrance to it and later by controlling the performance of licensees. Retaining a license may be subject to the periodic re-demonstration of the skills originally qualifying a licensee, and in some cases, of the demonstration of new skills. W. GELLHORN, INDIVIDUAL FREEDOM AND GOVERNMENTAL RESTRAINTS 105-51 (1968).

24. Licensing boards can be thought of as being state agencies, since the power they possess has been granted to them by state legislatures through the enactment of specific statutes. *Id.* at 106. Once a profession acquires the exclusive right from a legislature to regulate entry, it is expected to regulate itself thereafter to some extent. Note, *Professional Self-Regulation,* 29 ALA. L. REV. 679, 681 (1978). Not all licensing is focused on protecting the public. Many licensing statutes are employed, in fact, for their anti-competitive results, and economic reasons probably dominate in the usual case, rather than health or safety. W. GELLHORN, *supra* note 23, at 14.

25. 347 U.S. 442 (1954).

26. The Court said, "the practice of medicine in New York is lawfully prohibited by the state except upon the conditions it imposes. Such practice is a privilege granted by the state under its substantially plenary power to fix the terms of admission." *Id.* at 451.

27. 353 U.S. 232 (1957).

28. *Id.* at 246-47.

power of the states, affecting health, safety and welfare of its citizens by licensure and other means.[29] These bounds are threefold: the first is *specificity* (in standards and guidelines a board uses in issuing or revoking a license); the second is *rationality* (the standard must bear a rational relationship to good practice in the profession); and the third is *fairness* (makeup of the board and the process of review).[30]

The licensing board must implement a means of reasonably informing those affected as to what the criteria for conduct are in the profession. In addition, there remains a constitutional limit on the power that can be delegated to any administrative body by the legislature. Despite the assumption that very broad authority can be delegated, some, including Judge Skelly Wright, think the court should still require legislatures to "channel [their] . . . delegation of power with prospective guidelines and standards to the greatest extent possible."[31] This is in apparent opposition to one of the reasons for delegating licensure authority to a specified body — to make full use of its special knowledge.

Similarily, in matters of revocation or suspension for unprofessional conduct, the courts have upheld the delegation of such power and its use, provided some reasonable criteria are present. The criteria can be generally stated. For example, in *Moore v. Board of Trustees of Carron-Tahoe Hospital,*[32] the court upheld the board revocation of a physician's staff privileges on the basis that a medical staff member " 'who is guilty of unprofessional conduct, may have his privileges reviewed, altered or rescinded by the Board of Trustees on recommendation of the Medical Staff.' "[33] Thus, some care must be taken to insure that those subject to licensure be properly notified of the standards expected of them.

Williamson v. Lee Optical Co.[34] is illustrative of how the Supreme Court once looked upon the rationality of regulations adopted by a profession. In that case, the petitioner challenged a state law which prevented opticians from duplicating lenses without a presciption from a licensed optometrist. The Court accepted the state law and simply stated it was the legislature's responsibility "to balance the advantages and disadvantages of a new requirement."[35] This view should be read in conjunction with *Schware,* where the Court held there must be a rational

29. *See* California Reduction Co. v. Sanitary Reduction Works, 199 U.S. 306 (1905).

30. *See* Note, *Due Process Limitations on Occupational Licensing,* 59 VA. L. REV. 1097, 1104-18 (1973).

31. Wright, Book Review, 81 YALE L. J. 575, 587 (1972).

32. 88 Nev. 207, 495 P.2d 605, *cert. denied,* 409 U.S. 879 (1972).

33. *Id.* at 209, 495 P.2d at 607 (*quoting* Carron-Tahoe's Hospital By-Laws, Rules & Regulations Governing the Medical Staff, Article 4, Section 5).

34. 343 U.S. 483 (1955).

35. *Id.* at 487.

relationship between the regulation and the objectives of the law,[36] as has been held for other exercises of the state police power.

Licensing boards usually consist exclusively of members of the same profession, since many feel that technical expertise alone is needed in drafting and administering licensure regulations. This has generally been acceptable, because the courts feel that whether such circumstances will promote bias is a remote and speculative matter.[37] Even if some bias is shown, or a danger of bias exists, the court can use its judicial review function in specific cases to correct licensure boards that have acted in an inherently unfair manner. Due process also requires that a licensee or applicant disputing a board decision be provided the opportunity to be heard, to present information or evidence, and have the opportunity to rebut opposing witnesses.[38] Judicial review itself is an essential element of the constitutional right of due process, and the courts have the authority to postpone suspension or revocation of a license until a proper judicial review can be had.[39]

The licensing of physicians, as well as other professions such as architects and engineers, has obvious health, safety and environmental implications. In these fields, licensure seeks to prevent risks by controlling and maintaining standards for practitioners. This self-regulation can result in ever higher standards through continuing professional education and thus afford more protection for the public. Our present form of physician licensure did not really begin until the last part of the nineteenth century.[40] The state's right to protect its citizens from incompetent and unethical persons by licensure, under the state "police power," was held constitutional in 1889.[41] Today, physicians must meet educational and competency requirements to become licensed in a state. As with other licensing boards, the power to regulate the physician continues after initial licensing.[42] Relicensure is also a means of control,

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36. Schware v. Board of Bar Examiners, 353 U.S. 232 (1957).

37. *See In re* Rhodes, 370 F.2d 411 (8th Cir.), *cert. denied,* 386 U.S. 999 (1967); Board of Medical Examiners v. Steward, 203 Md. 574, 102 A.2d 248 (1954).

38. *See* Milligan v. Board of Registration in Pharmacy, 348 Mass. 491, 204 N.E.2d 504 (1965). While licensing boards are generally not composed of professional administrative personnel, the boards must guaranteee due process for application and grievance procedures. In the field of medicine, however, the opportunity to be heard before board actions may afford an incompetent physician the opportunity to harm more people. *See generally* note 3 *supra.*

39. *See* Berryhill v. Gibson, 331 F. Supp. 122 (M.D. Ala. 1971).

40. R. SCHROOCK, MEDICAL LICENSING IN AMERICA, 1650-1965, at 27-30 (1967).

41. *Id.*

42. For example, a physician in New Hampshire may have his or her license revoked if there is a

> finding that the person has obtained his license by fraudulent means, is a habitual user of drugs or intoxicants or is afflicted with physical disability, insanity, psychiatric disorders or other disease deemed dangerous to the public health; or is grossly ignorant or incompetent; or is guilty of dishonest, unprofessional or immoral conduct, or negligence in practicing medicine or surgery. . . .

N.H. REV. STAT. ANN. § 329:17 (VI) (Supp. 1979).

since license renewal can be required after a certain length of time, subject to certain requirements. For example, continuing education has often been used in states as a condition of renewing one's license.[43]

In addition to licensure, physicians have used certification for medical specializations. Private certification for about twenty specialties such as anesthesiology, dermatology, radiology and pediatrics is used.[44] Generally, certification for each specialty requires a certain level of professional ability, moral character and preliminary training.[45] While there are shortcomings to the certification of medical specialists, some level of competence for initial certification is required, and therefore some measure of control is effectuated. The goal of certification is to guide the future decisions of consumers by informing them of the higher quality and specialization of the certified person. When the certification process is conducted fairly, there usually are few problems in the later considerable amount of control exerted over a physician and any specialized practices.[46]

Architects require a license in all states. One purpose for this practice is to prevent the technically incompetent from endangering life, health and property. An architecture board of licensure has powers similar to those granted by a legislature to medical boards, and therefore controls the entrance of candidates and has the ability to suspend or revoke licenses and issue reprimands. In addition, an architect is legally liable for professional misconduct. This liability is governed by general principles of law, which are broadly applicable. An architect owes his client a professional level of competence and reasonable care in the performance of his work. The standard of care required of an architect is similar to that for other professions;[47] negligence is the most frequent tort concept used when an architect is sued for malpractice.[48] Other liability concepts that may be used include fraud, conspiracy, conflict of interest, and breach of contract.[49] Frequently, an architect may be

43. *Id.* § 329:16.

44. GREENWOOD & FREDRICKSON, SPECIALIZATION IN THE MEDICAL AND LEGAL PROFESSIONS 11-47 (1964). Wallace, *Occupational Licensing and Certification: Remedies for Denial,* 14 WM. & MARY 46, 61 (1972).

45. Wallace, *supra* note 44, at 62.

46. Hospitals are accredited by the Joint Commission on Accreditation of Hospitals, sponsored by American Medical Association, the American Hospitals Association, American College of Physicians and American College of Surgeons. The accreditation is voluntary and allows accredited hospitals to attract the necessary interns and residents to provide adequate medical services. A physician must apply and be appointed to practice by the medical staff of a hospital. The hospital board has authority to withdraw that appointment for sufficient reason, and must use discretion in medical staff appointments since it can be held liable for care given patients. *See* Darling v. Charlestown Community Memorial Hosp., 33 Ill.2d 326, 211 N.E.2d 253 (1965), *cert. denied,* 383 U.S. 946 (1966).

47. *See* J. ACRET, ARCHITECTS AND ENGINEERS: THEIR PROFESSIONAL RESPONSIBILITIES 2 (1977).

48. *Id.* at 16.

49. *Id.* at 34.

held liable for malpractice on the basis of statutory requirements (*e.g.* breach of local building code). Liability may also arise from the breach of specific terms of a contract.[50] A licensing board has the power to suspend or revoke an architect's license following such judicial decisions.[51] Finally, like the medical profession, architects have a code of ethics which must be followed, and this provides another layer of self-regulation.

Licensure itself is a form of regulation, since the power or authority to license and control a profession initially comes from a state legislature. The risk management question inevitably is whether licensure is sufficient to control medicine, architecture, engineering and other professions which are engaged in the generation of risks from products and systems. The inquiry is whether licensure should be expanded to allow other and new professions (*e.g.* hazardous waste transporters) to self-regulate by this peer review system. To answer this question, the several disadvantages of licensing have to be considered. It excludes many persons by high initiation fees, and by rigorous requirements which are often used to protect the economic advantage of those already in the field and reduce competition.[52] This leads to higher prices for the consumer,[53] and can segment skills which may cause consumers some inconvenience.[54] Many licensure boards are made up exclusively of persons in the occupation who use licensure for their own advantage. Some licensure requirements also impose unconstitutional restrictions until challenged in court. In addition, licensure causes a proliferation of administrative bodies composed quite frequently of persons with little or no administrative experience.

Licensure of a profession is therefore difficult to assess as an alternative to regulations because it is, in effect, tantamount to government regulation. Much of the success of licensure as an alternative to federal regulation will depend on the values and integrity of the peer group, and its actual practice. While it can be argued that licensure should be expanded to include more professions and occupations, many commentators propound that we have gone too far on a fragmented, state by state basis, in so controlling occupations.[55] Self regulation by licensure will work best when a real peer group exists which has developed professional guidance criteria, and when professional failure to utilize a reasonable standard of care, and gross errors in judgment or malprac-

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50. *Id.* at 44-68.

51. *See, e.g.*, N.H. REV. STAT. ANN. § 310:27 (1976).

52. Gellhorn, *The Abuse of Occupational Licensing*, 44 U. CHI. L. REV. 6 (1976).

53. Maurizi, *Occupational Licensing and Public Interest*, 82 J. POL. ECON. 399-403 (1974).

54. *See* Project, *Regulation of Health Personnel in Iowa — A Distortion of the Public Interest*, 57 IOWA L. REV. 1006 (1972).

55. *See* Wallace, *supra* note 44.

tice are easily recognizable and provable.[56] In expanding licensure, care must be given to the composition of the licensing board, since board credibility and public trust will suffer if a board is perceived as indifferent to the public interest. Agencies composed of public servants who are accountable to multiple public interests may be preferred. One approach to resolve this problem is to provide for accountability of board decisions through judicial review. Another is to screen potential board members for bias and conflicts. A third is to have public representatives serve on such boards. Thus, licensure offers an alternative regulation in the form of rule-making and is worthy of further consideration, particularly for risk contexts where professionals play significant roles.

II. INSURANCE AND OTHER COMPENSATORY PLANS

A. Workers' Compensation

Workers' compensation is a mechanism for providing cash "benefits" and medical costs to the victims of work-connected injuries.[57] It is a state administered system for imposing liability without fault, in which the employer is charged with worker injuries, arising out of the employment context.[58] Irrespective of whether the accident leading to the injury was unavoidable or due to the employee's carelessness, a workers' compensation statute entitles the employee to the "benefits" designated in the statutory framework.[59] Workers' compensation statutes are not designed to *remedy* physical injuries, or even to attempt to restore the injured employee to the condition he or she was in immediately prior to the injury. Rather, workers' compensation laws provide the worker with a measure of income insurance. It is the employee's actual or presumed loss of earnings resulting from the in-

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56. The medical profession provides a good example of licensure with these attributes and with a close relationship between those giving and those receiving the services. Medicine, therefore, appears to be an excellent case study wherein licensure, private certification, liability from court action and hospital affiliation all converge to manage the risks of medical practice. Few other professions are endowed with so many review features.

57. A. LARSON, THE LAW OF WORKMEN'S COMPENSATION 1 (1980).

58. *See* W. PROSSER, HANDBOOK OF THE LAW OF TORTS 531 (4th ed. 1971).

59. Each of the fifty states has a workers' compensation law. The federal government has established workers' compensation programs, including the Workmen's Compensation Law of the District of Columbia, 5 U.S.C. § 8139 (1976); the Federal Employee's Compensation Act, 5 U.S.C. § 8101 (1976); and the U.S. Longshoremen's and Harbor Workmen's Compensation Act, 33 U.S.C. §§ 901-950 (1976). The basic coverage or eligibility formula for the overwhelming majority of these state and federal statutes is any "personal injury by accident arising out of and in the course of employment." *See* CHAMBER OF COMMERCE OF THE UNITED STATES, ANALYSIS OF WORKMEN'S COMPENSATION LAWS 3 (1975) [hereinafter cited as CHAMBER OF COMMERCE]; A. LARSON, *supra* note 57, at iii.

jury that provides the basis for this coverage.[60] Thus, this form of insurance is designed to compensate an individual after the fact of injury.

To a limited extent, workers' compensation manages risks to workers' health and safety from product failures and workplace system failures. Under workers' compensation statutes, employers are required to pay specified benefits after the injury. Such potential liability should inspire the employer to prevent injuries whenever possible.[61] Therefore, these laws provide an alternative or supplemental mechanism to federal or state occupational safety regulation. Even where an employer has a workers' compensation *insurance* policy, this mechanism should still be an incentive for employers to control and monitor working conditions, since premium rates are correlated with an employer's safety record. The workers' compensation model, when functioning properly, contributes significantly toward alleviating the injury and illness problems of the worker (*e.g.* by the wages lost provision), the employer (*e.g.* by reducing litigation costs), and the society at large, which otherwise might be burdened with supporting the disabled worker and his or her family through charitable programs or otherwise.[62]

States' workers' compensation statutes can be either compulsory or elective. If elective, the employer may accept or reject the requirements. If the employer rejects the act, he loses three potentially available common law defenses in actions which may later be brought by injured workers: assumption of the risk, negligence of fellow employees, and contributory negligence.[63] A compulsory law, on the other hand, requires each employer to provide to the injured worker the benefits that

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60. Virtually all industrial employees are covered by workers' compensation. *See* CHAMBER OF COMMERCE, *supra* note 58, at 5. Specific applications of workers' compensation statutes vary from state to state:

> Some jurisdictions cover all private employment; others exempt those with less than a stipulated number of employees. Most jurisdictions specifically exclude certain employments. Due to the nature of the work, farm labor, domestic servants, and casual employees usually are exempted. Most jurisdictions permit employees in an exempted class to be brought in voluntarily by the employer or by Board order.

Id. at 5-6.

The right to benefits under each statute is entirely subject to the exceptions and limitations prescribed by the legislative body of the jurisdiction in question. *See* Project, *Developments in Workers' Compensation Law,* 53 J. URB. L. 755, 760 (1976).

Professor Arthur Larson has summarized the features of the typical workers' compensation act. *See* Larson, *Basic Concepts and Objectives of Workmen's Compensation,* in 1 SUPPLEMENTAL STUDIES FOR THE NATIONAL COMMISSION ON STATE WORKMEN'S COMPENSATION LAWS 33 (M. Berkowitz ed. 1973).

61. For manufacturers' liability for defective tools and machines used in the workplace under a products liability theory, *see* Mitchell, *Products Liability, Workmen's Compensation and the Industrial Accident,* 14 DUQ. L. REV. 349 (1976).

62. It is felt that these benefits could also result in a new application of the model to areas outside the workplace where the model could serve as an alternative to health, safety and environmental regulation. *Id.* at 381-89.

63. *See* W. PROSSER, *supra* note 58, at 533.

are specified in the statute. When an employee rejects an elective act and sues an employer who has accepted it, the employer retains the three common law defenses set forth above.[64]

As noted previously, workers' compensation internalizes the cost of injuries and provides, in theory, an incentive for employers to increase their safety efforts. Consequently, with a notable reduction in the incidence of workplace injuries in the last fifty years, it can be conjectured that workers' compensation programs are partly responsible for this trend.[65] Other observers have concluded that while the enactment of workers' compensation statutes has had an immediate, positive effect on safety in the workplace, these programs do not always induce employers to continuously seek improvements in employee safety.[66] The large number of work-related injuries and diseases that still occur support this observation. Since less than 1.5 percent of the 1976 payroll was the average employer's cost for workers' compensation, the resulting economic incentives to improve the health and safety conditions of the workplace tend to be relatively minor.[67] In addition, insurance mechanisms such as workers' compensation tend to spread risks and costs of accidents to other employers. Employers can also pass on a large portion of the workers' compensation costs by raising prices, by lowering or not raising wages, and by deducting costs as ordinary business expenses for tax purposes.[68] These factors tend to support the argument that health, safety or environmental improvements would be forthcoming in new and broader applications of the workers' compensation model, if most costs of the program are internalized or absorbed by the employer. Only then would significant economic incentives for a private and voluntary approach to risk prevention be created.

Another limitation on the efficacy of a general workers' compensation-type model as an alternative to regulation is evidenced by some states' legal and practical limitations on the recovery of medical benefits related to certain occupational diseases such as silicosis and asbestosis. For example, when Wisconsin instituted full silicosis coverage for its stone monument workers, the entire industry in that state was shut down because the workers' compensation premium was higher than the entire payroll for the industry.[69] Such a possible occurrence should be

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64. *See* CHAMBER OF COMMERCE, *supra* note 59, at 5.

65. *See* P. GREGORY & M. GISSER, THEORETICAL ASPECTS OF WORKMEN'S COMPENSATION 116 (1973).

66. *Id.* at 116-17.

67. *See National Workers' Compensation Standards Act of 1979: Hearings on S. 420 before the Senate Comm. on Labor and Human Resources,* 96th Cong., 1st Sess. 425 (statement of Ray F. Marshall, Secretary of Labor) [hereinafter cited as Statement of Ray Marshall].

68. *Id.*

69. *See* Larson, *Occupational Diseases Under Workmen's Compensation Laws,* 9 U. RICH. L. REV. 87, 110 (1974).

carefully considered before the workers' compensation model is applied as a regulatory device to deal with non-workplace health, safety and environmental risks — particular risks arising from an industrial system that provides essential goods and services.[70] Several other risks involved in adopting the workers' compensation model are: first, whether such developments would create negative health, safety or environmental incentives on the part of potential beneficiaries;[71] second, the inherent inconsistencies resulting from independent administration in each state; and third, the legislative scheduling of payments which are often inadequate and subject to change only through the cumbersome legislative process. For these reasons, workers' compensation programs have not provided an entirely satisfactory solution to safety and health hazards in the workplace. In a comprehensive study completed in 1972, the National Commission on State Workmen's Compensation Laws concluded that state laws did not uniformly provide fair and effective compensation for workers injured on the job.[72]

In summary, the typical state workers' compensation program defines the class of eligible beneficiaries; the necessary conditions leading to the injury or illness (*e.g.* time, place and activity engaged in); the types of illness or injury; the amounts of compensation; and the applicable procedures and appeals processes. It is certainly conceivable that consumers and other classes of persons other than workers who are exposed to health and safety risks, as well as to environmental hazards, could be provided for by similar statutes. Workers' compensation programs appear to be particularly suitable as an alternative to regulation of risks from systems that produce non-essential goods and services. When industries that produce essential goods and services are involved, however, statutory modifications of such programs might be needed to ensure that the cost of the requisite insurance premiums do not put the particular commercial system affected out of business altogether. This would be in recognition of any finding that there is an "optimal" level of health, safety and environmental risks which cannot be improved upon by an insurance mechanism. Thus, primarily with regard to these essential systems, the workers' compensation model might be inappropriate in its *pure* form for application as an alternative to governmental regulation.

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70. *See* Statement of Ray Marshall, *supra* note 67, at 410.

71. Workmen's Compensation programs might provide a negative safety incentive for workers because of the decrease in their own costs in terms of suffering occupational illnesses and injuries. *See* Chelins, An Empirical Analysis of Safety Regulation, in 3 SUPPLEMENTAL STUDIES FOR THE NATIONAL COMMISSION ON STATE WORKMEN'S COMPENSATION LAWS 54 (M. Berkowitz ed. 1973).

72. *See* NATIONAL COMMISSION ON WORKMEN'S COMPENSATION LAWS, STATE REPORT 25 (1972).

B. Government Subsidized Insurance

1. Black Lung Benefits Program

Heightened public awareness of the health and safety hazards posed to miners in the coal industry led to the enactment of the Federal Coal Mine Health and Safety Act of 1969 (Act).[73] The bill was enacted by Congress expressly to provide for the protection of "the health and safety of coal miners, and to combat the steady toll of life, limb and lung, which terrorizes so many unfortunate families."[74] The pivotal part of the Act has been extensively modified by the Black Lung Benefits Act of 1972[75] and the Black Lung Benefits Reform Act of 1977.[76]

The purpose of the Black Lung Benefits Program is to provide cash benefits, in cooperation with the states, to coal miners (or their dependents) who are totally disabled by pneumoconiosis (*i.e.* black lung disease).[77] Initially, the Act set up two programs to deal with benefit claims of disabled miners. The first program provides benefits for life to a miner (or to dependent survivors) for pneumoconiosis-related death or total disability which occurred prior to December 30, 1969. The Secretary of Health and Human Services administers this program and benefits were originally funded out of the general Treasury.[78] The second program is applicable to all claims filed on or after January 1, 1974, and is administered by the Secretary of Labor. Under this program, the coal mine operator, or the U.S. Department of Labor, if the responsible employer is absent, assumes liability for the payment of total disability or death benefits to miners who have contracted pneumoconiosis, provided that the disease arose out of employment in a mine operated during a period after December 31, 1969.[79]

Under both the pre-1974 and the post-1974 programs, a miner (or

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73. Federal Coal Mine Health and Safety Act of 1969, Pub. L. No. 95-239, 92 Stat. 95 (codified at 30 U.S.C. §§ 901-945 (1976 & Supp. III 1979)).

74. 30 U.S.C. § 901 (1976 & Supp. III 1979).

75. Black Lung Benefits Act of 1972, Pub. L. No. 92-303, 86 Stat. 150 (codified at 30 U.S.C. §§ 901-924 (1978)).

76. Black Lung Benefits Reform Act of 1977, Pub. L. No. 95-239, 92 Stat. 106 (codified at 30 U.S.C. § 904 (1977)).

77. Total disability is defined as "when pneumoconiosis prevents [the miner] from engaging in gainful employment requiring a substantial period of time." 30 U.S.C. § 902 (1976).

78. 30 U.S.C. §§ 924, 932 (1976 & Supp. III 1979). This program applies to all miners' claims filed through June 30, 1973. *See* DeCarlo & Vieweg, *Federal Black Lung Law and Insurance in a Nutshell,* 11 FORUM 661, 662-64 (1977).

79. 30 U.S.C. § 932 (1976 & Supp. III 1979). Claims filed after January 1, 1974 must be filed pursuant to state workers' compensation laws, if that law provides *adequate* coverage for pneumoconiosis. However, no state law has qualified to date. Therefore, all claims are filed with the Department of Labor. *See* Solomons, *Workmens Compensation for Occupational Disease Victims: Federal Standards and Threshold Problems,* 41 ALBANY L. REV. 195, 228 (1977); DeCarlo & Vieweg, *supra* note 78, at 667-74; and 30 U.S.C. §§ 924, 931(a), 932, 934 (1976).

survivor) filing for total disability or death benefits is entitled to a series of statutory presumptions, evidentiary rules, and diagnostic standards, which are designed to shift the burden of establishing any medical uncertainties in favor of the compensation claimant.[80] In spite of the existence of such presumptions, coal mine operators and their insurance carriers have vigorously contested those claims for which they would be required to pay benefits.[81] In 1977, it was estimated that ninety-five percent of all claims for which mine operators might be found liable were resisted in formal litigation. At that time, it was also estimated that fewer than 200 of the 3,800 claims approved for black lung benefits by the Department of Labor were being paid by the coal operators.[82] Certainly, great costs have been absorbed by the federal government in administering and paying for the Black Lung Benefits Program. Understandably, Congress created a Black Lung Disability Trust Fund in the Black Lung Benefits Revenue Act of 1977.[83] The fund pays benefits to eligible black lung claimants in certain cases.[84]

One significant aspect of the Black Lung Benefits Program is its accomplishment of establishing uniformity in the treatment of similarly situated miners in all states. This uniform federal appoach could be adopted by the states to deal with other health, safety or environmental problems which are not serious enough to warrant federal concern or fall beyond federal regulatory authority. Additionally, legislation following the black lung model could utilize existing state and local administrative systems such as workers' compensation boards. Such a framework, if effectively established, could minimize direct federal governmental participation, and hence regulation, by fostering the possibility that systems operators and victims can resolve their health, safety and environmental disputes efficiently and equitably through a compensation system analogous to the Black Lung Benefits Program.

Although the Black Lung Benefits Program is instructive,[85] certain results of the program should be eliminated in any analogous system. For example, the coal mine operators' and insurance carriers' resistance to payment illustrates how a program designed to effectuate out-of-court settlements will not always achieve that goal. A second drawback is that the financial burden of such a program can be shifted to the

80. 30 U.S.C. § 921(c)(1)-(5) (1976 & Supp. III 1979).

81. *See* Solomons, *supra* note 26, at 210-11.

82. *Id.* at 211.

83. The Secretary of the Treasury is the managing trustee of the fund and is responsible for its operation, administration and maintenance. 30 U.S.C. § 934(a)(2) (1976 & Supp. III 1979).

84. These include ones in which: (a) there is deemed to be no "responsible operator"; or (b) there is operator default. *See* H.R. REP. NO. 95-438, 95th Cong., 2d Sess. 3, *reprinted in* [1978] U.S. CODE CONG. & AD. NEWS 72, 74.

85. The program has several illuminating items such as its provision for retroactive benefits and its division of responsibility for payment periods between the government and the private sector. *See* 30 U.S.C. § 901 (1976 & Supp. III 1979).

American public either as taxpayers or consumers.[86] However, if prevention of pneumoconiosis was more within the economical and technical means of the operator, the program would significantly affect their approach to risk management. Coal operators would have a great economic incentive to avoid a liability cost they now incur. Therefore, if the health, safety or environmental hazard presented by a system is within the feasible control of the system operator, the operator can take some necessary and feasible measures to minimize liability costs and risks by adoption of a black lung model. This would result in less government regulation.

The Black Lung Benefits Program merits attention because of the novel manner in which it deals with a problem specific to a particular industrial system and its health risk. It is an after-the-illness mechanism for awarding benefits to injured persons and allocates the financial responsibility between the private sector and federal government. Theoretically, this results in an economic incentive for the mine operator to reduce potential liability by redesigning operations to prevent the risk of illness. Clearly, other programs could be developed after the black lung model to deal with after-the-illness and other irreversible health problems.

2. Price-Anderson Insurance

The *Price-Anderson Act*[87] is a unique federal indemnity plan for nuclear energy facilities. It was enacted by Congress in 1957,[88] with two central objectives: first, to insure that the public would be compensated should an accident occur at a licensed nuclear energy facility; and second, to limit liability of private industry and remove the roadblock of financial risk to private participation in the development of nuclear energy.[89]

The Act requires that utilities authorized to construct and operate nuclear power plants possess maximum insurance coverage for public liability claims at the current amount available from the insurance industry.[90] The Act further establishes that the federal government, acting

86. *See* Solomons, *supra* note 79, at 248.

87. 42 U.S.C. § 2210 (1976 & Supp. III 1979).

88. Atomic Energy Damages Act of 1957, Pub. L. No. 85-256, 71 Stat. 576 (codified at 42 U.S.C. § 2210 (1976 & Supp. III 1979)). Enacted for a ten year period in 1957, the Act has since been extended twice for additional ten year periods. The current version applies to all nuclear energy facilities for which construction permits are issued by the Nuclear Regulatory Commission prior to August 1, 1987. *See* 42 U.S.C. 2210 (1976 & Supp. III 1979).

89. *See* Lowenstein, *The Price-Anderson Act: An Imaginative Approach to Public Liability Concerns,* 12 FORUM 594, 597 (1976-77).

90. As of August 1, 1977, the insurance industry determined that $140 million would be the maximum available liability coverage it would offer. *See* Note, *The Price-Anderson Act under Attack,* 53 NOTRE DAME LAW. 954, 956 (1978). *See also* 42 U.S.C. § 2210(b) (1976 & Supp. III 1979).

through the Nuclear Regulatory Commission (NRC), provide indemnity protection for liability incurred by the licensees[91] in an amount in excess of the available private insurance coverage, up to a combined total of $560 million.[92] Damages incurred beyond the $560 million ceiling will not be compensated unless additional congressional action is taken. In cases determined by the NRC to constitute an "extraordinary nuclear occurrence," legal defenses, which ordinarily would be available to the defendant, are automatically waived. Thus, the Act also imposes the equivalent of liability without fault, under certain conditions. As in the case of conventional insurance coverage, the utility must pay premiums for the necessary coverage dictated by the Act. However, Price-Anderson rates are not influenced by the loss (liability) experience of the individual facility; rather, they are influenced by the operating experience (losses) of the entire nuclear power industry.[93] Premium funds are held in insurance pools[94] operated by the insurance industry and are used only to pay actual losses and loss expenses.[95] If the premium funds are not used for liability payments within eleven years after payment by the utility, the payments are refunded.[96]

The Act, in theory provides an economic incentive to reduce or eliminate health, safety and environmental risks from the operation of nuclear power plants. The individual plant proprietor wants to retrieve a large percentage of his paid premiums. All plant proprietors as as group, realize that their rates are dependent on the worst case or weakest link — if one catastrophic accident occurs at one facility, *every* operators' premium rates will be affected. Thus, peer pressure on a large scale is present as a force to minimize liability.

It is clear that the loss-compensation portion of the Price-Anderson structure is conducive to forming a model for health, safety and en-

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91. 42 U.S.C. § 2210(c) (1976 & Supp. III 1979). In addition to indemnifying licensees, the Act also covers all potentially liable persons connected with the construction and operation of the facility, including component manufacturers, contractors, etcetera. The aggregate indemnity coverage provided by the government cannot exceed $500 million for any single nuclear accident. *Id.*

92. *Id.* The 1975 Amendment extending the Act's coverage added a further provision that required *every* operator of a privately-owned commercial reactor to contribute up to $500 million toward the cost of compensating victims of a nuclear incident who suffered losses beyond that amount covered by the combined insurance policy. Since the total liability ceiling was held at $560 million, this "deferred premium" provision effectively reduces the government's contribution to the compensation scheme. 42 U.S.C. § 2210(b), (c) (1976 & Supp. III 1979).

93. *See* Marrone, *The Price-Anderson Act: The Insurance Industry's View*, 12 FORUM 605, 609 (1977).

94. *Id.* Approximately 27% of the premium is kept by the particular insurance company providing the individual facility with liability coverage. The remaining 73% goes into the insurance pool. *Id.*

95. *Id.*

96. As a result of minor and infrequent claims on the pool, $9.7 million of the $12.7 million collected during the first year of insurance coverage were refunded by 1977. *Id.*

vironmental risk management. Another part of the Act, the fixing of total liability at $560 million, is *not* consistent with the goal of risk management. If a system does not have to pay for damages it causes beyond the amount of insurance and indemnity coverage, no economic incentives, beyond those already discussed, exist for the system operator to limit his health, safety and environmental risks.[97]

While it may not be often that public policy would dictate such an indemnity partnership between government and private industry, this model could be considered for management of problems with catastrophic potential similar to nuclear power. Although there are some criticisms of this model, such as the limit on total liability,[98] it does hold reducing the amount of government regulation of new, high hazard technologies.

C. Bonding, Escrow and Restoration Funds

State statutes, local ordinances, and private contracts often stipulate that a person engaging in particular activities such as construction must indemnify the party (private party of public agency) for whom they perform these activities, against certain liabilities incurred during and after the course of performance. This indemnity requirement may be in the form of a posted bond,[99] securities placed in escrow,[100] or the creation of a restoration fund.[101] These are automatic indemnity mechanisms;

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97. While the Act provides for immediate payments to accident victims, such payments may not exceed 15% of the liability limitation without court approval. This is to ensure that if the total liability exceeds $560 million, all injured parties will be afforded equitable treatment. All claims arising out of a nuclear incident are to be transferred to a single federal district court to further ensure fair and equitable treatment. 42 U.S.C. § 2210(o) (1976 & Supp. III 1979). *See* Duke Power Co. v. Carolina Environmental Study Group, Inc., 438 U.S. 59, 66 n.6 (1978). *See also* Carolina Environmental Study Group, Inc. v. United States Atomic Energy Commission, 431 F. Supp. 203 (W.D.N.C. 1977).

98. *See* Green, *Nuclear Power: Risk, Liability, and Idemnity,* 71 MICH. L. REV. 479, 504 (1973). As early as 1957, it had been estimated that damages resulting from nuclear power plant accidents was as high as $7 billion per incident. *Id.* at 483, *citing* ATOMIC ENERGY COMMISSION, THE THEORETICAL POSSIBILITIES AND CONSEQUENCES OF MAJOR ACCIDENTS IN LARGE NUCLEAR POWER PLANTS (1957).

99. The term "bond" has many meanings. For the purpose of this study, the most relevant type is the performance bond, which guarantees the performance of a contract. A performance bond is an obligation in writing which binds the signatories to pay a sum certain upon the happening of a particular event; *e.g.*, a failure to fulfill the terms of a contract. *See generally* Brady, *Bonds on Federal Government Contracts: The Surety's View,* 46 N.Y.U.L. REV. 262 (1971); 12 AM. JUR. 2d *Bonds* §§ 1-79 (1964).

100. An escrow is a written instrument which similarly imposes a legal obligation, and is deposited together with a specified amount of funds with a non-party to a contract in question. The written instrument and funds so deposited are held by the third party until the full performance of an agreed-upon condition or the happening of a specified event (*e.g.*, an accident). Upon fulfillment of the condition or happening event, the deposited instrument and funds are handed over to the person indemnified. *See generally* 28 AM. JUR. 2d *Escrow* §§ 1-43 (1966).

101. A restoration fund is a trust fund created to ensure that funds will be available to rectify problems caused by a specified occurrence. Upon the happening of the specified occurrence, losses

upon the happening of the stipulated occurrence or violation of an agreed-upon condition, the indemnity mechanism becomes the key remedy.

If a bond is involved, the person providing the indemnity coverage is bound by contract to pay for the costs incurred. Litigation may still be necessary to enforce the bond, however. If escrow is involved, the impartial holder of the instrument is empowered to act or remedy the occurrence of the specified event. As a consequence, litigation or other delays in providing a remedy are less likely than in the case with a bond. Similarly, in the case of a restoration fund, if there are any "trustee" losses incurred, the fund is able to dispense the funds necessary to cover losses or damages promptly, in the absence of an injunction obtained by the depositor. These mechanisms share several common characteristics in that each involves a relatively automatic and sometimes significant financial loss to the party who is providing the indemnity;[102] and each involves a legally-recongized relationship between the parties to the promised indemnification. This relationship may be a contractual one between private parties or between a private party and a public agency; or the relationship may be a regulatory one between a licensing or permitting agency (*e.g.*, an energy facility review board or a zoning board, and a developer or other private party).

While the primary purpose of these indemnity mechanisms is to provide assurance of damage recovery, there are many examples of federal, state, and local statutes and ordinances also utilizing these mechanisms as an aid to risk management.[103] For example, a Michigan statute provides that before engaging in the business of removing liquid industrial wastes from the premises of another, a person must obtain a license and submit with the license application a surety bond.[104] The bond is meant to indemnify the state for the elimination of hazardous conditions which may arise from the waste removal process, and for the abatement of any pollution of waters which result form the improper disposal of industrial waste by the licensee.[105]

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incurred by the obligee are compensated automatically by proceeds from the restoration fund. In this study, a restoration fund is one which could be collected and administered by a party other than the person providing the indemnity.

102. The threat of loss is real, even if an insurance company guarantees the indemnity. Since surety on a bond, for example, is usually renewable on an annual basis, insurance premiums can rise, or coverage could become unavailable, depending upon the bond performance record of the person providing the indemnity. If that person is called upon to cover losses under the performance bond, it is going to hurt financially, irrespective of whether the bond is guaranteed by a surety or not.

103. Many of the federal and state statutes discussed were identified in W. IRWIN & R. LIROFF, ECONOMIC DISINCENTIVES FOR POLLUTION CONTROL: LEGAL AND ADMINISTRATIVE DIMENSIONS (1974) (prepared for the Office of Research and Development, U.S. Environmental Protection Agency).

104. MICH. STAT. ANN. § 3.533 (105) (1978).

105. *See* Irwin & Liroff, *supra* note 103, at 11. *Accord,* MD. NAT. RES. CODE ANN. § 7-506

In a sense, the bond, the escrow instrument, and the restoration fund amount to pre-paid fines or penalties for the violation of stipulated conditions or the occurrence of identified risks. In other words, the fine for violation is put "up front," rather than being imposed as a result of a trial.[106] The result is that system operators (or, for that matter, product manufacturers and retailers in any potential new application of these indemnity mechanisms) providing indemnity coverage cannot rely upon litigation costs to deter injured parties from taking action against them. Many cost-related common law factors which restrict the number of causes of action brought against potential defendants are therefore eliminated by the indemnity mechanism. In addition to indemnification through these means, the potential defendant is still liable for common law damages beyond that covered by the indemnity device. Hence, these mechanisms serve to increase the obligor's incentives to minimize the stipulated risks to health, safety and the environment.

Requiring these mechanisms in public circumstances is itself a simplistic form of governmental regulation. While they do not eliminate regulatory costs entirely, such mechanisms reduce administrative costs by defining the performance conditions necessary to avoid liability in the statute and by setting the penalty ahead of time, rather than through design rules and other burdensome actions. Consequently, the need for administrative adjudications should be reduced as should the need for administrative rulemaking. In sum, where it is within the financial capability of the system operator (or product manufacturer/retailer) to provide the necessary indemnity, these mechanisms are worthy of consideration as a possible substitute for health, safety, and environmental regulation.

III. GOVERNMENT INFLUENCE

A. Government Procurement

This section addresses whether the federal government's procurement power can be effectively used to control risks to health, safety and the environment by providing the economic incentive of awarding federal contracts and grants only to those who meet specific criteria for eligibility. The scope of federal procurement has been broadly construed to include grants as well as contracts, but most of the discussion herein is focused on federal contracting with the private sector.

Federal contracts and grants now total approximately $185 billion annually. Of this total roughly $100 billion is committed through federal

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(Supp. 1980) (insurance bond requirement); MICH. STAT. ANN. § 18.484 (15) (1980) (insurance on carnival and amusement rides); OHIO REV. CODE ANN. § 15.13.08 (1978) (requiring insurance bond for strip mining).

106. *See* IRWIN & LIROFF, *supra* note 103, at 10.

contracts,[107] while $85 billion is awarded through grants.[108] Both contracts and grants are subject to a myriad of statutes, regulations, executive orders and policy directives.[109] Congress has long perceived the government's considerable procurement power as a means to achieve a variety of national goals. In fact, nearly all government contracts and grants today contain "socio-economic clauses" which have nothing to do with furthering the procurement process itself,[110] but are used for the purpose of promoting various national objectives ranging from assisting the disadvantaged to energy conservation to environmental protection.[111] Given the extraordinary, if laudable, scope of these objectives, it is understandable that those few persons who have assessed government procurement are in agreement that a major overhaul is needed.[112] The most significant effort at reform has been that of the broadly mandated Commission on Government Procurement established by Congress in 1969.[113]

One of the Commission's major recommendations was the establishment of an ongoing procurement policy agency to coordinate and consolidate federal procurement,[114] which led to the Congressional creation of the Office of Federal Procurement Policy (OFPP) under the aegis of the Office of Management and Budget (OMB).[115] OFPP is charged with implementing the Commission's recommendations, but OFPP has been sharply criticized for failure to fully carry out this function.[116] As of

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107. *Report to the Congress on Recommendations of the Commission on Government Procurement: A Final Assessment* [1979] 9 GOV'T CONT. REP. (CCH) No. 424 [hereinafter cited as *Report No. 424*].

108. R. CAPPALLI, RIGHTS AND REMEDIES UNDER FEDERAL GRANTS 11 (1979).

109. As to contracts, *see, e.g.*, Armed Services Procurement Act of 1947, 10 U.S.C. § 2301 (1976); Federal Procurement and Administrative Services Act of 1949, 40 U.S.C. § 486 (1976); Defense Acquisition Regulations, 32 C.F.R. § 1 (1979); Federal Procurement Regulations, 41 C.F.R. § 1 (1979).

As to grants, *see* Cappalli, *Federal Grant Disputes: The Lawyer's Next Domain*, 11 J. URB. L. 378 (1979). Grant procedures are currently under review by OMB pursuant to the Federal Grant and Cooperative Agreement Act of 1979, 41 U.S.C. § 507 (Supp. II 1978).

110. *See* Caruso, *Socio-Economic Clauses and Policies*, ABA DEV. GOV'T CONT. L. 229 (1975).

111. These socio-economic contract clauses are effectuated in light of several federal enactments. *See, e.g.*, Military Construction Act Amendment of 1979, 10 U.S.C.§ 2698 (Supp. III 1979); National Historic Preservation Act of 1966, 16 U.S.C. § 470 (1976); Coastal Zone Management Act of 1972, 16 U.S.C. § 1501 (Supp. II 1978); Safe Drinking Water Act of 1974, 42 U.S.C. § 300f (1976 & Supp. I 1977); National Environmental Policy Act of 1969, 42 U.S.C. § 4321 (1976); Noise Control Act of 1972, 42 U.S.C. § 4901 (1976); Resource Conservation and Recovery Act of 1976, 42 U.S.C. § 6901 (1976); and Clean Air Act of 1977, 42 U.S.C. § 7401 (Supp. II 1978).

112. *Summary of the Report of the Commission on Government Procurement*, [1973] 9 GOV'T CONT. REP. (CCH) No. 53 [hereinafter cited as *Report No. 53*].

113. Act of Nov. 26, 1969, Pub. L. No. 91-129, 38 Stat. 269 (codified at 41 U.S.C. § 251 (1976)).

114. *See Report No. 53, supra* note 112.

115. Office of Federal Procurement Policy Act of 1974, Pub. L. No. 96-83, 88 Stat. 797 (codified at 41 U.S.C. §§ 401 to 412 (1976)).

116. *See Report No. 53, supra* note 112, at 109.

mid-1980, OFPP had placed much of its procurement reform hopes in the newly created Council on the Uniform Procurement System, made up of senior procurement officials from twenty-two departments and agencies. The Council's mandate directs it to submit a uniform procurement system to Congress.[117] In addition to the Council, OFPP has also issued a major policy directive calling for government agencies to assist the private sector to develop voluntary procurement guidelines wherever practicable.[118] Despite these OFPP efforts, and the efforts of others including the American Bar Association,[119] federal procurement is still characterized by an exceedingly complex overlay of requirements, none of which have been uniformly adopted by all federal departments.

Congress began to direct the use of the procurement power to achieve a variety of socio-economic goals in the 1930s through the enactment of several laws such as the Walsh-Healy[120] and Davis-Bacon[121] Acts, and the Buy-America[122] and Small Business[123] Acts. Thus, the principle of using the procurement power as an alternative to direct regulation was established early. Nonetheless, only the Walsh-Healy Act, among those early statutes, dealt with the management of certain health or safety risks.[124] Most of the laws dealt with alleviating certain economic hardships and discriminatory practices, and these goals remain important today.[125] During the 1970s, this route to the achievement of national goals was used to tackle new endeavors such as energy conservation.[126]

Several fundamental distinctions help to frame an analysis of the due process issues related to the government's use of its procurement power. First, contract relationships, historically characterized by freedom of the parties to bargain as they choose, are less vulnerable to due process challenges than grants and loans, which have an aura of *in loco parentis*. Second, actual recipients of contracts, grants or loans are in a better position to argue possession of a legal interest than prospective recipients. Third, blacklisting and termination of "necessities for life" under *Goldberg v. Kelly*[127] stands virtually alone as the major issue which currently arouses concern for due process safeguards, and therefore can be used to curb the government's otherwise broad discretion to act.

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117. 41 U.S.C. § 401 (1976).
118. 45 Fed. Reg. 4326 (1980).
119. *See Caruso, supra* note 110, at 237.
120. 41 U.S.C. §§ 35-54 (1976).
121. 40 U.S.C. § 276(a) (1976).
122. 41 U.S.C. §§ 10a-10d (1976).
123. 15 U.S.C. §§ 631-647 (1976).
124. 41 U.S.C. §§ 35(a)-35(e) (1976).
125. *See, e.g.*, 25 U.S.C. § 47 (1976); 29 U.S.C. § 47 (1976); 41 U.S.C. §§ 46-48 (1976); Exec. Order No. 12092, 43 Fed. Reg. 51,375 (1978); and Exec. Order No. 11246, 30 Fed. Reg. 12,319 (1965).
126. *See* note 111 *supra*.
127. 397 U.S. 254 (1970).

Two additional legal considerations affect the due process question. *Perkins v. Lukens Steel Co.*,[128] decided by the United States Supreme Court in 1940, is still considered to be good law, standing for the proposition that the government has unrestricted power in procurement contracts to determine those with whom it deal, notwithstanding *Goldberg* which specifically excluded *Perkins*-type contract situations from its holding.[129] The other consideration is section 553(a)(2) of the Administrative Procedure Act (APA)[130] which exempts contracts, loans, and grants from section 553 notice and comment requirements for rulemaking.[131] This exemption, perhaps more so than anything else, illustrates the low level of attention paid to the federal-private procurement and grant relationship.

Despite the greater sensitivity for due process concerns in grants, the government is still not generally required by statute or court holding to recognize private parties as possessing sufficient legal interests to warrant wholesale restrictions on the government's grants and awards process.[132] As for regulatory implementation by the agencies, a review of departmental and agency due process procedures indicates that the government's main concern lies with debarment or blacklisting practices.[133] Both are similar to agency issuance of adverse publicity, and it is likely that they will be subject to increasingly stringent procedural safeguards.[134] The final due process consideration is the amount of discretion an agency has in its contracting process. Although government procurement is seemingly bounded at every turn by assorted procedural rules, there are indications that agencies have remarkable discretion.[135]

Utilization of the government's procurement power as an alternative

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128. 310 U.S. 113 (1940).

129. 397 U.S. 254, 264 (1970).

130. 5 U.S.C. § 553(a)(2) (1976).

131. 5 U.S.C. § 553(c) (1976).

132. *See* CAPPALLI, *supra* note 108, at 180-225.

133. The Department of Defense has enumerated causes for debarment such as a history of failure to perform. 32 C.F.R. §§ 1-600 (1979). On the civilian side, a hearing is provided for any party an agency is proposing to debar. 41 C.F.R. § 1-1.6 (1979). Similarly, the Environmental Protection Agency blacklist regulations state that no facility shall be listed without notice and, where appropriate, an opportunity to be heard. 40 C.F.R. §§ 15, 20 (a) (2) (1979).

134. *See* Recommendation A-46 of the Commission on Government Procurement, *Report No. 424, supra* note 107, at 81, 109, which would make debarments for socio-economic violations more uniform and equitable.

135. *See, e.g., In re* Wright-Dick-Boeing, [1977] 77-1 BCA (CCH) ¶12, 437 (Feb. 10, 1977) (holding that contractors could be held to more stringent standards than those established by the Occupational Safety and Health Act of 1970, Pub. L. No. 91-596, 84 Stat. 1590 (codified in scattered sections of 5, 15, 18, 29, 49 U.S.C.)); *In re* McCollum, [1976] 76-1 BCA (CCH) ¶11, 746 (Feb. 24, 1976) (holding that contractors could be held to more stringent safety standards than those established by contract hours and the Work Hours and Safety Act of 1962, 40 U.S.C. § 327 (1976)).

to direct regulation does have some disadvantages. Criticisms include widespread agency disregard of socio-economic clauses and agency reluctance to blacklist major companies. It has also been suggested that the procurement power has achieved little because of the government's overriding need to meet other national interests such as securing goods at minimal cost and with minimal delay.[136]

Favorable opinion of the procurement power is rooted in the view that it can operate expediently with little or no delay for judicial review, and with the absence of any need to prove violations beyond a reasonable doubt.[137] Perhaps the single greatest affirmation of the procurement power's viability is the consistent inclusion or procurement provisions in statutes enacted by the Congress over the past fifty years.

In summary, the use of socio-economic procurement provisions has never been challenged in any substantive way, nor have critics called for their abolition. Criticisms cluster around the need for weeding out clauses that are no longer relevant, providing minimum uniform procedures to guide the use of this power, and consolidating the many procurement provisions to facilitate agency usage.[138] Such comparatively mild criticisms, coupled with the positive reactions from others, suggest that the procurement power has viability at its core and is mostly in need of incremental refinements. The argument for the increased use of procurement as an alternative to classical regulation is not that it is the right tool for all situations; its primary value lies in its immediate availability to agencies as a preferred means of stimulating compliance with health and environmental standards and particular.

B. Government Information and Publicity

The government's ability to disclose information and to force others to publicly disclose information as to environmental, health and safety risks, and to provide adverse publicity as to the sources of such risks is another major alternative to direct regulation. By more fully informing the public of parties generating risks, the federal government has an alternative, non-regulatory means to achieve certain health, safety and environmental objectives.

Well-known examples of public disclosure requirements have been imposed on private parties since 1934 with the passage of the Securities Exchange Act,[139] and more recently with the enactment of the Federal

136. *See generally* R. NASH, FEDERAL PROCUREMENT AND THE ENVIRONMENT, FEDERAL ENVIRONMENTAL LAW. 460, 489 (2d ed. 1974).

137. *See* Rosenthal, *The Federal Power to Protect the Environment: Available Devices to Compel or Induce Desired Conduct*, 45 S. CAL. L. REV. 397 (1972).

138. *Id.* at 445.

139. Securities Exchange Act of 1934, ch. 404, 48 Stat. 881 (codified at 15 U.S.C. §§ 78a-78111 (1979)).

Election Campaign Act.[140] Although rulemaking is involved in fixing the disclosure requirements under these laws, the disclosure itself has the advantage of involving no further government intrusion into the private transactions involved. Some of the benefits of the disclosure approach include less expense than incurred in rulemaking, less time to set the government's requirement, and less need for agencies to attempt to devise "ideal" ways for people to behave by detailed regulation.[141]

In conjunction with disclosure, adverse publicity is also effective in managing risks and has two subtypes. The first embraces the power of federal agencies to warn the public about defective consumer items and safety and environmental hazards.[142] The second subtype usually takes the form of agency news releases which focus on specific individuals or businesses.[143]

A basic distinction between disclosure and adverse publicity is that disclosure generally relies on prior rulemaking subject to the Administrative Procedure Act (APA),[144] and its implications are dependent on subsequent voluntary compliance. Publicity, in contrast, seldom involves prior rulemaking, and is wholly under the government's control. Further, while individuals may avoid disclosure requirements by foregoing subsequent activities, adverse publicity sweeps broadly and allows for no similar avoidance option.[145] Other forms of information disclosure include labeling requirements, access to information pursuant to the Freedom of Information Act (FOIA),[146] and agency programs which provide for the continuing generation of public information and education.[147]

As an alternative to direct regulation, the government's "information

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140. Federal Election Campaign Act of 1971, Pub. L. No. 92-255, § 301, 86 Stat. 11 (codified at 2 U.S.C. §§ 431-442 (1976 & Supp. III 1979)).

141. Even citizen disclosures have been encouraged by agencies as part of their fact-gathering process to support agency action later, such as issuances of adverse publicity, warnings, and direct regulation. *See, e.g.*, National Traffic and Motor Vehicle Safety Act of 1966, 15 U.S.C. §§ 1411-1420 (1976); Federal Hazardous Substances Act of 1960, 15 U.S.C. §§ 1261-1274 (1976); Consumer Product Safety Act of 1972, 15 U.S.C. § 2051 (1976); Food, Drug, and Cosmetic Act of 1938, 21 U.S.C. § 375 (1976); Occupational Safety and Health Act of 1979, 29 U.S.C. § 651 (1976); and Exec. Order No. 11566, 35 Fed. Reg. 16, 675 (1970).

142. *See, e.g.*, Toxic Substance Control Act, 15 U.S.C. § 2613 (a) (3) (1976) (granting the Environmental Protection Agency authority to notify the public as to toxic substances which present an "unreasonable risk of injury to health or the environment.").

143. *See* Gellhorn, *Adverse Publicity by Administrative Agencies*, 86 HARV. L. REV. 1380 (1973).

144. *See* 5 U.S.C. § 553 (1976).

145. *See* Gellhorn, *supra* note 143, at 1413.

146. 5 U.S.C. § 552 (1976).

147. For instance, the Environmental Protection Agency is required to carry out information programs under the Federal Water Pollution Control Amendments of 1977, 33 U.S.C. § 1294 (Supp. I 1977); the Resource Conservation and Recovery Act of 1976, 42 U.S.C. § 6983 (e) (1976); and the Clean Air Act of 1977, 42 U.S.C. § 7401 (Supp. II 1978).

power" has some drawbacks. For instance, concern has been expressed about agency usage of news releases and press conferences which focus on named individuals who are under indictment or subject to an administrative complaint.[148] A common criticism of these practices is that agencies resort to the information power as a pressure mechanism for de facto enforcement, even in the absence of any statutory enforcement authority.[149] Of less concern, however, are agency news releases which target a product, an entire industry, or a particular risk because no legal action is being taken against a named person, and because such public warnings are usually explicitly authorized by statute. Further, the public's need to know usually outweighs any harm that may fall to some party as an unavoidable consequence of such general warnings.[150] Another problem concerns agency gathering and dissemination of business related information.[151] Since federal agencies have broad authority to gather information, including trade secrets, Congress has attempted to devise a compromise whereby agencies may acquire whatever information they need, but industry, in turn, is afforded protection against the public disclosure of such information under the "trade secrets" exemption to the Freedom of Information Act.[152] This balancing of interests has proved effective.

Despite concerns over business information and other potential problem areas, there have been only a small number of cases in which an agency's use of its information power has been challenged. In these instances, courts have narrowly constructed their holdings so as not to collide with congressional delegation of the information powers, however vague the delegation may be. The leading cases illustrate a strong presumption of legality accorded government use of such powers, and, thus, have directly and implicitly encouraged their use.[153]

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148. *See, e.g.*, Silver King Mines, Inc. v. Cohen, 261 F. Supp. 666 (D. Utah 1966).

149. The Office of Federal Contract Compliance, for example, highly publicized a complaint it had brought against a major Cleveland bank for alleged widespread race and sex discrimination. *See* Legal Times of Washington, May 26, 1980, at 3, cols. 1 & 2.

150. For a statute which attempts to consider both the public's need to know and an adversely affected individual's right to a measure of due process, *see* Consumer Product Safety Act of 1972, 15 U.S.C. § 2051(b)(1) (1976).

151. So sweeping is the federal government's power to secure information, agency officials have developed self-imposed, internal guidelines to manage such information. For example, the Commissioner of the Consumer Product Safety Commission proposed to narrow the scope of duties of his agency with regard to the gathering of information from manufacturers of asbestos. *See* Legal Times of Washington, May 26, 1980, at 11, cols. 1, 2, 3, & 4.

152. 5 U.S.C. § 552(b)(4) (1976).

153. *See, e.g.*, Chrysler Corp. v. Brown, 441 U.S. 281, 293-94 (1979) (while Freedom of Information Act exemptions restrict an individual's ability to secure certain information, the exemptions do not represent an absolute bar to disclosure); FTC v. Cinderella Career and Finishing Schools, Inc., 404 F.2d 1308, 1313-14 (D.C. Cir. 1968) (held not prejudicial for FTC to issue news release simultaneously with the filing of a complaint, since agency has explicit statutory authority to disseminate information); Kukatush Mining Corp. v. SEC, 309 F.2d 647, 650 (D.C. Cir. 1962)

In the final analysis, any expanded use of the information power as an alternative to rulemaking should be accompanied by an identification of which problems are most susceptible to its responsible use, and a determination of how often dissemination can be used before its impact is diluted. If developed in this way, agency disclosure and publicity effectuated in tandem with other nonregulatory measures, will provide another sound alternative to risk regulation.

C. Advance Notice of Intent to Regulate

A relatively new tactic of several government agencies to promote voluntary risk-reduction efforts by regulated industries involves the publication of a quasi-formal "notice" in the Federal Register of an agency's "advanced notice of proposed rulemaking" (ANPRM). By issuing an early warning of an intention to consider rulemaking in response to a particular problem, the agency is attempting to generate information that may be useful, from any quarter, and is putting the sources of a problem on notice that unless voluntary measures are taken to abate or eliminate the problem, the agency will begin the fact-finding and subsequent formal stages of the rulemaking process.[154] Of course, an ANPRM also affords the sources of the problem an early opportunity to either begin changing their activities to abate risks, or to begin mustering an array of techniques to influence or oppose subsequent agency efforts — techniques which may include intensified lobbying of the agency, of Congress and the Executive Office, and an intensive public relations campaign.

Using ANPRMs as an alternative to classical regulation would be in keeping with a 1978 Executive Order,[155] requiring all executive agencies to implement regulatory reforms, including the consideration of meaningful alternatives to rulemaking. ANPRMs serve the useful function of pointing out problem areas to the public and allowing both industry and government agencies the opportunity to develop non-rulemaking solu-

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(SEC disclosure requirements are imperative to inform the public); and Ajoy Nutrition Foods, Inc. v. FDA, 378 F. Supp. 210, 212, 217 (D. N.J. 1974) (FDA has broad statutory mandate to issue information on health warnings). *But see* GTE Sylvania, Inc. v. Consumer Product Safety Comm'n, 404 F. Supp. 352 (D. Del. 1975) (agency barred from disclosing incomplete and ambiguous information); *cf.* United States v. Abbott Laboratories, 505 F.2d 565, 568-69 (4th Cir. 1974) (despite pretrial publicity through inaccurate, agency-released information, no dismissal without concerted effort of defendant to minimize effects through voir dire, change of venue, or continuance).

154. *See, e.g.*, ANPRM issued by the Environmental Protection Agency regarding the perceived need for manufacturers of selected chemical substances to submit information associated with production volume, mass and exposures. 44 Fed. Reg. 37,517 (1979).

155. Exec. Order No. 12044, 43 Fed. Reg. 12,661 (1978). This Carter Administration order has been replaced by President Reagan's Exec. Order No. 12291, 46 Fed. Reg. 13,193 (1981), which incorporates Exec. Order No. 12044 requirements in a larger framework of regulatory reform measures.

tions, such as the development of voluntary standards by the private sector. If such voluntary responses are not forthcoming within a reasonable time, the agency can promptly assume full responsibility and initiate its rulemaking process.

A concluding observation is that ANPRMs, to be effective as alternative regulatory tools, should be used selectively. Particularly appropriate are situations which do not present immediate risks. Also, the government must be prepared to take prompt action where an ANPRM does not result in some type of self-regulatory behavior, and to demonstrate that the ANPRM "opportunity" should be thereafter used. Given a mix of using ANPRMs in the right situations and taking prompt regulatory action when faced with insufficient responses from the private sector, the government might find that expanded use of this simple device is an inexpensive and effective way to induce the voluntary management of risk by the private parties creating the risk.

CONCLUSION

Historically, our society has addressed risks to health, safety and environment through a variety of non-regulatory measures. Although these measures were legally sound, they often produced unsatisfactory results for a number of reasons, and this led to the rapid growth of the regulatory approach. This article has suggested a new role for the government regulator through the use of in-place and proven alternatives to regulation. Under this approach the regulator would consider an array of risk reduction strategies within a procedural framework allowing all interested parties to be heard. Then, the regulator would select the most efficacious strategy or combination of mechanisms, and would rulemake only as a last resort. Some of these strategies will require congressional assistance, either by expanding the regulator's discretion, or by creating or reinforcing the alternative mechanisms the regulator seeks to use. Such a role would be compatible with the societal need for risk management by federal agencies without the burdensome attributes of more formal and costly regulation. This would mark the beginning of a creative approach to risk management, one more finely-tuned to the attributes of the risk in question and its socio-economic context.

The Federally Qualified Health Maintenance Organization: An Analysis of Federal Legislation and Agency Action

*Marc Edward Chafetz**

The health maintenance organization (HMO) is a relatively recent innovation in American health care practice. The paradigmatic HMO is a group practice plan in which individuals pay in advance for its use. The purpose of such a system is to encourage the practice of preventive health care. In this Article, the author examines the efficacy of HMOs in regard to the quality of care it delivers; the benefits accruing to health care consumers; and the cost effectiveness of the system's operation. Federal legislation was enacted in 1973 to advance the development of HMOs. The author assesses this legislation, as well as its subsequent amendments in 1976 and 1978, illuminating its advantages and deficiencies. Also addressed is federal agency oversight and regulation, which is putatively provided by the Department of Health and Human Services (HHS). While the Health Maintenance Organization Act requires HHS to oversee federally qualified HMOs, the author details the lack of this agency's support and propounds more agency involvement and control through regulation and supervision.

The classic health maintenance organization[1] (HMO) is a prepaid medical group practice which combines two separate aspects of the health delivery system: the fee-for-services physician and private health

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1. The term "health maintenance organization" was coined by Dr. Paul Ellwood in 1970, health advisor to the Nixon Administration. *See* P. ELLWOOD, N. ANDERSON, T. BILLINGS, R. CARLSON, E. HAAGBERG & W. MCCLURE, THE HEALTH MAINTENANCE STRATEGY (Institute for Interdisciplinary Studies, 1970). *See also* Rosoff, *Phase Two of the Federal HMO Development Program: New Directions After Shaky Start*, 1 AM. J. L. & Med. 209, 210 (1975).

insurance. It is this amalgam that makes an HMO unique, for the financial incentives of sickness are reversed. An HMO generally receives only one monthly fee from the health care consumer and the consumer may utilize the full services of the plan for just this fee.[2] This creates an incentive for the system to keep its members healthy.[3]

In direct contrast, under the traditional fee-for-services system with third-party payment by insurance companies, the system only begins to function when one is ill. The consequence is that fee-for-service physicians and other health care providers do not have any income until the system is triggered by an individual's sickness. The HMO reverses this paradoxical, misdirected process;[4] it encourages the practice of preventive medicine. This is the functional mainspring of the HMO and is the significant reason why they have captured the imagination and support of many for their continued development, especially in light of the skyrocketing costs of medical care during the past decade.

Politicians of diverse political backgrounds, such as Richard Nixon and Edward Kennedy, have rallied to support the HMO.[5] In the early 1970s, it was seen as a panacea to the medical care crisis that continues to confront this country.[6] In 1973, Congress passed the HMO Act which made funds available to HMOs for their development and growth.[7] Although this enactment helped to spawn and foster hundreds of HMOs, the legislation was seen by many as more of a hindrance than a helping hand to the HMO movement.[8] Three years after the passage of the HMO Act an amending act was passed to rectify some of the original statute's deficiencies.[9] In 1978, an additional act was passed to further define what the Congress expected of HMOs.[10]

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2. Some HMOs charge a nominal fee for each visit. For example, Group Health Association (GHA) of Washington, D.C. has both options. Under the high option plan, there is no additional charge. Under the basic plan, there is a three dollar charge per physician visit. *See* Group Health Association, 1981 Health Care Benefits — High Option and Basic Plans (1981) (information available from: GHA Main Medical Center, 2121 Pennsylvania Avenue, N.W., Washington, D.C. 20037).

3. For a discussion of the economic aspects of the HMO, *see* Havighurst, *Health Maintenance Organizations and the Market for Health Services,* 35 L. & CONTEMP. PROB. 716 (1970); Note, *The Role of Prepaid Group Practice in Relieving The Medical Care Crisis,* 84 HARV. L. REV. 887 (1971).

4. *See, e.g.,* Iglehart, *Coalition Pushes for Changes in Faltering HMO Program,* 7 NAT'L J. 875 (1975). President Nixon is quoted in that article as stating: "Income grows not with the number of days a person is sick but with the number of days a person is well. HMOs therefore have a strong financial interest in preventing illness. . . ." *Id.*

5. *See* Iglehart, *supra* note 4.

6. *Id.*

7. Health Maintenance Organization (HMO) Act of 1973, Pub. L. No. 93-222, § 2, 87 Stat. 914 (1973) (codified at 42 U.S.C. §§ 300e to 300e-14 (1976 and Supp. II 1978)).

8. *See* Iglehart, *supra* note 4.

9. Health Maintenance Organization Amendments Act of 1976, Pub. L. No. 94-460, 90 Stat. 1945 (1976) (codified at 42 U.S.C. §§ 300e-1 to 300e-15 (Supp. 1977)).

10. Health Maintenance Organization Amendments Act of 1978, Pub. L. No. 95-559, 92 Stat. 2131 (1978) (codified at 42 U.S.C. § 300e-3, 300e-4 (Supp. II 1978)).

This Article will first explore the historical and performance record of the HMO.[11] It will then address and assess the federal legislation and the administrative machinery set up to promote their development. Finally, predictions as to the future of the HMO as a provider of health care will be considered.

I. BACKGROUND

Prepaid group practice first appeared in the late 1920s.[12] The community Hospital Clinic, an early style HMO, was then developed by the Farmers Union Hospital Association in Oklahoma.[13] The oldest, still-existing HMO, is the Kaiser Foundation Health Plan which began on the west coast and today has branches throughout the United States which have an enrollment of 3.2 million individuals.[14] From the beginning, however, the medical profession has been less than supportive of prepaid group plans. The American Medical Association (AMA), in 1933, rejected a report favorable to prepaid group practice.[15] The medical community's continued resistance to HMO is still present. For instance, in late 1970 the AMA warned President Nixon that the development of prepaid group plans would drive doctors out of active practice, inflate costs, and lower physician productivity.[16] In addition, a variety of legal constraints currently exist to slow the development of HMOs.[17] These constraints have ranged from problems with incorpora-

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11. There are two basic HMO models: (a) the prepaid group practice and (b) the individual practice association or medical care foundation. The former, sometimes known as a "staff" or "closed" model, usually involves delivery of a full range of services by physicians who are associated with the organization, to members who pay on a per person, prepayment basis. The group practice model is responsible for the quality and availability of its services. Under the latter model, the physicians, who may be engaged in a solo or group practice, contract with an HMO to provide medical care out of their own offices to enrollees of the HMO as well as continuing to treat fee-for-services individuals. This paper will focus on the former model which is the prototypical concept of an HMO. *See* Rosoff, *supra* note 1, at 216-20.

12. *See* Kissam & Johnson, *Health Maintenance Organizations and Federal Law: Toward A Theory of Limited Reformmongering*, 26 VAND. L. REV. 1136, 1165 (1976).

13. *See* A. SHADID, CRUSADING DOCTOR 111-19 (1956).

14. The Kaiser plan began as a program to deliver medical care to Kaiser Industry employees in the 1940s. *See* HOUSE COMM. ON INTERSTATE AND FOREIGN COMMERCE, HEALTH MAINTENANCE ORGANIZATION AMENDMENTS OF 1978, H.R. REP. NO. 95-1479, 95th Cong., 2d Sess. 8 (1978) [hereinafter cited as 1978 HOUSE REPORT], *citing* H. SOMERS & A. SOMERS, DOCTORS, PATIENTS AND HEALTH INSURANCE (The Brookings Institution 1978).

15. *See* W. MACCOLL, GROUP PRACTICE & PREPAYMENT OF MEDICAL CARE 136 (1966), *cited in* Note, *supra* note 3, at 954 n.3, 955. Furthermore, in AMA v. United States, 317 U.S. 519 (1943), the United States Supreme Court found that the D.C. Medical Society was guilty of restraint of trade actions against an alternative health care delivery system developed by GHA.

16. *See* Note, *supra* note 3, at 955 n.4.

17. *See* Holley & Carlson, *The Legal Context for the Development of Health Maintenance Organizations*, 24 STAN. L. REV. 644, 653-62 (1972); Note, *supra* note 3, at 960-75.

tion[18] to insurance regulations.[19] In large part, these impediments have been removed by recent federal legislation supporting the HMO concept and the HMO's own favorable acceptance among health care consumers.

A. HMO Performance

A large measure of support for the HMO concept is based on the recognition that they are highly cost-effective.[20] The prepaid group plan can deliver high quality comprehensive health care at low cost. Furthermore, given the nature of organization, greater opportunities to control health care cost exist. "[T]here is a distinct incentive to the organization to achieve significant cost savings through decreased hospital utilization, decreased drug costs, decreased elective surgery, and substitution of ambulatory care for hospitalization. . . ."[21] Additionally, the automatic ordering of a battery of tests which might have little relevance to the patient's condition is decreased; the possibility of unnecessary duplication of tests by different physicians in the treatment process is lessened because all doctors are together in one building and can use the results from one set of tests; and paraprofessionals are utilized for medical acts for which a physician is not necessary.[22]

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18. This problem involved the common law notion prohibiting the corporate practice of medicine. The fear was that a physician's loyalty would be to the organization which pays her salary rather than to the patient she treats. *See* Hansen, *Laws Affecting Group Health Plans,* 35 IOWA L. REV. 209 (1950).

19. Because HMOs could be seen as performing a function similar to insurance, the possibility arose that they could be subject to insurance regulations. This would have made difficult their ability to function if insurance requirements (such as large reserve funds) had been required. The courts have generally upheld the distinction between HMOs and insurance companies. In a 1939 case, for example, a federal circuit court noted the differences:

> [T]he distinctive features of the [HMO] are the rendering of service, its extension, the bringing of physician and patient together, the preventive features, the regularization of service as well as payment, the substantial reduction in cost by quantity purchasing, in short, getting the medical job done and paid for; not, except incidentally to these features, the indemnification for cost after the service is rendered. Except the last, these are not distinctive or generally characteristic of the insurance arrangement. There is, therefore, a substantial difference between contracting in this way for the rendering of service, even on the contingency that it be needed, and the contracting merely to stand its cost when or after it is rendered.

Jordan v. Group Health Ass'n, 107 F.2d 239, 247 (D.C. Cir. 1939) (footnotes omitted).

20. *See* REIDEL, FEDERAL EMPLOYEES HEALTH BENEFITS PROGRAM: UTILIZATION STUDY (U.S. Dep't of Health, Educ. & Welfare Pub. No. (HRA) 75-3125 1975), *cited in* 1978 HOUSE REPORT, *supra* note 14, at 10 & n.13; Roemer & Sharick, *HMO Performance, The Recent Evidence,* MILBANK MEMORIAL FUND Q., HEALTH & SOC'Y (1973), *cited in* 1978 HOUSE REPORT, *supra* note 14, at 10 & n.13.

21. *See* Holley & Carlson, *supra* note 17, at 651.

22. *See, e.g.,* N.Y. Times, Jan. 28, 1976, at 1, col. 7. Reported in this article are the findings of one researcher who notes that twenty-two percent of all antibiotics prescribed in hospitals are unnecessary. *Id.* at 17, col. 1.

The insurance company, by comparison, simply passes on the increased costs of health care to the individual it indemnifies by increasing its rates.[23] As a middleman there is little incentive for the insurance company to control costs.[24] Indeed, there is a counter productive incentive fostered by the traditional system which encourages the freewheeling use of hospitals and physicians. Under such a system, an increase in illness results in an increase in services and a concomitant increase in income to these parties.[25] Stated simply, the traditional system profits more from sickness than the lack thereof. Furthermore, the impact of the cost for these services is disguised because of insurance coverage which often pays for the majority of the expenses incurred.[26] The health care provider realizes that the patient will not be burdened with the bulk of the expenses; hence, she has no disincentive to order what might be superfluous or marginally relevant care.

The HMO, on the other hand, is an integrated system which provides a comprehensive range of medical care services for one set fee.[27] There is no additional charge to the member — or income to the organization — for increased utilization of services.[28] Thus, the incentive to overutilize health care services is removed and replaced by a need to be economical. The primary reason that HMOs have been cost effective is due to their great emphasis on ambulatory care which decreases the rate of hospitalization.[29] This singular reduction is significant because hospitalization is the most expensive item of health care.[30] A recent House Committee Report stated that "[r]eductions in the use of hospitals [under an HMO system] have most generally been in the range of 20 to 25 percent, although there are a number of reports showing even greater savings reductions in the use of hospital services."[31] In the Aid to Families of Dependent Children and Old Age Assistance programs, matching groups of recipients were compared for hospital utilization rates. The findings were striking: group practice plans had

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23. *See generally* Holley & Carlson, *supra* note 17; Iglehart, *supra* note 4; Kissam & Johnson, *supra* note 12.

24. *See generally* Holley & Carlson, *supra* note 17; Kissam & Johnson, *supra* note 12.

25. *See generally* Holley & Carlson, *supra* note 17; Kissam & Johnson, *supra* note 12.

26. *See generally* Holley & Carlson, *supra* note 17; Kissam & Johnson, *supra* note 12.

27. *See* Group Health Association, 1981 Health Care Benefits — High Option and Basic Plans (1981). *See also* Iglehart, *Carter Wants to Heal The Long-Suffering HMOs,* 9 NAT'L J. 1146 (1977).

28. *See* note 2 *supra.*

29. *See generally* Holley & Carlson, *supra* note 17; Iglehart, *supra* note 4; Kissam & Johnson, *supra* note 12.

30. *See* Kissam & Johnson, *supra* note 12, at 1168-74.

31. 1978 HOUSE REPORT, *supra* note 14, at 10.

hospitalization rates that were two and one-half times less than fee-for-service plans.[32]

Recently, there has been a great deal of speculation regarding the amount of unnecessary surgery performed in this country.[33] HMOs create a major disincentive to perform such surgery. Unlike the traditional fee-for-services system, the HMO physician will not earn more with the greater number of surgical procedures performed. As a result, decreased costs for surgery have been noted in HMOs.[34] Among federal employees in 1966, for instance, "[t]hose in prepaid group practice plans had half as many appendectomies as those in the fee-for-service system, they had one-fourth as many tonsillectomies and adenoidectomies — and even more important, they had half as many female surgeries."[35] In short, as a recent Congressional report on HMO's stated: "there is [a] fairly broad consensus that care provided through health maintenance organizations is less expensive than that provided through fee-for-service insurance plans."[36]

B. Quality of Care

The various cost savings achieved by HMOs raise the possibility that HMOs may try to decrease overhead expenses to the detriment of the enrollee. More specifically, the member may not get the medical care she really needs because the organization is overly concerned with cost cutting. One limitation to that possibility is the potential for malprac-

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32. Gans, Contracts in HMO and Fee-for-Service Performance (Dec. 30, 1975) (unpublished paper presented to the American Economic Association, Dallas, Texas), *cited in* GROUP HEALTH NEWS, Apr. 1976, at 4, 5 [hereinafter cited as Gans].

33. *See* HOUSE SUBCOMM. ON OVERSIGHT AND INVESTIGATIONS, 94TH CONG., 2D SESS., REPORT ON COST AND QUALITY OF HEALTH CARE: UNNECESSARY SURGERY 4 (Comm. Print H-502, 1976).

34. *See* M. Glasser, Consumer of Health Care Expectations (Dec. 9, 1969), *cited in* Note, *supra* note 3.

35. M. Glasser, Consumer of Health Care Expectations, at 15 (Dec. 9, 1969), *cited in* Note, *supra* note 3, at 923.

36. 1978 HOUSE REPORT, *supra* note 14, at 12. The report quotes the testimony of Dr. Theodore Cooper, then Assistant Secretary of the Department of Health, Education and Welfare (HEW), before the Senate Subcommittee on Health in 1975: "Overall, HMOs appear to achieve cost savings of 10 to 30 percent, compared with traditional health care." *Id.* In one study over a three-year period comparing Medicaid patients enrolled in Group Health Association with Medicaid patients receiving their medical care through fee-for-service systems, "[s]ignificant and consistent decreases in all four categories of utilization — physician encounters, drug prescriptions, hospital admissions, and hospital days — were found for [the HMO] group." *Id.* at 13. With regard to costs, there was a 37% savings for the HMO members:

Per Capita Costs for Medicaid Enrollees

	1972	*1973*	*1974*
HMO	$282	$232	$286
Fee-for-services	$373	$435	$465

Id.

tice suits[37] and the unfavorable publicity that would follow. Secondly, and more important, is that physicians are given a strong incentive to practice sound medicine, regardless of its cost to the patient.[38] Added to the physician's desire to treat patients effectively is the professional review and interaction with colleagues, that is inherent in a group practice. A physician will be less likely to practice minimum medical care — in order to decrease costs — while surrounded by his colleagues.[39] Indeed, a good argument can be made that simply by being among one's peers, the quality of care provided will be enhanced. The likelihood for recognizing possible misfeasance of a physician would be more likely recognized among a group of physicians than if a doctor were a solo practitioner. The existence of a group of physicians working together enhances the probability of increased consultation. This can be a function not only of the requirement the HMO may impose on its physicians,[40] but also because the increased possibility to consult exists by having eliminated the barrier, for example, of distance. Moreover, group practices allocate time for continuing physician education.[41] An HMO doctor, then, is being kept up-to-date with new practices and procedures. Also, physicians in HMO's work fewer hours than solo practitioners because the HMO has physicians to cover a colleague's patients during vacations and when one has gone home.[42]

An additional feature of HMOs further ensures health care of high quality: each enrollee has a single medical record.[43] This is advantageous to the health-care consumer because the physician knows his diagnoses will be assessed by his peers. Secondly, it allows for greater continuity of care since the patient's complete medical history is available in one place;[44] a cost saving is thereby effectuated by eliminating the need for a duplicate review of medical history each time a patient sees a new physician.

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37. *See generally* Curran & Moseley, *The Malpractice Experience of Health Maintenance Organizations*, 70 NW. U. L. REV. 69 (1975).

38. By negative implication, there is no greedy intent being imputed to the fee-for-services physician. Rather, the organization of medical care under that system enhances the possibilities for over-utilization and excessive costs. One article has noted that the emphasis in the traditional medical care delivery system "has been erring in the direction of over-servicing those who can afford care, and that a reduction in service will not necessarily be detrimental to the health of those involved." Note, *supra* note 3, at 926.

39. *See* Kissam & Johnson, *supra* note 12, at 1174.

40. Group Health Association of Washington, D.C. requires review of a physician's decision to perform surgery. This review is effectuated by the department chief. Interview with Phil Schalet, Director of Marketing, Group Health Association, Washington, D.C., in Washington, D.C. (March 13, 1981) [hereinafter cited as Schalet Interview].

41. At Group Health Association, for example, all physicians are required to take at least one week of continuing education each year. *See* Schalet Interview, *supra* note 40.

42. *See* Schalet Interview, *supra* note 40.

43. *Id.*

44. *Id.*

Notwithstanding the benefits to the enrollee, it must be recognized that it is very difficult to measure the effects and quality of medical care because of the subjectivity in determining what good health means. The access to and quality of medical care is simply one aspect of an individual's health status. The amount of physical exercise, the amount of alcohol and food consumed, the effect of the environment and one's genetic background all have a significant impact on one's health.[45] These factors make virtually impossible a precise comparison between the fee-for-service medical care system and the HMO. There is, however, no evidence indicating that the quality of care received from an HMO is less adequate than that delivered by the fee-for-service system.[46]

C. *Enrollee Satisfaction*

Another concern regarding HMOs is that people will be unhappy with the manner in which care is provided.[47] This involves two separate concerns: freedom to choose the physician of one's choice, and the possibility of clinic-like impersonal care with long waits for physicians.

The concern over lack of personalized care has been the major complaint of participants in HMOs.[48] HMO managers have been aware of this complaint and have made attempts to respond.[49] At this date, it is too early to tell whether those efforts have been successful as no empirical data is available on this point. With regard to long waits for physicians, a recent study indicated no difference between waiting times for enrollees in HMOs and individuals using fee-for-service physicians.[50] Both sets of individuals waited an average of eleven days for an appointment and an average of thirty-two minutes in the physician's office prior to being seen.[51] Concerning the former issue involving the freedom to choose one's own physician,[52] it is true that the HMO enrollee is limited to a choice among the physicians who are members of the plan.[53] That choice, however, is not so limited as to be

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45. *See generally* Kissam & Johnson, *supra* note 12.

46. In fact, "HMOs have shown an ability to reduce the amount of surgery and cost of drugs that they provide to patients without apparent decline in the overall quality of care." *Id.* at 1175.

47. *Id.* at 1175-78.

48. *Id.* at 1195; Note, *supra* note 3, at 941.

49. *See* Schalet Interview, *supra* note 40.

50. *See* Gans, *supra* note 32.

51. *Id.*

52. The author feels that the freedom of choice issue is specious. Certainly, one should not be required to go to a doctor in whom one has no confidence or simply dislikes, but beyond that the *reality* of freedom to choose is unimportant. Most individuals choose their physicians on the basis of friends' recommendations, cost and location. Thus, because consumers lack incisive medical knowledge, it is difficult for them to choose a physician on the basis of quality alone. *See* Note, *supra* note 3, at 938-39.

53. *See* Schalet Interview, *supra* note 40. Of course, however, an individual may use a physician outside of the plan at her own expense.

inflexible. At Group Health Association, a Washington, D.C. based HMO, an enrollee may choose among more than sixty primary care physicians.[54] She can try several physicians to determine which one will be her doctor.[55] The physicians she chooses will then be her "family doctor" within the organization and refer her to specialists when necessary.[56]

In sum, though HMOs may not always offer a completely personal health care delivery atmosphere, it is not clear whether the fee-for-service system is significantly different. With regard to cost control, however, it is certain that HMOs are substantially more cost effective than the fee-for-service delivery model. This cost saving is reflected in decreased utilization rates for hospitalization and routine surgery, as well as in decreased overall health care costs to the consumer.[57] Furthermore, this cost savings is achieved without any appreciable difference in the quality of health care delivered.[58] In many instances, the quality and reliability of health care is significantly better because of the access to and array of facilities and personnel available in an HMO.

II. FEDERAL LEGISLATION

In December of 1973, the Health Maintenance Organization Act (HMO Act or Act) became law.[59] The HMO Act was the federal government's first major endorsement of prepaid group practice as an alternative to the traditional fee-for-service delivery system.[60] As mentioned previously, support for the HMO cut across political lines and had almost unilateral legislative support.[61] The specific method for the government to promote the development of the HMO, however, was predictably where the legislative parties disagreed.[62]

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54. *Id.*

55. *Id.*

56. *Id.*

57. In a recent study, a Stanford University health economist reports that HMO enrollees in the California Kaiser plan spend an average of 10 to 40 percent less in terms of total premium and out-of-pocket costs than similar individuals covered by traditional health insurance. Luft, *How Do Health-Maintenance Organizations Achieve Their Savings? - Rhetoric and Evidence,* 298 NEW ENGLAND J. MED. 1336, 1337 (1978).

58. *See* Kissam & Johnson, *supra* note 12, at 1175.

59. The Health Maintenance Organization (HMO) Act of 1973, Pub. L. No. 93-222, 87 Stat. 914 (codified at 42 U.S.C. §§ 300e to 300e-14 (1976 & Supp. II 1978)).

60. It was not, however, the first federal legislation involving HMOs. The Federal Employees Health Benefits Act of 1959, 5 U.S.C. §§ 8901-8913 (1976), allowed federal employees to join a prepaid group practice as an alternative to either Blue Cross/Blue Shield or another commercial health insurer. In 1968, the Social Security Amendments of 1967, Pub. L. No. 90-248, 81 Stat. 821 (codified in scattered sections of 26, 42, 45 U.S.C.), allowed prepaid group practices to be available as a choice for Medicare recipients. Further, the Social Security Amendments of 1972, Pub. L. No. 92-603, 86 Stat. 1329 (codified in scattered sections of 5, 7, 25, 26, 42 U.S.C.), authorized the establishment of per capita rates for HMOs which would combine payment for services under Parts A and B of the Medicare program.

61. *See* Iglehart, *supra* note 4.

62. For a description of the legislative fight, *see* Iglehart, *Intense Lobbying Drive by Medical*

One major issue in the consideration of HMO legislation involved the extent of the federal government's financial commitment. Senator Kennedy's proposed bill was the most generous, seeking a $5 billion program to develop hundreds of HMOs nationwide.[63] The AMA, on the other hand, adopted a hesitant posture. It thought that it would be better to develop only a few HMOs.[64] Initially, the AMA propounded that data be developed and the concept be evaluated prior to the full commitment of large amounts of federal funds.[65] Many commentators, health care professionals, and legislators were dubious as to the real reason for the AMA's positions.[66]

When the Kennedy bill was finally reported out of the Senate/House conference on December 12, 1973, the funds allotted were substantially less than the originally requested expenditure.[67] Three hundred and seventy-five million was allocated for a five year period with $50 million earmarked for monitoring and evaluation.[68] The Senate, however, won certain provisions over the House version with respect to, *inter alia,* the benefits to be provided, and the qualification of HMOs.[69] One commentator summarized the law as follows:

> The law offers federally qualified HMOs three basic benefits: (1) money for development; (2) override of certain restrictive state laws; and (3) a mandate to certain employers to make HMO coverage optional as part of their employee health benefit plans. As a quid pro quo, the law requires that for an HMO to meet the federal qualifying standards, [compliance with which is at the HMO option] it must (a) deliver a more comprehensive package of benefits, (b) to a more broadly representative population, (c) on a more equitable basis, (d) with more participation by consumers, (e) all at the same or a lower price than traditional forms of health insurance.[70]

Group Dims Prospect for HMO Legislation, 4 NAT'L J. 1404 (1972); Iglehart, *House Panel Moves Toward Compromise HMO Plan Despite Strong AMA Opposition,* 4 NAT'L J. 777 (1972); Iglehart, *Democrats Cool to Nixon's Health Proposal, Offer Their Own Alternatives,* 3 NAT'L J. 2310 (1971); Iglehart, *Prepaid Group Medical Practice Emerges as Likely Federal Approach to Health Care,* 3 NAT'L J. 1443 (1971).

63. S. 3327, 92d Cong., 2d Sess. (1972), *cited in* S. REP. NO. 97-978, 92d Cong., 2d Sess. (1972).

64. *See* Iglehart, *Intense Lobbying Drive by Medical Group Dims Prospect for HMO Legislation,* 4 NAT'L J. 1404 (1972).

65. *Id.*

66. *Id.*

67. Senator Kennedy's bill, which was reintroduced in 1973, called for an expenditure of $805 million over a three year period. *See* S. 14, 93d Cong., 1st Sess. (1973).

68. *See* Rosoff, *supra* note 1, at 212-14.

69. *Id.*

70. *Id.* at 215.

The 1973 HMO Act was considered by many to be a step backward, since the price of becoming federally qualified was considered too high.[71]

The major reason an HMO would want to become federally qualified is because it would allow the organization to exercise the important marketing tool known as "dual choice."[72] The "dual choice" mechanism is a key advantage to an HMO since it would require employers, who offer some form of health insurance to their employees, to also offer an HMO as an alternative.[73] One cost of attaining federal qualification, however, was that the HMO had to provide a comprehensive range of health services.[74] The extent of HMO coverage became problematic, to compete successfully with other health insurance plans, the cost of the coverage could not vary radically with the cost of traditional health care insurance.[75] But, in order to provide all of

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71. *See generally* Iglehart, *supra* note 4; Rosoff, *supra* note 1; Scheider & Stern, *Health Maintenance Organizations and the Poor: Problems and Prospects,* 70 NW. U. L. REV. 90 (1975).

72. 42. U.S.C. § 300e-9 (1976).

73. *Id.*

74. The statute required the following basic services:

(A) physician services (including consultant and referral services by a physician);
(B) inpatient and outpatient hospital services;
(C) medically necessary emergency health services;
(D) short-term (not to exceed twenty visits), outpatient evaluative and crisis intervention mental health services;
(E) medical treatment and referral services (including referral services to appropriate ancillary services) for the abuse of or addiction to alcohol and drugs;
(F) diagnostic laboratory and diagnostic and therapeutic radiologic services;
(G) home health services; and
(H) preventive health services (including (i) immunizations, (ii) well-child care from birth, (iii) periodic health evaluations for adults, (iv) voluntary family planning services, (v) infertility services, and (vi) children's eye and ear examinations conducted to determine the need for vision and hearing correction).

Id. at § 300e-1(1) (1976).

In addition, the HMO had to provide supplemental health services as options to the basic coverage, if they were available. These supplemental benefits included:

(A) services of facilities for intermediate and long-term care;
(B) vision care not included as a basic health service;
(C) dental services not included as a basic health service;
(D) mental health services not included as a basic health service under paragraph (1)(D);
(E) long-term physical medicine and rehabilitative services (including physical therapy);
(F) the provision of prescription drugs prescribed in the course of the provision by the health maintenance organization of a basic health service or a service described in the preceding subparagraphs of this paragraph; and
(G) other health services which are not included as basic health services and which have been approved by the Secretary for delivery as supplemental health services.

Id. at § 300e-1(2).

75. Even without the extensive coverage required for qualification, HMOs would have been hard-pressed, given the novelty of the concept, to compete with traditional health insurance on the basis of price alone. This is because traditional health insurance usually requires the insured to satisfy an annual deductible of one hundred dollars prior to the commencement of coverage. After the deductible has been satisfied, the insured is required to copay twenty percent of his medical care costs. Generally, this would result in a monthly premium lower than that of an HMO pro-

the services that the HMO Act required, the premium for HMO coverage would had to have been prohibitively high. As a result, any real competition with health insurers seemed unlikely if an HMO were to become qualified.

An added requirement under the 1973 Act concerned copayments by subscribers. Any required copayments had to be limited to *nominal* charges for any of the basic health services.[76] The law stipulated that the payments could "not be required where or in such a manner that they serve (as determined under regulations of the Secretary) as a barrier to delivery of health services."[77] The regulations subsequently promulgated required that copayments neither exceed fifty percent of the cost of a covered service nor twenty percent of the aggregate cost of all basic health services.[78] In addition, the regulations required:

> No copayment may be imposed on any subscriber or member covered by his contract with the health maintenance organization in any calendar year, when the copayments made by such subscriber or members in such calendar year total 50 per cent of the total annual premium cost which such subscriber or members would be required to pay if he or they were enrolled under an option with no copayments, if such subscriber or members demonstrate that copayments in that amount have been paid in such year.[79]

Group Health Association of America (GHAA), the trade association for HMOs, vehemently objected to this provision, contending that there was no authority in the Act for such a promulgation. In a letter to the Department of Health, Education and Welfare (HEW), the Executive Director of GHAA stated:

> It has been estimated that the premium cost of the proposed 50 per cent of premium standard can range as high as 3 per cent. In our judgment, the cost would be higher. It is incredible that the regulation writers could read into the Congressional intent so paradoxical an intent — a unilaterally arbitrary premium increase for all members — as to remove the barrier to care for some. The barrier to care provision could easily be met with minimal premium impact if the matter were left to a case by case judgment.[80]

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viding similar benefits, but without copayments or a deductible. When additional benefits are included, which in turn mean increased costs and therefore an increased monthly premium, competition by an HMO with a traditional insurance plan is going to be difficult. *See* Kissam & Johnson, *supra* note 12, at 1167-75.

76. 42 U.S.C. § 300e(b)(1)(D) (1976) (emphasis added).

77. *Id.*

78. 42 C.F.R. § 110.105(a)(4)(i) (1979).

79. 42 C.F.R. § 110.105(a)(4)(ii) (1979).

80. Letter from Jeffrey Cohelan, Executive Director, Group Health Association of America to Department of Health, Education and Welfare, Bureau of Community Health Services (June 5, 1974), *cited in* Rosoff, *supra* note 1, at 224-25.

Another problem with the 1973 Act involved the requirement that federally qualified HMOs have an "open enrollment" period each year.[81] "Open enrollment" mandated an HMO to accept any individual who applies for membership during that period.[82] According to the regulations promulgated thereunder, an individual had to be enrolled in the plan without regard to their health status or their requirements for health services.[83] Thus, an HMO was unable to impose either waiting periods or exclusions for whatever pre-existing medical condition an individual had. This meant that an HMO was required to accept a potentially adverse population group during the "open enrollment" period. The result of such a large influx of high risk individuals would mean high utilization of services with concomitant increases in the plan's expenses.[84] The economic vitality of a relatively new HMO could be rapidly cut short.

The most surprising problem with the Act involved organized labor's dissatisfaction with the "dual choice" provision.[85] Specifically, the "dual choice" provision directed all employers who employed at least twenty-five employees, and were covered by the Fair Labor Standards Act of 1938,[86] to offer a federally qualified HMO as an alternative to the health plan presently available.[87] The employer was not required to contribute any more toward the HMO coverage than that amount which he contributed to his employees' present health plan.[88] The reason for the "dual choice" provision was clear: it provided the HMO with an opportunity for marketing what intransigent or apathetic employers might otherwise not grant.

The problem with "dual choice" from labor's prospective was that it was perceived as an interference with their power to contol collective bargaining.[89] The regulations originally proposed with respect to "dual choice" would have allowed the *employer* to make the initial decision regarding the choice of a qualified HMO.[90] The collective bargaining agent would then be allowed to choose among the benefit options

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81. Health Maintenance Organization Act of 1973, ch. 373, § 1301, Pub. L. No. 93-222, 87 Stat. 914 (1973) (current version at 42 U.S.C. § 300e(c)(4) (1976)).

82. *Id.*

83. 42 C.F.R. § 10.108(d) (1975).

84. Health Maintenance Organization Act of 1973, ch. 373, § 1301, Pub. L. No. 93-222, 87 Stat. 914 (1973) (current version at 42 U.S.C. §§ 300e(c)(4), 300e(d) (1976)).

85. 42 U.S.C. § 300e-9 (1976).

86. 29 U.S.C. § 206 (1976).

87. 42 U.S.C. § 300e-9(a) (1976).

88. *Id.* § 300e-9(c).

89. Unions have the power to control certain areas of bargaining under the National Labor Relations Act. The Act lists health benefits as a "condition of employment." As such, the bargaining representative is the individual who decides what health care coverage may be made available to union members. 29 U.S.C. §§ 158(a)(5), 159(a) (1976).

90. 42 C.F.R. § 110.802(a)(4) (1975) (proposed).

available from the HMO.[91] The individual employee would then decide whether she wanted to enroll in the HMO.[92] It was this final element that disturbed labor. They wanted to have veto power as to whether the HMO option would be offered at all to employees.[93] HEW, however, believed that, pursuant to Congressional intent, the decision to join an HMO should be an individual one.[94] The irony of this conflict was that labor had been a longtime supporter of the HMO concept. One commentator explained the reasons for labor's opposition as follows:

> The key to this paradoxical situation lies in the defense of principle . . . the unions' strongly held principle that all matters now recognized as proper subjects for collective bargaining should remain such and that the power which the NLRA gives to labor must be jealously guarded against gradual erosion, even when this requires taking a stand against something the unions might otherwise favor.[95]

There were certainly other problems with the 1973 Act,[96] but the areas discussed were its major detractions. The dissatisfaction with the legislation[97] led to the passage of an amending act in 1976. On October 8, 1976, President Ford signed into law the Health Maintenance Organization Amendments Act of 1976.[98] This enactment was a major step forward for the HMO movement. Many of the overly idealistic requirements for HMOs contained in the original act were modified.

First, the method of offering the supplemental benefit package was

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91. *Id.* § 110.803(b)(1).

92. *Id.* § 110.804(a).

93. *See* Rosoff, *supra* note 1, at 230-31.

94. *Id.*

95. *Id.* at 233.

96. One other problem involved the definition of "medical group." This issue involves the distinction between the Kaiser-type model and the individual practice association. Because this paper focuses on the former model, there is no discussion of this issue. But, for such a discussion, *see* Rosoff, *supra* note 1, at 216-22.

97. Not only was there great dissatisfaction with the statute's requirements, but implementation of the law by HEW was found to be weak. In testimony before the Senate Subcommittee on Health, James D. Martin, reporting on the General Accounting Office's 1975 review of HEW's implementation of the Act, expressed dismay:

> Slow progress in implementation of the HMO program is evident in that HEW has not used over $17.5 million of the $40 million in grant funds which were available for fiscal years 1974 and 1975. Further, the Administration has requested only $15 million of the $85 million authorized for grants in fiscal year 1976.

1978 HOUSE REPORT, *supra* note 14, at 17. Furthermore, Congressman James Hastings, ranking minority member of the Subcommittee on Health, stated: "generally it would seem . . . that the administration [of HMOs] has been absolutely terrible from HEW. . . ." Iglehart, *HMO Act Changes Advanced to Bolster Troubled Program*, 7 NAT'L J. 1161, 1162 (1975).

98. Health Maintenance Organization Amendments Act of 1976, Pub. L. No. 94-460, 90 Stat. 1945 (codified at 42 U.S.C. §§ 300e-1 to 300e-15 (1976)).

changed.[99] Instead of the HMO being required to offer supplementary benefits, it need now only do so at its option.[100] While the basic health services remained essentially unchanged,[101] the granting to the HMO of the choice of offering the supplemental services was an important change from the original Act.[102] No longer would the HMO be required to have the capacity to supply the full range of supplemental services. This amendment greatly enhanced the competitive position of HMOs.

The second change focused on the annual "open enrollment" period. HMOs were exempted from engaging in "open enrollment" until either five years from their commencement of operations or until they had a membership of 50,000 and had not incurred a deficit in their most recent fiscal year.[103] Furthermore, under the 1973 Act, the HMO had to enroll up to its capacity all individuals who enrolled during the thirty day "open enrollment" period.[104] The amendments modified that requirement. The period in which the HMO must accept all individuals who apply will only last until the new enrollees constitute three percent of the HMO's total increase in enrollment during the previous fiscal year.[105] In addition, the amendment provides that the HMO will "not be required to enroll individuals who are confined to an institution because of chronic illness, permanent injury, or other infirmity which would cause economic impairment. . . ."[106] Although the HMO must still accept a certain number of adverse risk enrollees, it is not required to do so without any limit. Under the original Act, the HMO might have had to admit new members to its economic detriment; now it is given some time to become economically sound.

The third significant development concerned the "dual choice" option that was strongly objected to by labor. The Congress conceded labor some flexibility in this area for reasons of political expediency.[107]

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99. *See* 42 U.S.C. § 300e-1 (1976), *as amended by* Health Maintenance Organization Amendments Act of 1976, Pub. L. No. 94-460, § 101, 90 Stat. 1945.

100. 42 U.S.C. § 300e-1 (1976), *as amended by* Health Maintenance Organization Amendments Act of 1976, Pub. L. No. 94-460, § 101, 92 Stat. 1945.

101. Under basic health services, the coverage for preventive care was expanded to include immunizations, well-child care from birth, and periodic health evaluations for adults. 42 U.S.C. § 300e-1(1)(H) (1976), *as amended by* Health Maintenance Organization Amendments Act of 1976, Pub. L. No. 94-460, § 104(a)(1), 90 Stat. 1947.

102. *See* GROUP HEALTH NEWS, Apr. 1976, at 1.

103. 42 U.S.C. § 300e(d)(1)(a) (1976), *as amended by* Health Maintenance Organization Amendments Act of 1976, Pub. L. No. 94-460, § 103, 90 Stat. 1945.

104. *Id.*

105. 42 U.S.C. § 300e(a)(1)(B)(ii) (1976), *as amended by* Health Maintenance Organization Amendments Act of 1976, Pub. L. No. 94-460, § 103, 90 Stat. 1945, 1947.

106. 42 U.S.C. § 300e(d)(2) (1976), *as amended by* Health Maintenance Organization Amendments Act of 1976, Pub. L. No. 94-460, § 103, 90 Stat. 1945, 1947.

107. *See* Havighurst, *Health Maintenance Organizations and the Health Planner,* 1978 UTAH L. REV. 123, 135 (1978).

As a result of this concession, an employer who is required to offer his employees the option of a qualified HMO can satisfy that requirement if the union representing the employees rejects the "dual choice" option.[108] No longer are employees allowed the individual right to decide whether to join an HMO if their union has previously rejected that possibility.[109] In addition, states and municipalities were expressly required to offer a qualified HMO to their employees under the threat of the denial of future federal grants from the Public Health Service.[110] Finally, the Secretary of HEW was granted the authority to enforce the requirements of "dual choice."[111]

There were a variety of other revisions as well. For instance, grant limits, effectuation of feasibility studies, initial development, and operation support were increased.[112] The authorizations for HMO loans and loan guarantees were revised.[113] The requirement for community rating[114] of the basic health services was delayed until a four year period after the HMO had become qualified.[115] In sum, the 1976 amendments did much to improve federal support and assistance for the development of HMOs. The revised HMO Act made optional the offering of supplemental benefits; partially exempted HMOs from open

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108. *Id.*

109. 42 U.S.C. § 300e-9(a)(2) (1976), *as amended by* Health Maintenance Organization Amendments Act of 1976, Pub. L. No. 94-460, § 110(a), 90 Stat. 1950.

110. 42 U.S.C. § 300e-9(a)(1)(B) (1976), *as amended by* Health Maintenance Organization Amendments Act of 1976, Pub. L. No. 94-460, § 110(a), 90 Stat. 1950. This provision resolved the problem that had been raised by National League of Cities v. Usery, 426 U.S. 833 (1976). As the commentators said in reference to *National League of Cities:*

> By declaring the federal minimum wage law inapplicable to most state and local government operations [the] decision effectively exempted state and local governments from the Federal HMO Act's requirement that employers subject to the minimum wage provisions of the Fair Labor Standards Act must, under certain conditions, offer an HMO option to their employees as part of any health benefits plan.

Kissam & Johnson, *supra* note 12, at 1163-202.

111. 42 U.S.C. § 300e-9(g) (1976), *as amended by* Health Maintenance Organization Amendments Act of 1976, Pub. L. No. 94-460, § 110(a), 90 Stat. 1951, 1952.

112. 42 U.S.C. §§ 300e-2, 300e-3 (1976), *as amended by* Health Maintenance Organization Amendments Act of 1976, Pub. L. No. 94-460, §§ 107, 107(a), 90 Stat. 1948, 1949, 1950, 1953, 1955.

113. 42 U.S.C. § 300e-8 (1976), *as amended by* Health Maintenance Organization Amendments Act of 1976, Pub. L. No. 94-460, § 113(c), 90 Stat. 1954.

114. A "community rating system" means a fixed system of rate payments for health services. Under this system, rates are established on a uniform per-person or per-family basis. Community rating should be compared to "experience" rating. Experience rating, used by most health insurance companies, is annually adjusted according to the health care utilization rate of the employee group. To the extent utilization is high, rates are adjusted upward and vice versa. As a result, the employee groups in the same city using the same insurance companies may have different rates. Experience rating is not allowed by HMOs, instead they must annually establish one rate for the community. Most HMOs, such as Group Health Association, have always been on a community rating system. *See* Schalet Interview, *supra* note 40.

115. 42 U.S.C. § 300e(b)(2)(1976), *as amended by* Health Maintenance Organization Amendments Act of 1976, Pub. L. No. 94-460, § 105(a), 90 Stat. 1945, 1947.

enrollment; allowed for a cap on total enrollment; and did not substantially mitigate the effectiveness of the "dual choice" option. Combined, all of these modifications solidify the HMO system, but further fine-tuning was still necessary.

In 1978, the General Accounting Office (GAO), the watchdog agency of Congress, issued a report on the implementation of the HMO Act, as amended.[116] The report concluded that although the HMOs studied[117] were generally complying with the organizational and operational requirements of the Act, improvements were necessary both for the fiscal viability of several HMOs and the broadening of the population group enrolled.[118] The lack of effective management was one reason cited as creating economic problems for the developing HMOs.[119] Concerning "open enrollment," the GAO Report found that not one of the HMOs had effectuated an open enrollment period.[120] Parts of the problem involved HEW's failure to establish regulations implementing the Act. To an extent, HEW's problems were attributable to a lack of organization and staff.[121]

To ensure the effectiveness of the Act, the GAO Report recommended that HEW issue final regulations and guidelines regarding, among other things, open enrollment.[122] Furthermore, the Report stated that the Department should obtain the additional personnel necessary to more rapidly administer the HMO program.[123] With regard to the amendments to the program that were then being considered by Congress, the GAO recommended a tempered and cautious approach.[124] It suggested that funds available for loan increases to individual HMOs not be made until HEW had demonstrated its ability to carry out the purposes of the Act and to efficiently administer the programs therein.[125]

In October of 1978, Congress passed a second set of amendments to the HMO Act.[126] These amendments provided authorization to continue federal support of HMO programs until 1981[127] and increase the

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116. U.S. GENERAL ACCOUNTING OFFICE, REPORT TO CONGRESS: CAN HEALTH MAINTENANCE ORGANIZATIONS BE SUCCESSFUL? AN ANALYSIS OF 14 FEDERALLY QUALIFIED "HMOS." No. HRD-78-125 (1978) [hereinafter cited as 1978 GAO REPORT].

117. There were fourteen HMOs studied throughout the country. *Id.* at 2-3.

118. *Id.*

119. *Id.* at 38-42.

120. *Id.* at 18-21.

121. *Id.* at 18-23.

122. *Id.* at 61.

123. *Id.* at 61-62.

124. *Id.* at 61.

125. *Id.*

126. Health Maintenance Organization Amendments Act of 1978, Pub. L. No. 95-559, 92 Stat. 2131, (codified at 42 U.S.C. §§ 300e(a) to 300e-17 (Supp. II 1978)).

127. 42 U.S.C. §§ 300e-3(j), 300e-4(d) (Supp. II 1978), *as amended by* Health Maintenance

funding available for the development of new and existent HMOs.[128] An important issue favorably resolved by the 1978 Amendments involved the authorization of payroll deductions by the employer upon the enrollment of an employee in the HMO.[129] This amendment was beneficial to the HMO from both an administrative and a marketing perspective. To the extent that participants would have to be individually billed, the HMO would be a less attractive alternative to private health insurance. In addition, the cost of individual billing would be a significant cost to the HMO. Thus, as with private health insurance, the employee need only consent to the payroll deductions in order for them to be made.

In response to the HMO management problems cited in the GAO Report, the 1978 amendments authorized the Secretary of HEW to establish a National Health Maintenance Organization Intern Program.[130] The purpose of this program was to provide "training to individuals to become administrators and medical directors of health maintenance organizations. . . ."[131]

Moreover, the requirements for basic health services were modified so that HMOs can now recover for services provided to members who are covered by either workmen's compensation or an insurance policy.[132] A variety of other changes were made,[133] but the ones addressed are the most significant. Most important is that the 1978 Amendments indicate Congress's continuing interest in and commitment to HMOs. In the final analysis, federal support of the HMO through the 1973 Act and its amendments in 1976 and 1978 have served to make the HMO an attractive alternative to traditional health care systems.

Organization Amendments of 1978, Pub. L. No. 95-559, §§ 2(a), 2(b), 92 Stat. 2131.

128. 42 U.S.C. §§ 300e-3, 300e-4 (Supp. II 1978), *as amended by* Health Maintenance Organization Amendments of 1978, Pub. L. No. 95-559, §§ 3, 4, 92 Stat. 2131.

129. 42 U.S.C. § 300e-9 (Supp. II 1978), *as amended by* Health Maintenance Organization Amendments Act of 1978, Pub. L. No. 95-559, § 8, 92 Stat. 2135.

130. 42 U.S.C. § 300e-16 (Supp. II 1978), *as amended by* Health Maintenance Organization Amendments Act of 1978, Pub. L. No. 95-559, § 7(a)(1), 92 Stat. 2134.

131. 42 U.S.C. § 300e-16 (Supp. II 1978), *as amended by* Health Maintenance Organization Amendments Act of 1978, Pub. L. No. 95-559, § 7(a)(1), 92 Stat. 2134.

132. 42 U.S.C. § 300e (Supp. II 1978), *as amended by* Health Maintenance Organization Amendments of 1978, Pub. L. No. 95-559, § 11(b), 92 Stat. 2139.

133. The manner in which community rating is to be determined was modified to exclude full-time students from the determination. Financial disclosure requirements of the HMO were implemented in order to expose possible conflicting interests of parties involved with the operation of the HMO. The Amendments further required a consolidated financial statement to be submitted if the HMO is controlled by another organization. 42 U.S.C. § 300e (Supp. II 1978), *as amended by* Health Maintenance Organization Amendments Act of 1978, Pub. L. No. 95-559, § 11(b), 92 Stat. 2139.

III. THE FUTURE: MORE AGENCY INVOLVEMENT

The HMO has not become a fundamental part of the health care delivery system as was expected by the Nixon Administration.[134] There are little more than eight million people enrolled in HMOs today.[135] Since it is clear that HMOs are effective health care delivery systems, their future growth is to be encouraged and promoted.

It is still very difficult to market HMOs, in large part, because of the statutory infringement of dual choice.[136] Individuals continue to view HMOs with a certain amount of suspicion. Union representatives have the opportunity to take advantage of such attitudes (or the general lack of knowledge surrounding HMOs) by opposing the incorporation of dual choice in a collective bargaining agreement.[137] While this position may not be in the best interests of the union's membership, it can serve as an effective bargaining lever during negotiations.[138] As a result, Congress must make available funds to conduct a national educational campaign to inform the public about HMOs. Education of the public will have two effects. First, it will make individuals aware of the HMO as a real alternative to their present method of receiving medical care. Second, increased awareness will help stimulate the development of additional HMOs.

With respect to the first issue of using broad informational approaches to establish the HMO as a viable alternative, the current statute expresses a strong legislative purpose behind informing the public about the characteristics of HMOs.[139] However, a tension in the

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134. In 1971, Elliot Richardson, Secretary of HEW in the Nixon Administration, stated that he expected there to be 1700 HMOs serving 40 million people by 1976. *See* Iglehart, *supra* note 27, at 1146.

135. The Henry J. Kaiser Family Foundation, HMO's, Still Widely Unknown, Gaining Acceptance, Press Release (Sept. 24, 1980) (information obtainable from Kaiser Family Foundation; 525 Middlefield Road — Suite 200; Menlo Park, California 94025).

136. This assessment is based on the author's own experiences working in the marketing department of a Washington, D.C. HMO.

137. *See* Kissam & Johnson, *supra* note 12, at 1168-74.

138. Employers may greatly desire to provide a contractual dual choice option to encourage the utilization of HMOs, thereby maintaining a more healthy and productive workforce. It is also a viable alternative form of compensation which may be offered in lieu of concrete benefits such as wages. A union negotiator, with knowledge of an employer's stance, might oppose dual choice to win other bargaining concessions. Thus, the issue of dual choice might become more of a bargaining chip than one of public health.

139. Section 300e(c)(11) states that each HMO shall:

> (11) provide, in accordance with regulations of the Secretary (including safeguards concerning the confidentiality of the doctor-patient relationship), and effective procedure for developing, compiling, evaluating, and reporting to the Secretary, statistics and other information (which the Secretary shall publish and disseminate on an annual basis and which the health maintenance organization shall disclose, in a manner acceptable to the Secretary, to its members and the general public) relating to (A) the cost of its

law exists concerning the interest in education. Under section 330e-9, a union official representing employees under a collective bargaining agreement[140] may effectively preclude the education of the represented employees.[141] Where the information is suppressed, the interest in and desire for HMOs among the affected employees might never evolve. If the HMO alternative is superior, presumably the wider such information is disseminated, the less likely it is that a union representative will obstruct the sentiments of a substantial number of employees. The law actually imposes an affirmative duty on the Secretary of HEW (now the Department of Health and Human Services or HHS) to regulate the full disclosure of descriptive information concerning HMOs.[142] In other words, if union control over dual choice produces a result contrary to the best interests of the employees, the injustice would lie not only with the machinations of a negotiating union bureaucrat, but also with the lack of positive enforcement of the law by the Secretary. Consequently, the Secretary of HEW should promulgate, as soon as possible, regulations concerning dual choice; these rules should be strictly enforced.

The Secretary has promulgated extensive regulations providing for the dissemination of information regarding HMOs, but this information only becomes available to employees once the employer-HMO contract is signed.[143] If HHS were to create and disseminate information independently of the regulations and procedures prescribed,[144] the mandate of the Act would be carried forward regarding the education of persons as to the services offered by HMOs, while the right of the union

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operations, (B) the patterns of utilization of its services, (C) the availability, accessibility, and acceptability of its services, (D) to the extent practical, developments in the health status of its members, and (E) such other matters as the Secretary may require.

42 U.S.C. § 300e(c)(11) (1976). Furthermore, the Act requires that the Secretary of HEW must determine whether an HMO "which was included in a health benefits plan offered to employees pursuant to section 300e-9 . . ., is not organized or operated in a manner proscribed by section 300e(c) [above] of this title." 42 U.S.C. § 300e-11 (1976). Thus, from the wording of both sections, it is clear that the Secretary of HEW has an affirmative obligation to encourage, through regulation, the dissemination of relevant information about HMOs to the public at large.

140. *See* 42 U.S.C. § 300e-9 (1976).

141. The problem is that the information system is flawed. Employees under a collective bargaining agreement, whose union representative denies the dual choice option in the collective bargaining agreement, will not learn of the HMO benefits because all of the regulations on dissemination of information are triggered by the creation of a contract between the employer and the HMO. No information is available to employees until the employer-HMO contract is created. *See* 45 Fed. Reg. 72512-72521 (1980) (to be codified in 45 C.F.R. § 110 H).

142. *See* note 139 *supra*. Such regulations could prescribe the dissemination brochures capable of informing the broadest possible reaches of the public. These pieces of information could highlight certain benefits attractive to special subgroups within the population. Furthermore, such information could be targeted to cities where employees are not afforded the option of an HMO.

143. *See* 45 Fed. Reg. 72512-72521 (1980) (to be codified in 45 C.F.R. § 110 H).

144. *Id.*

representative to dictate the fate of dual choice within a collective bargaining agreement would remain intact. Where the union official denies the dual choice option, his constituents would be in a better position to weigh the propriety of his denial. This procedure would lead to the end of one of the principal roadblocks to public education regarding HMOs.

The Secretary of HHS must also implement an HMO Intern Program to produce capable management for new HMOs. The fact that several HMOs have been operating productively for decades without the benefit of federal assistance is testimony that such a method of delivering health care is a viable option. While an adequate option, specially trained managers are necessary for the program to flourish. It is hoped that HHS's Intern Program will respond to this managerial need.

In 1973, Congress passed the National Health Planning and Resources Development Act.[145] Among other things, this legislation requires that the development of new health care facilities first be approved by a local Health Systems Agency (HSA) through a "certificate of need" (CON) process. The reason for CON is to avoid the overdevelopment of health care resources. One commentator has convincingly argued that these HSAs have thrown roadblocks in front of those who want to develop HMOs.[146] In 1978, legislation was introduced in Congress to amend the Health Planning Act to eliminate the certificate of need process for HMOs.[147] Unfortunately, this provision was not passed.[148] Obviously, if HMOs are going to have the opportunity to grow in accordance with stated federal policy, the Planning Act will have to be amended.

CONCLUSION

The number of individuals enrolled in HMOs has doubled since 1971. That fact is striking given the problems with the HMO Act as originally passed in 1973. It does, however, reinforce the point that the HMO is an effective and workable system whose time has come. It is the only unit for the delivery of medical services that provides high quality care and is proven to be cost-effective for both the short and long term. In 1973, Senator Kennedy's proposed HMO bill called for $5 billion for the development of HMOs. This proposal was radically decreased in part due to the AMA position that HMOs should first prove their effectiveness before huge federal funds were committed.

145. 42 U.S.C. §§ 300k-300t (1976).
146. *See* Havighurst, *supra* note 107.
147. S. 2534, 95th Cong., 2d Sess. (1978).
148. *See* Iglehart, *HMOs — An Idea Whose Time Has Come?*, 10 NAT'L J. 311 (1978).

That proposition, dubious in 1973, is hardly a reflection of reality today. The 1978 amendments allocated only $65 million for fiscal year 1980 for HMOs.[149] This is a very small sum for a nation which spends more than $260 billion annually for health care.[150] The time has arrived for Congress to make a major and unqualified commitment to the development of HMOs, and for federal administrative agencies to step in and fulfill the purposes of present HMO legislation. The HMO is not, to be sure, the panacea for the health care concerns of the nation. That problem is far too complex to be solved by any single concept. But access to and quality of medical care is a crucial aspect of the calculus. To that extent, the HMO is a proven entity that must be developed to gain its deserved status as a necessary and important component in the future of American health care.

149. 42 U.S.C. § 300e-8 (Supp. II 1978), *as amended by* Health Maintenance Organization Amendments Act of 1978, Pub. L. No. 95-559, § 2(c), 92 Stat. 2131.

150. *See* Iglehart, *supra* note 148, at 311.

The Role of State Regulatory Authorities in the Implementation of Federal Ratemaking Policies and Regulations for Small Hydroelectric Producers

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The Public Utility Regulatory Policies Act of 1978 (PURPA)[1] has established as a national policy objective: "[T]he expeditious development of hydroelectric potential at existing small dams. . . ."[2] Through

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1. Public Utilities Regulatory Policies Act of 1978, Pub. L. No. 95-617, 92 Stat. 3117 (codified in scattered sections of 15, 16, 30, 42 & 43 U.S.C. (Supp. III 1979)). The Energy Act was submitted to Congress in April of 1977 by President Carter. Eighteen months later a package of National Energy Legislation was enacted which included: The Public Utilities Regulatory Policies Act of 1978, Pub. L. No. 95-617, 92 Stat. 3117 (codified in scattered sections of 15, 16, 30, 42 & 43 U.S.C. (Supp. III 1979)); The Energy Tax Act, Pub. L. No. 95-618, 92 Stat. 3174 (codified in scattered sections of 26 U.S.C. (Supp. III 1979)); The National Energy Conservation Policy Act, Pub. L. No. 95-619, 92 Stat. 3206 (codified in scattered sections of 12, 15 & 42 U.S.C. (Supp. III 1979)); The Powerplant and International Fuel Use Act of 1978, Pub. L. No. 95-620, 92 Stat. 3289 (codified in scattered sections of 15, 19, 42 & 45 U.S.C. (Supp. III 1979)); The Natural Gas Policy Act of 1978, Pub. L. No. 95-621, 92 Stat. 3350 (codified in scattered sections of 15 U.S.C. (Supp. III 1979)).

The House bill, H.R.8444, 95th Cong., 2d Sess., 123 CONG. REC. 7987 (July 27, 1977), which incorporated the President's national energy proposal, differed from the Act submitted by the President in that the House bill included incentives for the development of alternative energy sources, including hydroelectric power. Section 201 of Title II of the Public Utilities Regulatory Policies Act of 1978, 16 U.S.C. 796(17)(A) (Supp. III 1979), defines a small power production facility as a facility which:

> (i) produces electric energy solely by the use, as a primary energy source, of biomass, waste, renewable resources, or any combination thereof; and (ii) has the power production capacity which, together with any other facilities located at the same site (as determined by the Commission), is not greater than 80 megawatts . . . .

A "qualifying" small power production facility is then statutorily defined as a facility

> (i) which the Commission determines, by rule, meets such requirements (including requirements respecting fuel use, fuel efficiency, and reliability) as the Commission may, by rule, prescribe; and
> (ii) which is owned by a person not primarily engaged in the generation or sale of electric power (other than electric power solely from cogeneration facilities or small power production facilities). . . .

Id. § 17(c).

The House and Senate conferences specifically state in their Joint Explanatory Statement of the Committee of Conference, H.R. REP. NO. 1750, 95th Cong., 2d Sess. 63 (1978) (hereinafter cited as 1978 Conference Report), *reprinted in* [1978] U.S. CODE CONG. & AD. NEWS 7797, that "[t]he conferees intend that water be included within the meaning of the term renewable resources with respect to hydroelectric facilities at existing dams." *Id.* at 89, *reprinted in* [1978] U.S. CODE CONG. & AD. NEWS at 7823.

2. Public Utilities Regulatory Policies Act of 1978, 16 U.S.C. § 2601(3) (Supp. III 1979).

PURPA, Congress has granted to the Federal Energy Regulatory Commission (FERC) new authority to require electric utilities to purchase electric energy from small power producers at rates which are to be established by state ratemaking authorities.[3] On March 10, 1980, the FERC promulgated regulations[4] pursuant to PURPA which have given states broad discretion in both the implementation and substance of the federally mandated ratemaking requirements. All states are required to implement the FERC ratemaking regulations no later than March 20, 1981.[5]

The purpose of this article is to examine the rate-setting requirements statutorily prescribed by Congress for small power hydroelectric producers in Title II of PURPA; to analyze how these requirements were adapted to the methodology promulgated in federal regulations by FERC; and to evaluate the role given to state regulatory authorities in implementing both the federal policy mandate and the federal regulatory methodology.

I. PURPA: NATIONAL RATE SETTING REQUIREMENTS

PURPA sets forth a national rate-setting program for the purchase of energy by electric utilities from small power production facilities, including hydroelectric facilities at existing dams. This program is set out in sections 210(a), (b) and (d) of Title II of the act.[6] Section 210(a) is a general mandate which directs the FERC to promulgate rules as it determines necessary to encourage small power production.[7] This section

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3. Prior to the enactment of PURPA, small power producers had been subject to market constraints arising from the control of monopsonistic public utilities. This control enabled a public utility to deprive a small power producer of a market for its energy simply by refusing to buy it. Alternatively, a utility could use its unequal bargaining position to purchase power from small power producers at rates far below market value. PURPA addresses both of these conditions by requiring utilities to purchase power from small producers at rates which are established by state ratemaking authorities in accordance with federally mandated guidelines and policy principles.

4. Specifically, these regulations were promulgated under sections 201 and 210 of the Public Utilities Regulatory Policy Act of 1978 with regard to Small Power Production and Cogeneration. *See* 18 C.F.R. § 292.101-.602 (1980).

5. *Id.* at § 292.401(A).

6. Public Utilities Regulatory Policies Act of 1978, 16 U.S.C. § 824a-3 (Supp. III 1979).

7. Public Utilities Regulatory Policies Act of 1978, § 210(a), 16 U.S.C. § 824a-3(a) (Supp. III 1979). This section states:

> (a) COGENERATION AND SMALL POWER PRODUCTION RULES — Not later than 1 year after the date of enactment of this Act, the Commission shall prescribe, and from time to time thereafter revise, such rules as it determines necessary to encourage cogeneration and small power production which rules require electric utilities to offer to —
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> (1) sell electric energy to qualifying cogeneration facilities and qualifying small power production facilities and
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> (2) purchase electric energy from such facilities. Such rules shall be prescribed, after consultation with representatives of Federal and State regulatory agencies having ratemaking authority for electric utilities, and after public notice and a reasonable opportunity for interested persons (including State and Federal agencies) to submit oral as well as written data, views, and arguments. Such rules shall include provisions respecting

demands, *inter alia,* that the rules to be promulgated require electric utilities to purchase electric energy from such small facilities and include provisions respecting minimum reliability of qualifying small power production facilities.[8] In addition, this subsection directs the FERC to consult with federal and state regulatory agencies having ratemaking authority for electric utilities and to receive from such agencies and other interested persons "oral as well as written data, views and arguments."[9]

Section 210(b)[10] sets forth the specific standards to be used in the creation of purchase regulations. This section directs that the regulations to be promulgated by the FERC under section 210(a) "(1) shall be just and reasonable to the electric consumers of the electric utility and in the public interest, and (2) shall not discriminate against qualifying cogenerators or qualifying small power producers."[11] In addition, section 210(b) demands that the regulations "shall not provide for a rate which exceeds the incremental cost to the electric utility of alternative energy."[12]

Finally, section 210(d),[13] in an attempt to clarify one of the guidelines provided in section 210(b), defines the term "incremental cost of alternative electric energy." It states that for the purposes of section 210,

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minimum reliability of qualifying cogeneration facilities and qualifying small power production facilities (including reliability of such facilities during emergencies) and rules respecting reliability of electric energy service to be available to such facilities from electric utilities during emergencies. Such rules may not authorize a qualifying cogeneration facility or qualifying small power production facility to make any sale for purposes other than resale.

8. *Id.*

9. *Id.*

10. Public Utilities Regulatory Policies Act of 1978, § 210(b), 16 U.S.C. § 824a-3(b) (Supp. III 1979). This section provides:

(b) RATES FOR PURCHASES BY ELECTRIC UTILITIES — The rules prescribed under subsection (a) shall insure that, in requiring any electric utility to offer to purchase electric energy from any qualifying cogeneration facility or qualifying small power production facility, the rates for such purchase —

(1) shall be just and reasonable to the electric consumers of the electric utility and in the public interest, and

(2) shall not discriminate against qualifying cogenerators or qualifying small power producers.

No such rule prescribed under subsection (a) shall provide for a rate which exceeds the incremental cost to the electric utility of alternative electric energy.

Id.

11. *Id.*

12. *Id.*

13. Public Utilities Regulatory Policies Act of 1978, § 210(d), 16 U.S.C. § 824a-3(d) (Supp. III 1979). This section states:

(d) DEFINITION — For purposes of this section, the term "incremental cost of alternative electric energy" means, with respect to electric energy purchased from a qualifying cogenerator or qualifying small power producer, the cost to the electric utility of the electric energy which, but for the purchase from such cogenerator or small power producer, such utility would generate or purchase from another source.

Id.

"incremental cost of alternative electric energy" means "the cost to the electric utility of the electric energy which, but for the purchase from the cogenerator or small power producer, such utility would generate or purchase from another source."[14]

In an effort to further clarify the legislative intent of Congress, House and Senate conferees have set forth a Joint Explanatory Statement of the Conference Committee,[15] which states in part:

> Section 210, as agreed to by the conferees, is a compromise of the House and Senate positions on cogeneration and small power production. In lieu of the Senate guideline approach, this section requires that States and utilities follow rules which the Federal Energy Regulatory Commission is to prescribe within one year after the date of enactment of this legislation.[16]

As indicated by this explanation, PURPA directs the FERC to promulgate rate-setting rules which both states and electric utilities must follow. However, neither the statute nor the conference report indicated to what extent the FERC should nationalize rate-setting in this area.[17] Apparently the conferees felt that this issue would be resolved through the political dynamic which the procedural requirements of consultation and comment set forth in section 210(a) could be expected to generate.

The conference report, in explaining the meaning of the requirements of section 210(b), states that the phrase "just and reasonable to the electric consumers of the utility"[18] is to be interpreted as protecting the consumer's interest to receive energy at equitable rates. However, the report goes on to state that small power producers are not to be subject to the same examination as other utilities in deciding whether their rates are fair and reasonable. Rather, it explains that

> cogenerators and small power producers are different from electric utilities, not being guaranteed a rate of return on their activities generally or on the activities vis a vis the sale of power to the utility and whose risk in proceeding forward in the cogeneration or small power production enterprise is not guaranteed to be recoverable.[19]

The conferees further explain that section 210 was intended to encourage cogeneration and "therefore the examination of the level of

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14. *Id.*

15. 1978 Conference Report, *supra* note 1, *reprinted in* [1978] U.S. CODE CONG. & AD. NEWS 7797.

16. *Id.* at 97-98, *reprinted in* [1978] U.S. CODE CONG. & AD. NEWS at 7831-33.

17. Congress, for example, might have specifically required the FERC, through the statutory directives of PURPA, to promulgate specific uniform rates and guidelines or to require utilities to bypass state regulatory agencies and report directly to the FERC.

18. Public Utilities Regulatory Policies Act of 1978, 16 U.S.C. § 824a-3 (Supp. III 1979). *See* note 10 *supra.*

19. 1978 Conference Report, *supra* note 1, at 97-98, *reprinted* in [1978] U.S. CODE CONG. & AD. NEWS at 7831-32.

rates which should apply to the purchase by the utility of the cogenerator's or small power producer's power should not be burdened by the same examination as are utility rate applications, but rather in a less burdensome manner."[20] The report states that normal utility regulations would act as a disincentive to congeneration and small power production.[21]

Although the conference report clearly indicates that the utility rate applications of small power producers should be examined in a "less burdensome manner," neither PURPA nor the report specifies exactly what regulatory proceeding or examination should be substituted in lieu of traditional methods. The report, like the statute, seems only to require that the examination should not be a "disincentive" and that it has to be different from the traditional methods of examination.[22]

In pursuing the goal of section 210, which is to avoid subjecting small power producers to normal utility regulations, the report emphasizes that section 210(b) of PURPA places an upper limit on the price which FERC rules can set for the purchases of electricity by electric utilities from small power producers by stating that the rates prescribed may not exceed the "incremental cost of alternative energy."[23] Significantly, the language of the conference report indicates that such statutory limits apply only to FERC rules promulgated pursuant to section 210 and not to any state requirements that utilities purchase electricity from small power producers at higher rates.

The issue of an upper limit on rates is further addressed by the conferees when they explain the phrase "not discriminate against cogenerators or small power producers." The conferees explain that this requirement was designed to avoid the obstacle to small power production which may be constructed through "the charging of unjust and non-cost based rates for power solely to discourage cogeneration or small power production."[24] The report goes on to state that this provision should not encourage discrimination against consumers of electric

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20. *Id.* at 98, *reprinted in* [1978] U.S. CODE CONG. & AD. NEWS at 7832.

21. *Id.*

22. Although PURPA does not describe these traditional methods to which it refers, such methods may be presumed to be conventional adjudicatory administrative hearings where the applicant has the burden of proof and has a set rate of return on its rate base.

23. 1978 Conference Report, *supra* note 1, at 98, *reprinted in* [1978] U.S. CODE CONG. & AD. NEWS at 7831-32. The Report also states that under this subsection the utility would not be required to purchase electric energy from a qualifying cogeneration or small power production facility at a rate which exceeds the lower of the rates described above, a rate which

> is just and reasonable to consumers of the utility, in the public interest, and nondiscriminatory, or the incremental cost of alternate electric energy. This limitation on the rates which may be required in purchasing from a cogenerator or small power producer is meant to act as an upper limit on the price at which utilities can be required under this section to purchase electric energy. The conferees do not intend cogenerators or small power producers to be subject, under the commission's rules, to utility-type regulation.

Id., reprinted in [1978] U.S. CODE CONG. & AD. NEWS at 7832.

24. *Id.* at 97-98, *reprinted in* [1978] U.S. CODE CONG. & AD. NEWS at 7831-32.

utilities and explains that section 210(c) was "not intended to require the rate payers of a utility to subsidize cogenerators or small power producers."[25] However, the consumer subsidy issue remains because the upper limit is determined through the incremental cost of alternative energy; this cost being calculated in terms of cost over time, not simply in terms of costs at the time the power is sold.

Consequently, the conferees' statement that section 210(b) was not intended to make consumers subsidize small power producers[26] becomes less clear when viewed in light of their explanation of section 210(d). The conference report states that interpretation of the phrase "incremental cost of alternative energy" may require the FERC and the states to look beyond the alternative sources "instantaneously available to the utility"[27] and "look to the reliabiltiy of that power ... and the cost savings to the utility which may result at some later date by reason of supply to the utility at that time of power from the cogenerator or small power producer."[28] Although the conferees recognized the need to determine costs over time and seemed inclined to raise the limit which the term "incremental cost" imposes on rates, neither PURPA nor the report defines this concept with sufficient specificity to determine whether FERC rules should include or exclude future or expanded capacity costs in calculating "incremental cost."

A report[29] prepared for the New Hampshire Public Utilities Commis-

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25. 1978 Conference Report, *supra* note 1, at 98, *reprinted in* [1978] U.S. CODE CONG. & AD. NEWS at 7832. Consumers may, of course wish to subsidize small power producers since the individual subsidy paid by each consumer would be negligible. Furthermore, the subsidy would probably be offset by the value of environmental amenities, reduction of dependence on foreign oil and other external benefits which are excluded from the calculation of traditional electric utility costs and rate structures. Nevertheless, even if the consumer does not wish to subsidize small producers, the issue of consumer subsidy must be examined in terms of "cost over time," not simply in terms of costs at the time the power is sold.

26. 1978 Conference Report, *supra* note 1, at 97-98, *reprinted in* [1978] U.S. CODE CONG. & AD. NEWS at 7831-32.

27. *Id.* at 98-99, *reprinted in* [1978] U.S. CODE CONG. & AD. NEWS at 7832-33. The Conference cited as an example the situation where

> an electric utility which owns a source of hydroelectric power and which is offered the sale of electric energy from a cogenerator or small power producer might, if measured over the short term, have a low incremental cost of alternative power because of its access to hydropower; however, it may be the case that by purchasing from the cogenerator or small power producer and saving hydropower for later use, the utility can avoid the use of expensive electric energy generated by fossil fired units during later months of its seasonal generation cycle. Thus, viewed over the longer period of time, the incremental cost of alternative electric energy might be substantially higher than that measured by the instantaneously available hydropower.

Id. at 99, *reprinted in* [1978] U.S. CODE CONG. & AD. NEWS at 7833.

28. *Id.*

29. P. BROWN, A. BUXTON & M. RINGO, A REPORT TO THE NEW HAMPSHIRE PUBLIC UTILITIES COMMISSION OF NEW HAMPSHIRE CONCERNING THE IMPACT OF TITLE II OF THE PUBLIC UTILITIES REGULATORY POLICIES ACT OF 1978 ON RATEMAKING FOR THE SALE AND PURCHASE OF POWER BY SMALL SCALE HYDROELECTIC PROJECTS (1979) (Report by the Energy Law Institute of the Franklin Pierce Law Center).

sion (Energy Law Institute Report) argues that the legislative history of section 210 indicates that the term "incremental cost" includes future capacity cost considerations.[30] The authors base their argument on examination of House and Senate legislation before the conference committee which reported PURPA. The House bill,[31] which incorporated President Carter's energy proposal together with incentives for the development of alternative energy sources, including hydroelectric power, specified in section 516(1)(A) that the limit on rates for purchasing power from small production facilities would be based on costs calculated for the same period.[32] Section 12(c)(7) of the Senate bill[33] defined "incremental cost" as "the additional cost that would be incurred by a utility if the utility had generated the unit of electricity with its then available generation capacity or capacity available to it."[34] Observing that the original versions of the House and Senate bills specifically limited "incremental cost" to current capacity considerations, the Energy Law Institute Report concludes that the conferees intentionally "discarded" such a restriction in drafting 210(d) and therefore intended the term "incremental cost" to include considerations of future or expanded capacity. In support of this conclusion, the authors also cite language in the conference committee report which stated that both the Commission and states should look beyond alternative sources which are instantaneously available to the cost savings over time.[35]

Finally, the Energy Law Institute Report reasons that a rate could not be "just," "reasonable" and "nondiscriminatory" as required by section 210(b) if it were not based on the full value of the power which the electric utility purchased from the small power producer. When a utility purchases energy from a reliable producer for a long term, the utility gets the additional value of deferring or reducing its need to incur additional costs for future expanded capacity. By including the deferred cost of this future capacity in calculating the "incremental cost of alternative electric energy" for that utility, a rate is established which equals both the full avoided cost to the utility and the full value of the electricity produced by the small power facility.

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30. *Id.* at 4-5.
31. H.R. 8444, 95th Cong., 2d Sess., 123 CONG. REC. 7987 (July 27, 1977).
32. *Id.* at § 516(1)(B), 123 CONG. REC. 7989 (July 27, 1977).
33. S. 2114, 95th Cong., 1st Sess., S. REP. NO. 442, 95th Cong., 1st Sess. (1977).
34. S. 2114, 95th Cong., 1st Sess. § 12(c)(7), S. Rep. No. 442, 95th Cong., 1st Sess. 5 (1977).
35. This report states:

> In interpreting the term "incremental cost of alternative energy," the conferees expect that the Commission and the State may look beyond the cost of alternative sources which are instantaneously available to the utility. Rather, the Commission and States should look to the reliability of that power to the utility and the cost savings to the utility which may result at some later date by reason of supply to the utility at that time of power from the cogenerator or small power producer. . . .

P. BROWN, A. BUXTON & M. RINGO, *supra* note 29, at 9.

In summary, section 210 removes a major obstacle to small power producers by requiring utilities to purchase their power. However, it leaves intact another major obstacle to the marketability of small power production by failing to define precisely what constitutes a "just," "reasonable" and "nondiscriminatory" rate for purchase of such power.

II. FERC ORDER NO. 69: RATE-MAKING RULES PROMULGATED PURSUANT TO SECTION 210 OF PURPA

In Order No. 69, the FERC adopted regulations to implement section 210 of PURPA.[36] These regulations require electric utilities to purchase power from qualifying small power production facilities at a rate which meets the statutory parameters set forth in section 210(b). The regulations contained in Order No. 69 are divided into five major subparts, the following of which pertain directly to the implementation of PURPA rate making procedures: Subpart A — General Provisions,[37] Subpart C — Arrangements Between Electric Utilities and Qualifying

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36. *See* Regulations under Sections 201 and 210 of the Public Utilities Regulatory Policies Act of 1978 with regard to Small Power Production and Cogeneration, 18 C.F.R. § 292.101-.602 (1980).

The Federal Administrative Procedure Act defines rulemaking as any "agency process for formulating, amending or repealing a rule." 5 U.S.C. § 551(5) (1976). Usually when an agency engages in rulemaking, the same general statute commands the agency to publish a "general notice" of the proposed rule, stating the time and place for the proceedings and the nature of the proposed rule. This may not be necessary, however, if "the agency for good cause finds ... that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest." *Id.* § 553(b)(3)(B). After the required notice is given, however, the agency must at least afford "interested persons an opportunity to participate in the rulemaking through submission of written data, views, or arguments with or without opportunity for oral presentation." *Id.* § 553(c). Rulemaking conducted pursuant to section 553 is often called informal rulemaking or notice and comment rulemaking.

In promulgating regulations pursuant to section 210, the FERC was required by section 210(a) to meet certain procedural rulemaking requirements. In an attempt to do so, the FERC engaged in the following rulemaking process.

On June 27, 1979, the FERC issued a Staff Discussion Paper. Then, in July of 1979, the FERC held public hearings in San Francisco, Chicago, and Washington, D.C. to allow official consultation and comment with all regulatory agencies which have ratemaking authority for electric utilities. Thereafter, the FERC issued a Notice of Proposed Rulemaking on October 18, 1979. After releasing a preliminary Environmental Assessment on its Staff Discussion Paper, issuing a request for further comments on October 29, 1979, and holding further public hearings during November and December, 1979, in Seattle, Denver and Washington, D.C., the FERC issued its final draft rule on January 29, 1980.

The FERC invited state public utility commissioners to comment on the final draft at a public meeting held on February 5, 1980, and then invited representatives of electric utilities to comment at a public meeting held on February 8, 1980. 45 Fed. Reg. 12,214, 12,215 (1980). Finally, on February 25, 1980 the FERC issued its final rules under section 210, 45 Fed. Reg. 12,214 (1980) (to be codified in 18 C.F.R. § 292), over three months after its statutory deadline. *See* note 16 and accompanying text *supra*.

37. 18 C.F.R. § 292.101 (1979).

Cogeneration and Small Power Production Facilities Under Section 210 of the Public Utility Regulatory Policies Act of 1978,[38] and Subpart D — Implementation.[39]

1. *Subpart A*

Subpart A indicates that terms used in Order No. 69 will be defined in accordance with definitions set forth in PURPA. In addition, subpart A defines the terms "purchase," "rate" and "avoided cost" as follows:

> "Purchase" means the purchase of electric energy or capacity or both from a qualifying facility by an electric utility. . . .
>
> "Rate" means any price, rate, charge, or classification made, demanded, observed or received with respect to the sale or purchase of electric energy or capacity, or any rule, regulation, or practice respecting any such rate, charge, or classification, and any contract pertaining to the sale or purchase of electric energy or capacity.
>
> "Avoided costs" means the incremental costs to an electric utility of electric energy or capacity or both which, but for the purchase from the qualifying facility or facilities, such utility would generate itself or purchase from another source.[40]

The definitions of "purchase," "rate" and "avoided costs" set forth in Order No. 69 reflect a policy decision by FERC which goes beyond the literal directive and perhaps even the legislative intent of PURPA. Whereas the statute itself clearly requires a balancing of the interests of the general public, the electric utilities and the small power producers, PURPA only sets guidelines for balancing these interests and does not direct the FERC as to what that balance should be. According to the language of section 210(b), rates for the purchase of electric energy from small power producers "shall be just and reasonable to the *electric consumers* of the electric utility," and "in the *public* interest." Furthermore, they "shall not discriminate against qualifying *small power producers*," and "[shall not] exceed the incremental cost to *the electric utility* of alternative electric energy."[41]

In subpart A of Order No. 69, FERC states that its definition of avoided costs "... is derived from the concept of 'incremental cost to the electric utility of alternative electric energy' set forth in section 210(d) of PURPA."[42] Yet, in defining "purchase," "rate" and "avoided cost," FERC has actually redefined the terms "electric

38. *Id.* § 292.301-.308.
39. *Id.* § 292.401-.403.
40. 18 C.F.R. § 292.101(b)(2),(5),(6) (1980).
41. *Id.* (emphasis added).
42. 45 Fed. Reg. 12,216 (1980).

energy" and "incremental cost of alternative energy." By defining incremental cost of alternative energy as "avoided cost," FERC shifted the semantic balance of the original terms decisively toward the concept of marginal cost.

Although PURPA only speaks in terms or purchase of energy, Order No. 69 speaks in terms of energy costs and capacity costs:[43]

> The costs which an electric utility can avoid by making such purchases generally can be classified as "energy" costs or "capacity" costs. Energy costs are the variable costs associated with the production of electric energy [kilowatt-hours]. They represent the cost of fuel, and some operating and maintenance expenses. Capacity costs are the costs associated with providing the capability to deliver energy; they consist primarily of the capital costs of facilities.[44]

By linking the inclusion of capacity in the ratemaking structure to the concept of reliability, the FERC is again making new policy. Section 210(a) of PURPA does specify that FERC regulation should "include provision respecting minimum reliability of . . . qualifying small power production facilities (including reliability of such facilities during emergencies) and . . . respecting reliability of electric energy service to be available to such facilities from electric utilities during emergencies."[45] However, the ratemaking provision of PURPA, section 210(b), does not make any reference to "reliability" as a concept to be considered in ratemaking, but only with regard to determining availability for purchase or sale.[46]

In addition to the references to capacity, the FERC definition of "avoided costs" in Order No. 69 also adds the term "incremental." The FERC explains its inclusion of the term "incremental" in its definition of "avoided costs" by stating that "[t]he Commission has added the term 'incremental' to modify the costs which an electric utility would avoid as a result of making a purchase from a qualifying

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43. The term "electric energy" is used throughout the [Federal Power] Act to refer both to electric energy and capacity. The Commission does not find any evidence that the term "electric energy" in section 210 of PURPA was intended to refer only to fuel and operating and maintenance expenses, instead of all of the costs associated with the provision of electric service.

45 Fed. Reg. 12,225 (1980).

44. *Id.* at 12,216.

45. Public Utilities Regulatory Policies Act of 1978, § 210(a), 16 U.S.C. § 824a-3a (Supp. III 1979). *See* note 7 *supra* for the full text of section 210(a).

46. *Id.*

facility. . . . The utility's avoided incremental costs (and not average system costs) should be used to calculate avoided costs."[47]

A comparison of the FERC's definition of "avoided costs" in Order No. 69 and PURPA's definition of "incremental cost of alternative electric energy" in section 210(d) indicates that the FERC concluded in its rulemaking process[48] that Congress did not mean what it legislated. When Congress used the term "incremental cost of alternative electric energy," it meant instead "avoided incremental cost of energy and capacity." In balancing the interests of affected parties as required by PURPA, the FERC regulations materially favor the small power producer by raising the ceiling on rates to include purchase of capacity as well as energy at incremental costs.

2. *Subpart C*

As specified in PURPA, subpart C "applies to the regulation of sales and purchases between qualifying facilities and electric utilities."[49] Section 292.301(a) of subpart C sets forth the scope of the ratemaking process established in Order No. 69. This section, however, goes beyond the PURPA directives of section 210 and establishes as new policy that electric utilities and small power producers may, by agreement, establish rates, terms, or conditions for the sale or purchase of energy which differ from rates otherwise required by PURPA and Order No. 69. In addition, the FERC states in section 292.301(b) that existing contracts between electric utilities and small power producers are not to be affected by the new regulations.[50]

In its analysis of section 292.301, the FERC states that "[p]aragraph (b) (1) reflect[s] the Commission's view that the rate provisions of section 210 of PURPA apply only if a qualifying cogenerator or small power production facility chooses to avail itself of that section."[51] Apparently the FERC has made a policy decision that section 210 is in effect an option to be exercised only upon the election of the small power producer in the event that it cannot reach a satisfactory purchase and sale agreement with a utility.

Comments received by the FERC on its proposed regulation 292.301(b)(2) criticized the rule for penalizing small power producers

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47. *Id.*
48. *See* note 35 *supra.*
49. 18 C.F.R. § 292.301(a) (1980).
50. *Id.* § 292.301(b).
51. 45 Fed. Reg. 12,217 (1980).

who, prior to the promulgation of Order No. 69, had entered into binding contracts for less favorable rates than they might expect to receive under PURPA regulations. The FERC states that under section 210(a) it is charged with prescribing:

> "[S]uch rules as it determines necessary to encourage cogeneration and small power production . . ." to mean that the total costs to the utility and the rates to its other customers should not be greater than they would have been had the utility not made the purchase from the qualifying facility or qualifying facilities. That a cogeneration or small power production facility entered into a binding contractual arrangement with an electric utility indicates that it is likely that sufficient incentive existed, and that the further encouragement provided by these rules was not necessary.[52]

This justification seems to contradict earlier rulings set forth in Order No. 69. By including "capacity costs" as well as "fuel costs" in the rate structure, the FERC has ruled that "costs to the utility and the rates to the other customers" will be *greater* than if the utility had purchased the electricity from another utility. The FERC's suggestion "that sufficient incentive existed and that further encouragement provided by these rules was not necessary"[53] ignores the fact that virtually all existing contracts have been negotiated under monopsonistic conditions between a utility and a small power producer. Accordingly, the rate set forth in these existing contracts could result in economic infeasibility of projects still in the planning stage, in lack of financial incentive for a small power producer to maximize facility output through needed repairs, or in exhaustion of capital of those small power producers who have pioneered the industry. All of these consequences will deprive the "public interest" of stable, domestic, renewable energy sources.

On balance, the purpose of regulation 292.301(b) seems to be to strengthen and encourage independent contracts between utilities and small power producers and to reassure both parties that such agreements will be accepted and upheld despite changes in the law. By making the policy decision to exclude contracts from the scope of Order No. 69 ratemaking regulations, the FERC may well have sought to encourage any of the following objectives: 1) to establish long-term rates which small power producers could use to obtain financing; 2) to stabilize electric rates; 3) to minimize the regulatory burden on the small power producers in order to minimize overhead; 4) to minimize the regulatory burden on the electric utilities so that they would be encouraged to voluntarily enter into acceptable rate agreements with small power producers; or 5) to minimize the administrative costs to the state regulatory agencies of implementing Order No. 69. It appears that these

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52. 45 Fed. Reg. 12,217-18 (1980).
53. *Id.* at 12,218.

objectives are legitimate goals of the PURPA policy mandate to expedite small hydroelectric development. Therefore, the FERC may maintain that a policy to exclude contracting parties from the ratemaking structure is found in its enabling legislation. However, since there is no explicit PURPA directive for such an exclusion, it appears that the FERC has again forged its own policy. The FERC is balancing interests in favor of the development of only new small power production facilities.

In regulation 292.302, the FERC establishes a process for obtaining the data base necessary for its ratemaking procedures. In doing so, the FERC firmly places the burden of proof on the larger electric utilities. The general rule, regulation 292.302(b), requires that electric utilities "make available data from which avoided costs may be derived, not later than November 1, 1980, May 31, 1982, and not less often than every two years thereafter."[54] Utilities are also to provide their state regulatory authority, and to maintain for public inspection, the estimated avoidable costs on the electric utility's system with respect to purchases from qualifying facilities. These costs are to be stated on a cents per kilowatt hour basis, during daily and seasonal peak and off-peak periods, by year. The utilities are directed to divulge their plan for addition of capacity by amount and type over a ten year period and to state the estimated capacity costs at completion of the planned capacity additions.[55]

This paragraph provides the small power producer with the information necessary to calculate the electric utility's avoided costs and to thereby determine the economic feasibility of a small power production facility. By knowing the cost at which it can sell its power, the small power developer can obtain capital by estimating for possible investors the return on their investment.

Although regulation 292.302(b) of Order No. 69 provides for the production of sufficient data to calculate "avoided costs," regulation 292.302(d) allows a state regulatory authority to require an electric utility to provide "data different than those which are otherwise required by this section if it determines that avoided costs can be derived from such data."[56] The FERC analysis of this provision suggests that such state requirements "could provide that cost data be updated more frequently than every two years."[57] However, states could also provide for more radical changes in their regulations by requiring that electric utilities produce data which take into consideration system flexibility and efficiency, price and rate stability, including post-fuel factors, in order to

54. 18 C.F.R. § 292.302(b) (1980).
55. *Id.* § 292.302(b)(1)-(2).
56. *Id.* § 292.302(d).
57. 45 Fed. Reg. 12,218 (1980).

reflect the "public costs" of such factors as fuel scarcity or unavailability, environmental or pollutant costs, and national defense considerations. In the event that an alternative plan for data availablity accepted by a state under 292.302(d) did not provide "sufficient data from which avoided costs may be derived,"[58] the small power producer might seek court review of the state's implementation of Order No. 69.

Although the FERC places the burden of data production on the larger electric utilities it has created favored subclasses within that group. It does so by allowing exemptions to the data availability rules for electric utilities with sales of less than 500 million kilowatts per year during any calendar year after December 31, 1975.[59]

Under regulation 292.303(a), "[e]ach electric utility shall purchase in accordance with 292.304, any energy and capacity which is made available from a qualifying facility."[60] Again, by including "capacity" in this regulation, the FERC has expanded the policy directive of PURPA which required only that "energy" be purchased by electric utilities from qualifying small power producers. Regulation 292.304, entitled "Rates for Purchases," sets forth the FERC's ratemaking policy and requirements for purchases by electric utilities from small power producers. Section 292.304(a)(1) simply recites the PURPA standards of justness, reasonableness and nondiscrimination against small power producers.[61] However, 292.304(a)(2) departs from the PURPA standard set forth in section 210(b) that no rate *"exceed the incremental cost* to the electric utility of alternative electric energy."[62] It does so by stating that "[n]othing in this subpart requires any electric utility to pay more *than the avoided costs for purchases.*"[63]

In its analysis of 292.304(a), the FERC acknowledged that it received comments on its proposed 292.304(a). The comments suggested that the PURPA mandate of section 210(b) required a "split-the-savings" basis for ratemaking rather than an avoided cost basis.[64] Despite the salience

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58. *Id.*

59. 18 C.F.R. § 292.302(a)(1) (1980).

60. *Id.* § 292.303(a).

61. *Id.* § 292.304(a)(1)(i)-(ii).

62. Public Utilities Regulatory Policies Act of 1978, 16 U.S.C. § 824a-3(6) (Supp. III 1979) (emphasis added).

63. *Id.* § 292.304(a)(2) (emphasis added).

64. The FERC analyzed this "split-the-savings" approach as follows:

> [In a split-the-savings] type of transaction, the two utilities split the difference between the incremental costs incurred and the incremental costs that the purchasing utility would have incurred had it generated the power itself. . . . The effect of such a pricing mechanism would be to transfer to the utility's ratepayer a portion of the savings represented by the cost differential between the qualifying facility and the purchasing electric utility. These commenters observed that if the Commission's rules now require the payment of full avoided costs . . . the purchase power expenses of the electric utilities would increase. . . . They contend that unless they are permitted to purchase energy and capacity from qualifying facilities at a rate somewhere between the qualifying facilities'

of these comments and the seeming conflict between regulation 292.304(a) and PURPA section 210(b),the FERC rejected this argument, basing its decision to implement the proposed rule on: (1) the policy mandate of PURPA to encourage the development of small power production in section 2(d);[65] and (2) the PURPA directives in section 210(e), which exempt small power producers from traditional cost-of-service regulatory schemes.[66]

In balancing the interests of consumers and small power producers, the FERC implicitly acknowledges the conflict between regulation 292.304 and section 210 of PURPA, admitting that rates under the Commission's regulation will increase costs to consumers (presumably in violation of section 210(b) of PURPA).[67] The FERC, quoting language from the conference report on section 210(e), further justifies its "avoided costs" methodology, stating:

> [S]ection 210(e) of PURPA provides that the Commission shall exempt qualifying facilities from the Public Utility Holding Company Act, from the Federal Power Act and from state law and regulation respecting utility rates or financial organization, to the extent that the Commission determines that such exemption is necessary to encourage cogeneration or small power production.[68]

Whether regulation 292.304(a) resolves a patent ambiguity arising between section 210(b) and section 210(e) or simply represents the triumph of PURPA policy over PURPA directive is unclear. It is undeniable that this regulation reflects a strong FERC policy that encourages the development of small power production facilities. This policy also seeks to minimize the regulatory burdens on small power producers, including data production requirements. The effect of the "avoided costs" standard set forth in regulation 292.304(a) will be that rates for purchasing electricity will not vary on the basis of the costs of a particular facility. However, 292.304(e) establishes factors which may be considered to vary the rate from facility to facility. These are the data provided pursuant to section 292.302(b), (c), or (d) and the availability of capacity or energy from a qualifying facility during the daily and seasonal peak periods. Under this second factor there are

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costs and their own costs, they and their ratepayers will be subject to the continually increasing world price of oil.

45 Fed. Reg. 12,222 (1980).

65. *Id.*

66. *Id.*

67. Specifically, the FERC stated that:

> [A]ny rate reduction [under the split-the-savings approach] will be insignificant for any individual customer. On the other hand, if these savings are allocated to the relatively small class of qualifying cogenerators and small power producers, they may provide a significant incentive for a higher growth rate of these technologies.

Id.

68. *Id.*

several other elements: the ability of the utility to dispatch the qualifying facility, the expected or demonstrated reliability of the qualifying facility, the terms of any contract (*e.g.*, duration), the ability to coordinate scheduled outages, the usefulness of energy and capacity during system emergencies, the individual and aggregate value of energy and capacity from qualifying facilities in the system, and increased flexibility in expanding capacity. In addition, the regulation propounds other factors concerning the relationship between the availability of energy and capacity and the ability of the utility to avoid costs, including deferral of capacity and reduction of fossil fuel use, and the costs or savings resulting from variations in line losses.[69]

Since regulation 292.304(a)(2) sets a utility's "avoided cost" as a ceiling on rates set under FERC regulations, state regulatory agencies could not use the factors set forth under regulation 292.304(e) to increase rates above "avoided costs." The 292.304(e) factors could therefore only be used for the purpose of reducing purchase rates below avoided costs. In regulation 292.304(b), entitled "Relationship to Avoided Costs," the FERC authorizes states to establish such lower rates.[70]

The combined effect of paragraphs (a), (b) and (e) of regulation 292.304 is to open the door for state regulatory authorities to establish rates which are substantially lower than avoided costs. Although regulation 292.304(b)(3) indicates that such lower rates would still have to be "sufficient to encourage cogeneration and small power production," it may be difficult for state regulatory agencies, even if they are inclined to favor small power production, to counter utility requests for lower rates.

In its analysis of 292.304(b), the FERC acknowledges that rates for new capacity may be less than avoided costs under 292.304(b)(3) if a state regulatory agency so determines. However, the FERC does not seem to grasp the combined effect of 292.304(b)(2) and 292.304(e). The FERC has stated that equal rates for purchases shall equal full avoided costs with regard to facilities built after the enactment of PURPA (*i.e.* after November 9, 1978).[71] Yet, under the 292.304(e) factors,[72] utilities will have substantial leverage in pressing state agencies to set rates at less

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69. 18 C.F.R. § 292.304(e) (1980).

70. This regulation provides:

> (2) ... a rate for purchases satisfies the requirements of paragraph (a) of this section if the rate equals avoided costs determined after consideration of the factors set forth in paragraph (e) of this section.
> (3) A rate for purchases (other than from new capacity) may be less than the avoided cost if the State regulatory authority ... determines that a lower rate is consistent with paragraph (a) of this section, and is sufficient to encourage cogeneration and small power production.

18 C.F.R. § 292.304(b) (1980).

71. *See* 45 Fed. Reg. 12,223 (1980).

72. 18 C.F.R. § 292.304(e) (1980).

than "avoided costs" for facilities built after November 9, 1978, as well as for those built prior to that date. By controlling data availability on the vague and indefinite 292.304(e)(3) factors, the utilities can present the sophisticated argument that these factors do not reduce the rate below "avoided costs," but merely indicate that such a lower rate equals true "avoided costs" which have been adjusted for 292.304(e) considerations.

In regulation 292.304(c), entitled "Standard Rates for Purchasers," the FERC established a special ratemaking process for facilities with a design capacity of 100 kilowatts or less. Under this scheme, the state regulatory agency calculates a single rate based on the "avoided costs" methodology of 292.304(a) and (e). A rate is calculated for each technology and applied uniformly to all facilities utilizing that technology. Subsection (c)(2) authorizes, but does not mandate, that state regulatory agencies "put into effect standard rates for purchases from qualifying facilities with a design capacity of more than 100 kilowatts."[73]

In contrast to the individual case by case ratemaking calculations for "avoided costs" and 292.304(e) factors, the standard rate concept enables the state regulatory authority to conduct ratemaking proceedings in a manner which is efficient for the state, minimizes administrative costs, and more accurately takes into consideration the aggregate total capacity value of small power producing facilities as required by 292.304(e)(vi). Additionally, state ratemaking proceedings may provide small power producers with a generally applicable rate which may be used to calculate economic feasibility and to obtain financing for a planned facility. Lastly, state procedures may be used to establish a consolidated ratemaking process which would be more visible, thus providing small power producers with a better opportunity to forge a united, more sophisticated, better financed presentation.

Regulation 292.304(d) creates another possible method for ratemaking. However, this option is to be exercised directly by the small power producer through means of a contractual agreement. The producer may choose to sell to the utility on an "as available" basis with avoided costs to be calculated at the time of delivery,[74] or to sell on an "enforceable delivery" basis over a specified term with "avoided cost" calculated either at the time of delivery or at the time the obligation is incurred.[75] This alternative is attractive to the small power producer since it could then receive a greater percentage of the total avoided costs at the begin-

73. 18 C.F.R. § 292.304(c)(2) (1980).
74. 18 C.F.R. § 292.304(f)(2)(i) (1980).
75. 18 C.F.R. § 292.304(d)(2)(ii) (1980).

ning of the contract, when it is most needed, to meet high front-end capital costs.[76]

In Section 292.304(f), the FERC enables public utilities to refuse to purchase electricity from small power producers "during any period during which, due to operational cirumstances, purchases from qualifying facilities will result in costs greater than those which the utility would incur if it did not make such purchases, but instead generated an equivalent amount of energy itself."[77] The FERC attempts to restrict this provision so that the intended safety valve does not become a loophole for utilities to avoid the small power producer purchase requirements of regulation 292.304(a). Accordingly, the FERC includes notice requirements, penalty and verification requirements for any utility which wishes to use 292.304(f).

3. *Subpart D*

Subpart D of Order No. 69, entitled "Implementation," requires states to implement subpart C no later than one year after the regulations promulgated in Order No. 69 take effect (*i.e.*, on or before March 20, 1981). This subpart specifies that implementation may consist of issuing regulations resolving disputes between qualifying facilities and electric utilities, or any other reasonable act designed to implement the subpart.[78] In addition, state regulatory agencies are required to file a report describing the manner in which they will implement subpart C on or before March 20, 1981. Although FERC regulation 292.403 allows state regulatory agencies to apply for a waiver from the application of any of the requirements of subpart C,[79] the agency must show that "compliance with any of the requirements of subpart C is not necessary to encourage cogeneration and small power production and is not otherwise required under section 210 of PURPA."[80]

Both the implementation and the waiver provisions give the states broad latitude in implementing Order No. 69. The FERC chose to give such flexibility to the states despite comments on their draft proposal requesting the FERC to promulgate specific rulings to be adopted by the states. This policy decision by the FERC was based on the Commission's belief that encouraging experimentation by the states will best develop rate principles.[81]

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76. According to the FERC: "So long as the total payment over the duration of the contract term does not exceed the estimated avoided costs, nothing in these rules would prohibit a State regulatory authority or non-regulated electric utility from approving such an arrangement." 45 Fed. Reg. 12,224 (1980).

77. 18 C.F.R. § 292.304(f)(1) (1980).

78. 18 C.F.R. § 292.401(a) (1980).

79. 18 C.F.R. § 292.403 (1980).

80. 18 C.F.R. § 292.403(b) (1980).

81. 45 Fed. Reg. 12,231 (1980).

In summary, Order 69 establishes as FERC policy several principles: First, rates and ratemaking procedures for the sale of electric energy and capacity by small power producers to electric utilities should encourage the development of small power production facilities. Second, electric utilities and small power producers should be free to enter into binding contractual agreements with respect to rates for the purchase and sale of electric energy and capacity. Third, small power producers should be exempt from the traditional cost-of-service ratemaking procedures and the burdens attendant thereto. Finally, the ceiling on federally mandated rates should be the value of the energy and capacity of small power production facilities based on actual, incremental avoided costs of energy and capacity to the electric utility over time.

III. THE ROLE OF THE STATES UNDER PURPA AND ORDER NO. 69

Although it appears from section 2 of PURPA that Congress has sufficient constitutional authority to preempt state ratemaking authority and has given the FERC sufficient legislative power to do so,[82] the FERC has used this authority only to establish broad guidelines and flexible minimum standards for rates.[83] The states are left free to experiment with new ratemaking methodologies to the extent that they are consistent with federal policy and guidelines which encourage the development of small power producers.

By expanding and loosely defining the terms of section 210 of PURPA, the FERC has sought to establish minimum rates sufficient to encourage small power production within the ceiling established by PURPA section 210(b). At the same time, the FERC has sent the states a clear signal to exceed the PURPA limitations which constrained the FERC in its promulgation of Order No. 69, stating that:

> While the rules prescribed under section 210 of PURPA are subject to the statutory parameters, the states are free, under their own authority, to enact laws or regulations providing for rates which would result in even greater encouragement of these technologies. However, State laws or regulation which would provide rates lower than federal standards would fail to provide the requisite encouragement of these technologies, and must yield to federal law.
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> ... [H]igher rates would be based on State authority to establish such rates, and not on the Commission's rules.[84]

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82. Public Utilities Regulatory Policies Act of 1978, § 2, 16 U.S.C. § 2601 (Supp. III 1979). *But see* Mississippi v. FERC, UTIL. L. REP.-FED. (CCH) ¶ 12,412, at 15,268 (1981).

83. *See* P. BROWN, FEDERAL LEGAL OBSTACLES AND INCENTIVES TO THE DEVELOPMENT OF THE SMALL SCALE HYDROELECTRIC POTENTIAL OF THE NINETEEN NORTHEASTERN UNITED STATES 1-5 (1979) (Report by the Energy Law Institute of the Franklin Pierce Law Center). *See also* U.S. CONST. art. 1, § 8, cls. 1 & 3; art. 4, § 3, cl. 3.

84. 45 Fed. Reg. 12,221 (1980).

IV. RECOMMENDATIONS FOR STATE IMPLEMENTATION OF ORDER NO. 69

By exercising state authority over ratemaking procedures, state officials can provide incentives for the development of small power production facilities which will further implement the policy mandates of PURPA and FERC Order No. 69. The following are recommendations for state action which will create incentives to small hydroelectric power producers in addition to those created by federal law:

(1) Allow small power producers who contracted to sell electricity to utilities prior to November 9, 1978, to apply to the state regulatory authority for review of the contract and for voiding of any contract provisions which are not in compliance with current ratemaking procedures and methodology. Such a measure would allow state regulatory authorities to determine whether contracts executed under pre-PURPA monopsonistic conditions restricted the full development of facilities which would otherwise have been feasible under post-PURPA rates.

(2) Establish "incremental avoided costs" as a floor for calculations of rates, with authority to set rates in excess of "incremental avoided costs" based on such external costs and benefits as long term rate stability, environmental impact, and national security. This measure would assist small power producers by raising rates to include the value of externalities which would not necessarily be acknowledged by market conditions.

(3) Create an option to provide cost of service data in ratemaking proceedings. Although a requirement to do so may well be burdensome to small power producers, an option would provide sophisticated, larger producers with an opportunity to justify and obtain higher rates by generating their own data rather than having to rely on that of the public utilities.

(4) Establish an option for small power producers to elect a cost-of-service basis for ratemaking, together with the option to balloon front-end rates to adjust for high capital costs and low operating costs. This measure would be necessary to provide small power producers with sufficient cash flow to meet high near and term operating expenses resulting from high capital costs.

(5) Provide guidelines for determination of "capacity costs" based on aggregate capacity of small power producers, including marginally feasible facilities, and aggregate planned capacity by region or system instead of by utility. This option is necessary to measure the small incremental capacity value of each facility and to insure that the maximum capacity value of all the small power production facilities is included in the rate structure.

(6) Provide punitive damages, payable by electric utilities to small

power producers, for failure to supply or reveal data relevant to the ratemaking process, failure to negotiate rate purchase agreements in good faith with the intent of complying with state and federal ratemaking procedures, or failure to develop in good faith small power facilities which they own or control. This is necessary to discourage public utilities from using their residual monopsonistic control of information in the ratemaking and licensing process.

(7) Establish standard rates which small power producers with a capacity of less than five megawatts would have the option to elect. This measure would facilitate the financing of small power production by providing developers of certain sites with established rates. Such rates could be used both to determine the economic feasibility of a project and to obtain funding by demonstrating the production value of the facility.

(8) Establish categories of "reliability" for calculating capacity which are based on minimum deliverable kilowatt hours per year. Such a measure would broadly define the concept of reliability in a manner which would minimize seasonal and other hydrocological variations that might be used to justify a reduction of rates.

(9) Require that "time of day," "seasonal," and "peaking" considerations are factors which may increase, but do *not decrease* rates for purchases from small power producers. By using these factors to increase, but not decrease, the value of small power production, the state could provide an incentive to small power producers to coordinate power production with system demand. Coincidentally, it would not penalize small power producing facilities which were not able to do so.

(10) Establish compensatory and punitive damages for the failure of an electric utility to purchase electricity except in the case of system emergency. This measure would prevent a public utility from attempting to abuse its right to refuse to purchase power from a small power producer in the event of an emergency.

(11) Empower the state attorney general to review compliance by electric utilities with state regulations. This measure would balance the administrative, legal and financial capabilities of public utilities and small power producers with the resources of a state enforcement agency so as to ensure utility compliance with state and federal regulation.

(12) Enact a legislative package, including property tax abatements, investment tax credits, accelerated depreciation, eligibility for industrial and commercial revenue bonds, and other direct financial incentives for investment in small power facilities. Such a package of financial incentives would assist small power production development as well as assisting in expansion and development to include marginally feasible sites.

CONCLUSION

The success of federal policy to expedite the development of small power production facilities depends largely on the response of state regulatory authorities to section 210 of PURPA and FERC Order No. 69. Despite a strong federal mandate for development of such facilities, the federal government's failure to require state implementation of one specific national rate structure will allow state authorities to adopt rate structures which comply with the technical requirements of federal law, but which do not implement the federal mandate for expeditious development of hydroelectric potential at existing small dams.

The Duty to Act Fairly: An Alternative to the "Unalterably Closed Mind" Standard for Disqualification of Administrators in Rulemaking

*Alfred S. Neely, IV**

The recent case of Association of National Advertisers, Inc. v. FTC *addressed the problem of prejudgment in administrative rulemaking. In this Article, Professor Neely examines the issue and analyzes the standards employed by the D.C. Circuit in that case. The author concludes that alternative standards would better serve the needs of the public while still accommodating the needs of the administrative agencies.*

I. Prejudgment and the Administrative Process

Governmental and private decisions are qualitatively distinct. The power to decide in an official capacity carries with it special obligations and often is subject to limitations not relevant in private settings. Frequently the power to decide is subject to the sanction of the ballot box. This fact of public life may escape a rare elected official from time to time, yet, the need to stand for reelection serves as a periodic reminder. However, numerous officials in government are beyond the reach of direct political control. Members of the federal judiciary are not elected; neither are those who populate federal administrative agencies from top to bottom. This does not mean that administrative decision-makers are free to exercise uncontrolled discretion. There are means of control other than the ballot. Among these is a body of constitutional

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and statutory law which has been developed to limit, qualify and control administrative decisionmaking.[1]

One issue which this body of law addresses is the extent to which those affected by an administrative decision are entitled to an impartial and unbiased decisionmaker whose views are not clouded by preconceived notions and ready-made judgments.[2] This matter transcends the

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1. Administrative decisionmaking is also subject to the control and supervision of those who must answer to the electorate. Legislative bodies employ numerous and varied traditional techniques in overseeing administrative action. Legislative powers over appropriations, standing and watchdog committees, investigations, intercession in pending matters and, in some instances, participation in the appointment of administrative officials are means by which legislatures intervene in the administrative process. *See* Boisvert, *A Legislative Tool for Supervision of Administrative Agencies: The Laying System,* 25 FORDHAM L. REV. 638, 666 (1956-57); Herwitz & Mulligan, *The Legislative Investigating Committee,* 33 COLUM. L. REV. 1 (1933); Melville, *Legislative Control Over Administrative Rulemaking,* 32 U. CIN. L. REV. 33, 35-37 (1963); Newman & Keaton, *Congress and the Faithful Execution of the Laws — Should Legislators Supervise Administrators?,* 41 CALIF. L. REV. 565, 567-70 (1953); Schwartz, *The Administrative Process and Congressional Control,* 16 FED. B. J. 519, 521-22 (1956). Ultimately, administrative decisionmaking is subject to the control of the legislature's fundamental lawmaking power. Powers which a legislative body may confer may be withdrawn or reshaped by repeal or amendment of statutory law. *See* Kinnane, *Administrative Law: Some Observations on Separation of Powers,* 38 A.B.A. J. 19, 22 (1952); Melville, *supra,* at 35-37.

Increasingly, legislative bodies are turning to other means of control of administrative action which are more formal and dramatic than traditional techniques and yet do not go so far as immediate and outright statutory abolition or revision of an agency's powers. Principal examples of this development are statutory mechanisms which provide for formal legislative review of administrative rules and "sunset" laws which require agencies to justify their performance as a condition of their continued existence. Both of these methods have sparked controversy. *See, e.g.,* Fitzgerald, *Congressional Oversight or Congressional Foresight: Guidelines From the Founding Fathers,* 28 AD. L. REV. 429 (1976); Javits & Klein, *Constitutional Oversight and the Legislative Veto: A Constitutional Analysis,* 52 N.Y.U. L. REV. 455 (1977); Licata, *Zero-Base Sunset Review,* 14 HARV. J. LEGIS. 505 (1977); Price, *Sunset Legislation in the United States,* 30 BAYLOR L. REV. 401 (1976); Ribicoff, *Congressional Oversight and Regulatory Reform,* 28 AD. L. REV. 415 (1976); Schwartz, *Administrative Law in the Next Century,* 39 OHIO ST. L. J. 805 (1978); Schwartz, *The Legislative Veto and the Constitution — A Reexamination,* 46 GEO. WASH. L. REV. 351 (1978); Watson, *Congress Steps Out: A Look at Congressional Control of the Executive,* 63 CALIF. L. REV. 983 (1975); Note, *Congressional Oversight of Administrative Discretion: Defining the Proper Role of the Legislative Veto,* 26 AM. U. L. REV. 1018 (1977); Note, *Congressional Veto of Administrative Action: The Probable Response to Constitutional Challenge,* 1976 Duke L. J. 285; Note, *Sunset Legislation,* 11 MICH. J. L. F. 269 (1978).

2. This issue has been the subject of commentary in the legal literature. *See* Dixon, *Disqualification of Regulatory Agency Members: The New Challenge to the Administrative Process,* 25 FED. B. J. 273 (1965); Koch, *Prejudgment: An Unavailable Challenge to Official Administrative Action,* 33 FED. B. J. 218 (1975); Strauss, *Disqualification of Decisional Officials in Rulemaking,* 80 COLUM. L. REV. 990 (1980); Vache, *Appearance of Fairness: Doctrine or Delusion?,* 13 WILLAMETTE L. REV. 479 (1977); Note, *The Disqualification of Administrative Officials,* 41 COLUM. L. REV. 1384 (1941); Comment, *Administrative Bias: An Update,* 82 DICK. L. REV. 671 (1978); Note, *Bias in Administrative Rulemaking After* Association of National Advertisers v. Federal Trade Commission, 54 NOTRE DAME LAW. 886 (1979) [hereinafter cited as *Bias in Rulemaking*]; Note, *The Problem of Bias in the Administrative Process,* 4 ST. LOUIS U. L. J. 183 (1956); Note, *Regulator Disqualification from Rulemaking Proceedings,* 57 TEX. L. REV. 1193 (1979) [hereinafter cited as *Regulator Disqualification*]; Note, *Disqualification of Administrative Officials for Bias,* 13 VAND. L. REV. 712 (1960); Comment, *Due Process in FTC Rulemaking,* 1979 ARIZ. ST. L. J. 543; Annot., 8 A.L.R. FED. 300 (1971).

interests of those immediately affected by a particular decision. Its resolution implicates the quality and integrity of government itself. This Article focuses on one aspect of this issue, specifically the circumstances under which officials in administrative agencies should be disqualified from participation in rulemaking proceedings on account of prejudgment.

The idea that prejudgment could serve as a basis for disqualification in administrative rulemaking may at first seem novel and even foolish. Traditionally, administrative law instructs that rulemaking is analogous to legislative lawmaking.[3] This analogy between rulemaker and legislator was recognized in *Bi-Metallic Investment Co. v. State Board of Equalization,*[4] an early twentieth century case in which Justice Holmes turned aside a challenge to administrative action increasing the valuation of all taxable property in Denver. He noted that: "[t]he Constitution does not require all public acts to be done in town meetings or an assembly of the whole. General statutes within the state power are passed that affect the person or property of individuals, sometimes to the point of ruin, without giving them a chance to be heard."[5] Thus, a legislature's freedom to act without the obligation of affording notice and an opportunity to be heard was granted to administrative bodies acting in an essentially legislative capacity. In contrast, in *Londoner v. City of Denver,*[6] a case decided seven years prior to *Bi-Metallic,* it was held that an administrative action, essentially judicial or adjudicatory in character, was required, as a matter of due process, to be accompanied by notice and an opportunity to be heard.

The distinction drawn in *Bi-Metallic* and *Londoner* between basically legislative and adjudicatory administrative action has proved influential in structuring subsequent developments in administrative procedure. For the moment the dichotomy between administrative rulemaking and adjudication need not be explored,[7] but it is clear that "the line dividing rulemaking and adjudication . . . may not always be a bright one. . . ."[8] However, once administrative action is categorized as

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3. It is the legislative function of administrative agencies in which the power to make law, delegated by a legislative body to an agency, is exercised. *See, e.g.,* Alaskan S.S. Co. v. FMC, 356 F.2d 59, 61 (9th Cir. 1966); Jones v. District of Columbia, 323 F.2d 306, 308-09 (D.C. Cir. 1963); Superior Oil Co. v. FPC, 322 F.2d 601, 609 (9th Cir.), *cert. denied,* 377 U.S. 922 (1963). "[R]ulemaking is the part of the administrative process that resembles a legislature's enactment of a statute. . . . Admittedly this analogy to statutes . . . is imperfect. . . ." K. DAVIS, ADMINISTRATIVE LAW TREATISE § 5.01 (1958).

4. 239 U.S. 441 (1915).

5. *Id.* at 445.

6. 210 U.S. 373 (1908).

7. *See,* text accompanying notes 184-93 *infra.*

8. United States v. Florida E. Coast Ry. Co., 410 U.S. 224, 245 (1973). In *Bi-Metallic* the Supreme Court distinguished the decision in *Londoner* in part on the ground that there "[a] relatively small number of persons was concerned, who were exceptionally affected, in each case

rulemaking, the persistent implication of *Bi-Metallic* has been that due process has no greater bearing on the rulemaking process than on the legislative process.[9] From this contention it follows that the Constitution expects no more of the rulemaker in matters of prejudgment than it does of the lawmaker.[10]

Constitutional analysis is but one consideration in assessing the prejudgment issue. Statutory law also has an impact upon the rulemaking process. The Federal Administrative Procedure Act of 1946[11] (APA) adopted the principle of dichotomy recognized in *Bi-Metallic* and *Londoner,* dividing the universe of administrative action into two parts: rulemaking and adjudication.[12] With respect to rulemaking the APA

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on individual grounds. . . ." 239 U.S. 441, 446 (1915). There is a pervasive strain of pragmatism in Justice Holmes' distinction between rulemaking and adjudication in *Bi-Metallic* which has contributed to the absence of a bright line. However, the distinction with its flaws and ambiguities has survived to create what is today "a recognized distinction in administrative law between proceedings for the purpose of promulgating policy-type rules or standards, on the one hand, and proceedings designed to adjudicate disputed facts in particular cases on the other." 410 U.S. at 245.

9. *See, e.g.,* Superior Oil Co. v. FPC, 322 F.2d 601, 609 (9th Cir.), *cert. denied,* 377 U.S. 922 (1963). "In legislation, or rulemaking, there is no constitutional right to any hearing, *Id.* "If the function is treated as legislative in nature, there is no right to notice and hearing, unless a statute expressly requires them." B. SCHWARTZ, ADMINISTRATIVE LAW 143 (1976). The result has been that "[w]hile it has been common for the courts to find that the Constitution requires procedural safeguards in cases of adjudication, they have consistently refused to impose as a matter of due process procedures in rulemaking beyond those" required by statute. Note, *The Judicial Role in Defining Procedural Requirements for Agency Rulemaking,* 87 HARV. L. REV. 782, 785 (1974).

10. *See* Linde, *Due Process of Lawmaking,* 55 NEB. L. REV. 197, 225-26 (1976).

In any event, the Constitution does not require legislative bodies to hold hearings on bills or compile the legislative record which forms the basis for their actions. It is accepted that in legislatures

> [a] bill need not declare any purpose nor recite any legislative findings. It may be enacted by members whose minds are wholly closed to reasoned argument because of prior commitment to one point of view, ignorance and misinformation, lack of interest and lack of time, or simply because of the absence of any opportunity for inquiry and debate.

Id. at 226.

Are these the relevant standards under the Constitution for decisionmaking in rulemaking? Are no constitutional limitations to be placed on prejudgment in rulemaking because administrative rulemakers are for all constitutional purposes the functional equals of elected legislators? The traditional learning suggests affirmative answers to these questions.

11. Administrative Procedure Act of 1946, Pub. L. No. 404, 60 Stat. 237, 5 U.S.C. §§ 551-559, 701-706 (1976).

12. Under the APA, adjudication is defined as the "agency process for formulation of an order," which is defined as "a final disposition . . . of an agency in a matter other than rule making but including licensing. . . ." 5 U.S.C. § 551(7), (6) (1976). Rulemaking is defined as the "agency process for formulating, amending, or repealing a rule," 5 U.S.C. § 551(5) (1976), which is defined as

> an agency statement of general or particular applicability and future effect designed to implement, interpret or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganization thereof, prices, facilities, appliances, services or allowances therefor or of valuations, costs, or accounting, or practices bearing on any of the foregoing. . . ."

5 U.S.C. § 551(4) (1976).

added procedural requirements which go beyond the traditional demands of due process.[13] The act also recognized two distinct forms of rulemaking, informal and formal, placing upon the latter most of the obligations of formal adjudication.[14] The statutory law creating an agency and granting it power will also facilitate the assessment of the propriety of prejudgment in a rulemaking context. Unfortunately, it appears that Congress has never addressed the issue expressly in any statute.[15] Nevertheless, the provisions and legislative history of an enabling statute provide some indication of congressional intent as to an agency's mission and the manner in which it is expected to discharge its responsibilities.

The effect of these definitions is to establish licensing as an element of adjudication, ratemaking as an element of rulemaking and generally any agency process which does not constitute rulemaking as adjudication.

This division of administrative action was intended to reflect the attitude that rulemaking and adjudication "are the two main types of administrative justice. . . ." ADMINISTRATIVE PROCEDURE ACT: LEGISLATIVE HISTORY, S. DOC. NO. 248, 79th Cong., 2d Sess. 14 (1946). As indicated in the 1947 Attorney General's Manual on the Administrative Procedure Act, "the entire Act is based upon a dichotomy between rulemaking and adjudication." ATTORNEY GENERAL'S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT 14 (W. Gaunt pub. 1973).

13. Generally agencies are required to publish notice of their proposed rules in the Federal Register and allow interested persons the opportunity to submit their views on the proposals before promulgation of final rules, which themselves must be published in the Federal Register. 5 U.S.C. §§ 552(a)(1), 553(b)-(d) (1976). There are, nevertheless, exceptions which limit the scope of these procedures. Thus, section 553 does not apply at all to rules involving a military or foreign affairs function, agency management or personnel, public property, loans, grants, benefits or contracts. 5 U.S.C. § 553(a) (1976). Certain kinds of rules as well as certain subjects of rules also are exempt from some rulemaking procedures. For example, notice of proposed rulemaking is not required for interpretative rules, statements of policy, or rules of agency organization, procedure or practice, unless some statute other than the APA so requires. 5 U.S.C. § 553(b) (1976). Yet for those rulemaking activities which are in whole or in part covered by these procedures, the picture is one of a process which far exceeds the requirements of *Bi-Metallic*.

14. Section 553(c) provides that "[w]hen rules are required by statute to be made on the record after opportunity for agency hearing, sections 556 and 557 of this title apply. . . ." 5 U.S.C. § 553(c) (1976). The effect is the creation of a class of rulemaking known as formal rulemaking or rulemaking on-the-record which is procedurally more complicated than informal or notice-and-comment rulemaking in that hearings must be conducted in the manner required for adjudications. Formal rulemaking is relatively rare and has not been received with favor by most commentators. *See, e.g.*, B. SCHWARTZ, *supra* note 9, at 172-73; Hamilton, *Procedures for the Adoption of Rules of General Applicability: The Need for Procedural Innovation in Administrative Rulemaking*, 60 CALIF. L. REV. 1276, 1277-1313 (1972). *But see* Austern, *Food Standards: The Balance Between Certainty and Innovation*, 24 FOOD DRUG COSM. L.J. 440, 451 (1969). Nor has the Supreme Court been especially supportive of formal rulemaking. Congress must be rather explicit in the language of a statute and preferrably literal in requiring that rules be made on the record after opportunity for agency hearing; otherwise the agency will be allowed to proceed by informal rulemaking. United States v. Florida E. Coast Ry. Co., 410 U.S. 224, 234-38 (1973); United States v. Allegheny-Ludlum Steel Corp., 406 U.S. 742, 756-58 (1972).

15. However, Congress did not subject itself to the APA, 5 U.S.C. § 551(1)(A) (1976), and in this respect the analogy between lawmaking and rulemaking breaks down. For purposes of the APA the two are not functional equivalents. This raises the possibility that the APA creates standards and expectations germane to the issue of prejudgment in rulemaking which are quite irrelevant to an elected legislative body.

The guidance obtained from an enabling statute's provisions and its legislative history may be especially important when the statute does more than merely grant power to promulgate rules in accordance with the informal, notice-and-comment procedures of section 553 of the APA. In the past decade, Congress has often departed from the traditional model for informal rulemaking by creating statutory "hybrids" which require additional procedures in rulemaking. While these "hybrids" may fall short of the procedures required in formal rulemaking,[16] the procedures do introduce additional factors into any analysis of the prejudgment issue.[17]

Ultimately, resolution of issues of constitutional and statutory interpretation is a task for the judiciary. This includes answering the question of what standards governing prejudgment in rulemaking, if any, are implicit in the statutes governing administrative agencies. The role of the judiciary is of particular relevance because over the past decade fissures have appeared in traditional views on the role of due process in rulemaking and the dichotomy between rulemaking and adjudication.[18] Nowhere has this been more apparent than in the Court of Appeals for the District of Columbia. Like Congress, this court has developed its own brand of "hybrid" rulemaking by imposing various procedural requirements beyond those required for informal rulemaking under the APA.[19] In some cases, additional procedures have been required expressly on due process grounds.[20] In other cases, "basic considerations of fairness," a concept which seems not far removed from due process, have provided the rationale.[21] Additional procedures have also been

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16. *See, e.g.*, Consumer Product Safety Act, 15 U.S.C. § 2058 (1976); Toxic Substances Control Act, 15 U.S.C. § 2605 (1976); Occupational Safety and Health Act of 1970, 29 U.S.C. § 665 (1976); Department of Energy Organization Act, 42 U.S.C. § 7191 (Supp. I 1977); Clean Air Act Amendments of 1977, 42 U.S.C. § 7607 (Supp. I 1977). *See generally* Kestenbaum, *Rulemaking Beyond APA: Criteria for Trial-Type Procedures and the FTC Improvement Act*, 44 GEO. WASH. L. REV. 679, 686-87 (1976); Scalia & Goodman, *Procedural Aspects of the Consumer Product Safety Act*, 20 U.C.L.A. L. REV. 899, 906-27, 934 (1973); Verkuil, *Judicial Review of Informal Rulemaking*, 60 VA. L. REV. 185, 187 (1974).

17. An example of such a statute is the Magnuson-Moss Warranty-Federal Trade Commission Improvement Act, Pub. L. No. 93-637, 88 Stat. 2183 (1975), *amending* 15 U.S.C. §§ 45-46, 49-50, 52 (1970) (codified at 15 U.S.C. §§ 45(a)(1),(g), 46(a)-(b),(g)-(h), 49-50, 52(a), 56, 57a-c (1976)) [hereinafter cited as Magnuson-Moss]. The Federal Trade Commission Act was amended recently as a result of the Federal Trade Commission Improvements Act of 1980, Pub. L. No. 96-252, 94 Stat. 374 (1980) (to be codified at 15 U.S.C. §§ 45(b),(f), 46, 50, 57(a)-(c), 58). This act was the basis for the rulemaking proceeding which triggered a recent controversy on the appropriate standards for disqualification for prejudgment and, incidentally, precipitated this article. Association of Nat'l Advertisers, Inc. v. FTC, 627 F.2d 1151 (D.C. Cir. 1979), *cert. denied*, 100 S.Ct. 3011 (1980).

18. *See* note 197 *infra*.

19. *Id.*

20. *See, e.g.*, Home Box Office, Inc. v. FCC, 567 F.2d 9 (D.C. Cir. 1977).

21. *See, e.g.*, Walter Holm & Co. v. Hardin, 449 F.2d 1009, 1016 (D.C. Cir. 1971).

derived from assumptions concerning basic congressional intent.[22] Finally, requirements have been imposed to facilitate judicial review.[23] This trend demonstrates the capacity and will of the courts to deal with issues concerning rulemaking with a subtlety and sophistication foreign to the traditional learning.

An important question is the extent to which the decision of the United States Supreme Court in *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*,[24] has declared an end to this species of judicial activism. Assuming that *Vermont Yankee* is not an insurmountable obstacle,[25] there is merit in considering whether a need and basis exists for the application of judicial creativity to the issue of prejudgment in rulemaking.

Prejudgment is not an issue with which the courts are unfamiliar. Latent in any official decisionmaking is the possibility that persons affected by the outcome will fear, suspect or believe that the outcome is preordained by reason of some pre-existing bias. That bias may arise out of pecuniary interest, relationship with a party, personal hostility, or it may be a product of another form of bias: prejudgment.

Courts have shown a willingness to address issues of bias in their ranks. At an early date, English jurisprudence developed, as one of the principles of natural justice, the precept that no man shall be a judge in his own case.[26] This philosophy flourished, affording meaningful and acceptable criteria for dealing with bias in the courts.[27] In this country concepts of due process have been similarly effective in ensuring judicial impartiality.[28]

The utility of natural justice and due process concepts have not been confined to judicial bias. With slight modification, courts have also applied these principles to bias in its many manifestations in administrative adjudication.[29] Thus, for example, one expression of the standard for disqualification by reason of prejudgment in adjudicatory agency proceedings is whether "a disinterested observer may conclude that [the decisionmaker] has in some measure adjudged the facts as well

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22. *See, e.g.*, Kennecott Copper Corp. v. EPA, 462 F.2d 846, 849-56 (D.C. Cir. 1972).

23. *See, e.g.*, Portland Cement Ass'n v. Ruckelshaus, 586 F.2d 375, 402 (D.C. Cir. 1973).

24. 435 U.S. 519 (1978). *See* note 197 *infra*.

25. *See generally* text accompanying notes 155-69 *infra*.

26. The rule of *nemo judex in causa sua*, the second principle of English natural justice, arose in the 17th century out of disagreement between Sir Edward Coke, Chief Justice of England, and King James I over the propriety of the latter sitting as judge in what was in essence the King's own case. Sullivan, *The Missing Link: Fairness, British Natural Justice, and American Planning and Administrative Law*, 11 URB. LAW., 75, 90-92 (1979).

27. *See* text accompanying notes 155-69 *infra*.

28. *See* notes 148-50 and accompanying text *infra*.

29. *See* notes 151-53 and accompanying text *infra*.

as the law of a particular case in advance of hearing it."[30] This is comparable to the standard which would apply to a traditional judge.[31]

The difficulty is that the function of administrative agencies involves more than adjudication. Agencies, with increasing frequency, have used rulemaking to carry out their responsibilities. Moreover, with encouragement from the judiciary, agencies have discovered advantages in using rulemaking as a means of formulating policy.[32] Although seldom requiring agencies to proceed by rule,[33] courts have offered what has been termed "a rather pointed hint" that agencies having a choice between rulemaking and adjudication should choose the former.[34]

In general, commentators have praised the virtues of rulemaking.[35]

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30. Cinderella Career & Finishing Schools, Inc. v. FTC, 425 F.2d 583, 591 (D.C. Cir. 1970), *quoting* Gilligan, Will & Co. v. SEC, 267 F.2d 461, 469 (2d Cir.), *cert. denied,* 361 U.S. 896 (1959).

31. *See* note 150 *infra.*

32. In 1960, the use of trial-type procedures was "a strong current, perhaps the main current, of administrative procedural development" in the United States. Fuchs, *Fairness and Effectiveness in Administrative Agency Organization and Procedures,* 36 IND. L. J. 1, 25 (1960). As recently as 1970 another commentator observed that "[m]ost agencies have chosen adjudication, and the NLRB has been the most monogamous of all." Bernstein, *The NLRB's Adjudication — Rule Making Dilemma Under the Administrative Procedure Act,* 79 YALE L. J. 571, 574 (1970).

During the 1970's, enthusiasm for rulemaking increased. This gave Professor Kenneth Culp Davis cause to note that "[t]he United States is entering the age of rulemaking. . . ." K. DAVIS, ADMINISTRATIVE LAW OF THE SEVENTIES § 6.01 at 167 (1976). *See, e.g.,* Bruff, *Presidential Power and Administrative Rulemaking,* 88 YALE L. J. 451, 453 (1979); Bruff & Gellhorn, *Congressional Control of Administrative Regulation: A Study of Legislative Vetoes,* 90 HARV. L. REV. 1369, 1375 (1977); Pedersen, *Formal Records and Informal Rulemaking,* 85 YALE L. J. 38, 38-39 (1975); Robinson, *The Making of Administrative Policy: Another Look at Rulemaking and Adjudication and Administrative Procedure Reform,* 118 U. PA. L. REV. 485, 490-93 (1970); Wright, *The Courts and the Rulemaking Process: The Limits of Judicial Review,* 59 CORNELL L. REV. 375 (1974); Note, *supra* note 9, at 982.

33. The courts have been reluctant to interfere in the exercise of a choice between policy formulation through rulemaking or adjudication. They have viewed the choice as one which "lies primarily in the informed discretion of the administrative agency." SEC v. Chenery Corp., 332 U.S. 194, 203 (1947). This principle has survived. *See, e.g.,* NLRB v. Bell Aerospace Co., 416 U.S. 267, 294 (1974). It has done so despite tortured meandering on occasion. *See* NLRB v. Wyman-Gordon Co., 394 U.S. 759 (1969). It also appears to have survived the suggestion in Morton v. Ruiz, 415 U.S. 199, 230-36 (1974), that certain kinds of policy affecting individual rights and obligations must be developed by rule rather than case-by-case adjudication. *See* Fuchs, *Development and Diversification in Administrative Rule Making,* 72 NW. U. L. REV. 83, 101-02 (1977).

34. NLRB v. Majestic Weaving Co., 355 F.2d 854, 860 (2d Cir. 1966) (Friendly, J.). The pointed hint Judge Friendly had in mind was the statement of the Supreme Court in *SEC v. Chenery Corp.* that:

> [s]ince the Commission, unlike a court, does have the ability to make new law prospectively through the exercise of its rule-making powers, it has less reason to rely upon *ad hoc* adjudication to formulate new standards of conduct. . . . The function of filling in the interstices of the Act should be performed, as much as possible, through this quasi-legislative promulgation of rules to be applied in the future.

SEC v. Chenery Corp., 332 U.S. 194, 202 (1947). The Supreme Court in this case, however, did not require that the SEC proceed by rule.

35. *See, e.g.,* H. FRIENDLY, THE FEDERAL ADMINISTRATIVE AGENCIES 142-47 (1962); Bernstein, *supra* note 32, at 587-93; Boyer, *Alternatives to Administrative Trial-Type Hearings for*

Indeed, rulemaking has been characterized as "one of the greatest inventions of modern government."[36] The explosion in rulemaking activity at the federal level has raised numerous issues of law and policy, one of which is the significance of prejudgment.[37] There is every reason to believe that prejudgment will be as prevalent in rulemaking as it is in adjudication. The new question presented, however, is whether a state of mind which is a vice in adjudication is simply a neutral factor or even a virtue in rulemaking. The search for an answer to this question and a standard governing prejudgment in rulemaking is of recent origin in the United States.[38] Yet, development of the principles of natural justice in England demonstrate that a search for new standards governing bias in administrative rulemaking, including prejudgment, is feasible.[39] The English evolution of a duty to act fairly without regard to the form of administrative action is one way in which American law is capable of developing.[40] New and meaningful standards can be developed. Nonetheless, the United States has lagged in this search,[41] and it has only been in the past year that its law has caught up.

This development is reflected in the case of *Association of National*

Resolving Complex Scientific, Economic, and Social Issues, 71 MICH. L. REV. 111, 169 (1972); Fuchs, *supra* note 32, at 48; Mayton, *The Legislative Resolution of the Rulemaking Versus Adjudication Problem in Agency Lawmaking,* 1980 DUKE L. J. 103; Peck, *A Critique of the National Labor Relations Board's Performance in Policy Formulation: Adjudication and Rule-Making,* 117 U. PA. L. REV. 254, 260 (1968); Strauss, *Rules, Adjudications, and Other Sources of Law In An Executive Department: Reflections on the Interior Department's Administration of the Mining Law,* 74 COLUM. L. REV. 1231, 1275 (1974); Wright, *supra* note 32. *But see, e.g.,* Robinson, *supra* note 32, at 514, 527-35; Robinson, *On Reorganizing the Independent Regulatory Agencies,* 57 VA. L. REV. 947, 957-59 (1971); Note, *NLRB Rulemaking: Political Reality Versus Procedural Fairness,* 89 YALE L. J. 982 (1980).

36. K. DAVIS, *supra* note 3, § 6.15 at 283 (Supp. 1970). Professor Davis wrote with informal rulemaking under the APA specifically in mind. K. DAVIS, *supra* note 32, § 6.01 at 168 (1976).

37. *See generally* Carberry, *Ex Parte Communications in Off-The-Record Administrative Proceedings: A Proposed Limitation on Judicial Innovation,* 1980 DUKE L. J. 65; Kestenbaum, *supra* note 16, at 680-89; Pedersen, *supra* note 32, at 50-51, 76-88; Robinson, *The Federal Communications Commission: An Essay on Regulatory Watchdogs,* 64 VA. L. REV. 169, 173-76, 226-30 (1978); Sinaiko, *Due Process Rights of Participation in Administrative Rulemaking,* 63 CALIF. L. REV. 886, 886-92 (1975); Wright, *supra* note 32, at 383-88; Note, *Ex Parte Communications in Rulemaking:* Home Box Office *and* Action for Children's Television, 1978 ARIZ. ST. L. J. 69; Note, *supra* note 9, at 805-06.

38. Perhaps the reason for this lies in the traditional learning on the relevance of due process to rulemaking. It may be simply that no one asked the question because the answer was assumed to be obvious. The explanation for the recent vintage of the search may lie in the fact that rulemaking is now in vogue and highly visible today. Perhaps it lies in the advent of "hybrid" rulemaking which by its nature blurs the lines between rulemaking and adjudication and thus forces the asking of previously unsuspected questions. Perhaps it lies in an increased sensitivity to the peculiar characteristics and demands of the administrative process which make solutions acceptable for the traditional branches of government unacceptable for the fourth, the administrative branch.

39. *See* text accompanying notes 155-69 *infra.*

40. *See* text accompanying notes 155-70 *infra.*

41. *See Bias in Rulemaking, supra* note 2, at 886; *Regulator Disqualification, supra* note 2, at 1198-99.

Advertisers, Inc. v. FTC.[42] In 1978, the Federal District Court for the District of Columbia ruled that Michael Pertschuk, Chairman of the Federal Trade Commission (FTC), had prejudged factual issues integral to the ultimate disposition of the Commission's rulemaking proceeding concerning advertising to children and enjoined his continued participation in the proceeding.[43] In late 1979, the Court of Appeals for the District of Columbia reversed the order of the district court and cleared the way for further participation by Chairman Pertschuk.[44] Thereafter, Chairman Pertschuk announced his decision to withdraw voluntarily from participation in the rulemaking proceeding.[45] In June, 1980, the United States Supreme Court denied petitions for a writ of certiorari in the case.[46] Consequently, the decision of the court of appeals stands at this time as the leading case on prejudgment in rulemaking.

The decision is noteworthy in two principal respects. The first is the

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42. 460 F. Supp. 996 (D.D.C. 1978), *rev'd,* 627 F.2d 1151 (D.C. Cir. 1979), *cert denied,* 100 S. Ct. 3011 (1980). It may be some time before the capacity of this rulemaking proceeding for generating controversy is exhausted. The prejudgment issue represents but one facet of the intense struggle which surrounds it. Previously advertisers and trade associations had sought and were denied interlocutory review of special rules which the FTC promulgated to deal with the proceeding, certain ex parte contacts and the adequacy of notice. Association of Nat'l Advertisers, Inc. v. FTC, 617 F.2d 611 (D.C. Cir. 1979). These issues await final resolution. Questions also have been raised concerning the FTC's authority to promulgate its proposal and, assuming its authority, the constitutionality of that authority in light of recent developments in the area of commercial speech protected by the first amendment. *See* Comment, *Big Brother's War on Television Advertising: How Extensive is the Regulatory Authority of the Federal Trade Commission?,* 33 Sw. L. J. 683, 686-700 (1979). These, too, will require determination by the courts unless the FTC reexamines and redefines its objectives, a possibility at this juncture, or Congress undertakes this task itself. There is already evidence that Congress may be inclined to do this. *See* Federal Trade Commission Improvements Act of 1980, Pub. L. No. 96-252, 94 Stat. 374 (1980) (to be codified at 15 U.S.C. §§ 45(b), (f), 46, 50, 57a-c, 58). Of special importance are the provisions of the 1980 Act providing for advance notice of proposed rulemaking, greater independence for officers presiding in FTC rulemaking proceedings, limitations on ex parte contacts in such proceedings, and regulatory analyses and agendas in connection with such proceedings. *Id.* §§ 8, 9, 12, 15 (to be codified at 15 U.S.C. §§ 57a, 57b-3). Likely to prove of greatest significance to the future of the advertising to children rulemaking proceeding, however, are two other provisions of the amendments. One strips the FTC of authority to promulgate any rule in the proceeding on the basis of a finding that such advertising constitutes an unfair act or practice and requires suspension of the proceeding until certain new procedures are met. *Id.* § 11(a), (c) (to be codified at 15 U.S.C. § 57a). The other subjects any final rule which might be promulgated to congressional review and possible legislative veto. *Id.* § 21 (to be codified at 15 U.S.C. § 57a-1).

43. Association of Nat'l Advertisers, Inc. v. FTC, 460 F. Supp. 996 (D.D.C. 1978).

44. 627 F. 2d 1151, 1175 (D.C. Cir. 1979).

45. The Chairman withdrew on January 7, 1980. He indicated that "[n]ow that the law has been clarified and the danger of chilling candid discussion in agency rulemaking proceedings posed by an adverse precedent has passed, I have to consider whether my continuing participation in this proceeding remains in the best interest of the FTC generally and the Children's Advertising proceeding in particular." He concluded it was best to step down to "remove any issue of my personal participation from the legislative debate" which was underway concerning termination of the entire proceeding. Legal Times of Washington, Jan. 14, 1980, at 14, col. 1.

46. 100 S. Ct. 3011 (1980). It is possible that the Supreme Court was influenced in some measure by the apparent mootness of the case following the Chairman's voluntary recusal.

enunciation of a standard for disqualification of administrators from participation in rulemaking on the grounds of prejudgment. The court held that a member of an agency may be disqualified from involvement in a rulemaking proceeding "only when there [is a] *clear and convincing* showing that [he] has an *unalterably closed mind* on matters critical to the disposition of the proceeding."[47] In apt and picturesque fashion the dissent observed that "[s]uch a rule would establish a legal principle that evidence of bias and prejudice would not be disqualifying unless it could surmount a fence that is horse high, pig tight and bull strong."[48]

The second significant aspect is the manner in which the majority marshalled various principles of administrative law to lead it inexorably to its standard for disqualification. For example, in rejecting the district court's view that the rulemaking proceeding at issue was hybrid or quasi-adjudicative in nature, the majority noted that "[t]he district court's characterization ... ignores the clear scheme of the APA. Administrative action pursuant to the APA is either adjudication or rulemaking."[49] This resurrection of the traditional view of the dichotomy between rulemaking and adjudication by this particular court is in itself curious.

The purpose of this Article is to take this case as a point of departure and reference for an analysis of the dilemma of prejudgment in administrative rulemaking and the principles of constitutional and statutory law which may limit or aid in controlling prejudgment. The proposition is that the search for a standard in the rulemaking context must continue. To that end this Article examines alternatives for confronting the problem and suggests that there are alternatives which will accommodate the realistic needs of administrative decisionmakers while simultaneously serving the higher need for maintaining a sense of integrity and credibility in administrative action whether it takes the form of rulemaking, adjudication, or some combination of the two.

II. PREJUDGMENT AND THE FTC

A. *The Prominence of the FTC in the Law of Administrative Bias and Prejudgment*

It seems appropriate that the FTC was the focal point of the controversy which resulted in the standard for disqualification in administrative rulemaking in *Association of National Advertisers, Inc. v. FTC*.[50] The Commission has contributed much to the development of

47. 627 F.2d at 1170 (emphasis added).
48. *Id.* at 1188.
49. *Id.* at 1160.
50. 627 F.2d 1151 (D.C. Cir. 1979), *cert. denied*, 100 S. Ct. 3011 (1980).

the law concerning bias in administrative proceedings.[51] There are two primary reasons for this.[52] One is the human factor. Institutions of

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51. Perhaps more than any other federal agency it has lent its name, albeit involuntarily, to leading cases on disqualification. The subject cannot be dealt with absent consideration of, for example, FTC v. Cement Institute, 333 U.S. 683 (1948). This case concerned the unsuccessful allegation that a prior FTC study and report to Congress on pricing in the cement industry constituted disqualifying prejudgment which precluded a subsequent FTC adjudication on the legality of the pricing practices. In Texaco, Inc. v. FTC, 336 F.2d 754 (D.C. Cir. 1964), *vacated on other grounds,* 381 U.S. 739 (1965), the court disqualified Chairman Dixon from further participation in an FTC adjudication on account of a speech he had given to a trade association meeting. Pillsbury Co. v. FTC, 354 F.2d 952 (5th Cir. 1966), concerned the successful allegation that Congressional interference in an FTC adjudication challenging certain acquisitions required the disqualification of certain commissioners from further participation. At issue in American Cyanamid Co. v. FTC, 363 F.2d 757 (6th Cir. 1966), were the prior activities of Chairman Dixon as a member of the staff to a Congressional subcommittee. He was disqualified from participating in an FTC proceeding involving issues before the subcommittee and later before the FTC. In Safeway Stores, Inc. v. FTC, 366 F.2d 795 (9th Cir. 1966), *cert. denied,* 386 U.S. 932 (1967), Chairman Dixon was not disqualified from participating in review of a cease and desist order even though his examination of a witness gave some indication of a fixed viewpoint on issues before the Commission. Finally, in Cinderella Career & Finishing Schools, Inc. v. FTC, 425 F.2d 583 (D.C. Cir. 1970), Chairman Dixon was disqualified on account of a speech he had given which reflected prejudgment of the facts at issue in an adjudication pending before the Commission.

52. There are other reasons for this phenomenon; however, they do not stand up under close scrutiny. The FTC as a multi-member agency consisting of five commissioners presents more opportunities for allegations of bias because of the number of members. It may be merely a matter of a greater number of potential targets, but the FTC is by no means unique in its multiple membership. *See, e.g.,* 15 U.S.C. § 2053(a) (Supp. II 1978) (creating the Consumer Product Safety Commission consisting of five members).

On the other hand, the FTC has been in existence since 1914. If the accumulation of allegations of bias and thus contributions to the case law require only the passage of time, one might expect an agency of senior status to be at the forefront. One difficulty in any theory based on longevity is that the Interstate Commerce Commission was established in 1887, and it has made no significant contributions to the law of bias in administrative proceedings. The Interstate Commerce Act of February 4, 1887, ch. 104, 24 Stat. 379 (1887).

Another possibility is that the FTC lacks the traditions which serve as a check against conduct likely to be challenged as biased. It has been observed that "no tradition of restraint operates on the administrative body comparable to that which has been developed in the courts." Note, *Bias of Trial Examiners and Due Process of Law,* 30 GEO. L. J. 54, 62 (1941). Yet this, too, is unsatisfactory. The Commission is not a newcomer to government. The time for evolving a "tradition of restraint" has been ample. Rather it appears that the FTC has been unable or unwilling to do so. Had it been otherwise, it is unlikely that one of its commissioners would have had reason to report some fifty-seven years after its creation that most collateral suits instituted against its proceedings involved either rulings in adjudicatory proceedings or allegations of bias and prejudgment. MacIntyre & Volhard, *The Federal Trade Commission,* 11 B.C. INDUS. & COM. L. REV. 723, 761 (1970).

Each of the explanations just considered look inward to the FTC itself, but external factors might be the source of the FTC's prominence in the law of administrative bias. It is, after all, persons affected by agency action who bring such matters to the courts, charging bias and prejudgment once agency officials have refused to recuse themselves voluntarily. Perhaps those subject to the jurisdiction of the FTC are especially recalcitrant and given to the dilatory lawsuit on any ground imaginable. With its responsibility over proceedings concerning "unfair methods of competition" and "unfair or deceptive acts or practices" the Commission has jurisdiction over much of American business and industry. Those affected by FTC action represent a cross section of the business community, and that cross section is affected by numerous other regulatory programs. If it were the affected parties who are the cause of the frequency of allegations of bias in the FTC, it

government are not biased or given to prejudgment; persons who populate them may be. Special mixtures of professional zeal, personality and background may produce individuals who in particular situations and cases may tend toward bias and prejudgment, real or apparent. Such individuals in control of an agency may influence and set the tone of administration and enforcement for the entire agency. This in turn may affect the way in which the agency is perceived by those affected by its decisions. Consequently, affected parties will be more likely to challenge the decisions of officials whom they perceive to be prejudiced or biased. There is some evidence that this is true with the FTC. Former Chairman and now Commissioner Paul Rand Dixon has been the key figure in a number of the significant bias cases involving the FTC.[53] One commentator has noted that "Dixon seems to have been

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would seem reasonable for them to exhibit similar tendencies with respect to other agencies. Certainly other agencies have significant impact on commercial activities and economic interests, but no single agency has emerged to challenge the leadership role of the FTC in the law of administrative bias. There is, therefore, reason to look further within the FTC itself.

One characteristic of the FTC which gives an air of inevitability to charges of bias and prejudgment is the combination of numerous functions within the agency and especially at the top of the agency in the commissioners themselves. From the outset Congress assigned the FTC the multiple tasks of investigating, prosecuting and adjudicating cases. *See* Act of September 26, 1914, ch. 311, 38 Stat. 717. Even if this combination of functions does not result in actual bias, the appearance of bias persists. As a former commissioner observed, "[t]he problem of avoiding prejudgment, in appearance or in fact, constantly hovers over all agency activities and is troublesome to agency members in almost every kind of action it takes." Elman, *A Modest Proposal for Radical Reform,* 56 A.B.A.J. 1045, 1048 (1970). He attributed this in particular to the "blending of prosecutorial and adjudicative powers in a single tribunal ...." *Id.*

Dealing with the questions of bias which this feature raises is not impossible when disparate and potentially conflicting tasks are divisible. For example, staff members engaging in investigation and prosecution of adjudicatory proceedings can be prohibited from advising in deciding the cases. Section 554(d) of the APA provides that "[a]n employee or agent engaged in the performance of investigative or prosecuting functions for an agency in a case may not, in that or a factually related case, participate or advise in the decision, recommended decision or agency review...." 5 U.S.C. § 554(d) (2) (1976). *But see generally* Pedersen, *The Decline of Separation of Functions in Regulatory Agencies,* 64 VA. L. REV. 991 (1978), for a criticism of the application of the concept of separation of functions to agency proceedings which are nonaccusatory in nature.

Individual commissioners with multiple functions are obviously not susceptible to comparable insulation. For them the problem remains. The prohibition of combination of functions in § 554(d) does not apply "to the agency or a member or members of the body comprising the agency." 5 U.S.C. § 554(d)(C) (1976). *See, e.g.,* FTC v. Cement Institute, Inc., 333 U.S. 683 (1948); Ash Grove Cement Co. v. FTC, 577 F.2d 1368 (9th Cir. 1978). Yet this is not uniquely an FTC problem. Numerous administrative officials in high places have a multiplicity of functions with the same risks of bias and prejudgment. In reality, "[t]he only important federal agency to which the solution of complete separation [of functions] has been applied is the National Labor Relations Board." B. SCHWARTZ, *supra* note 9, at 322.

53. *See, e.g.,* Cinderella Career & Finishing Schools, Inc. v. FTC, 425 F.2d 583 (D.C. Cir. 1970); American Cyanamid Co. v. FTC, 363 F.2d 757 (6th Cir. 1966); Safeway Stores, Inc. v. FTC, 366 F. 2d 795 (9th Cir. 1966), *cert. denied,* 386 U.S. 932 (1967); Texaco, Inc. v. FTC, 336 F. 2d 754 (D.C. Cir. 1964), *vacated on other grounds,* 381 U.S. 739 (1965). Indeed, the Chairman and presently Commissioner Dixon is the only member of the FTC ever to write an article devoted exclusively to the subject of disqualification. *See* Dixon, *supra* note 2, at 273. Whether there was in fact a challenge to the administrative process might be debated, but Chairman Dixon was correct

unusually prone to prejudging cases. . . .''[54] Subsequently, Chairman Michael Pertschuk joined Commissioner Dixon on the Commission. As the *Association of National Advertisers* case reveals, Chairman Pertschuk cannot be charged with any deficiency in professional zeal either.[55] Those who see the FTC as tending to prejudge cases will not be prone to the kind of charitable outlook which prompted one of Commissioner Dixon's colleagues to describe his actions in one case as "a momentary lapse of judicial temperament.''[56] An agency which is viewed as one which tends to decide before it proceeds is likely to generate allegations of bias and prejudgment.

The second consideration stems from the FTC's traditional role in determining policy *solely* through case-by-case administrative adjudication. In the past, the FTC could not take sanctuary by turning to rulemaking with its advantage of the traditional inapplicability of due process requirements. Therefore, for much of its history, the FTC had no choice but to proceed by a means where agency bias and prejudgment were likely to lead to disqualification. Beginning in the 1960's, however, the FTC began to test the utility and legality of its dormant rulemaking power as an alternative to policy formulation through adjudication.[57] A decade later, it was established that the Commission could in fact make rules. This was established first by judicial decision and subsequently by legislative enactment.[58]

Congress, in creating the FTC, clearly intended that the agency formulate policy. The Federal Trade Commission Act (FTCA) was only "unfinished law which the administrative body must complete before it is ready for application.''[59] Congress expected the Commission in the course of adjudicating cases "to formulate standards that would put flesh on the 'bare-bones concept of unfair competition.' ''[60] In all likelihood the adjudicatory means by which the Commission believed it was required to proceed also created expectations among persons before the agency concerning how the Commission should conduct itself and reach its decisions. When these expectations were frustrated and bias

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in his implicit recognition of a challenge to the Dixon process, as amply illustrated in both prior and subsequent cases.

54. Gifford, *The* Morgan *Cases: A Retrospective View,* 30 AD. L. REV. 237, 272 n.221 (1978).

55. *See* note 121 *infra.*

56. MacIntyre & Volhard, *The Federal Trade Commission,* 41 GEO. WASH. L. REV. 407, 408 (1973).

57. *See* text accompanying notes 77-84 *infra.*

58. *See* text accompanying notes 85-98 *infra.*

59. FTC v. Ruberoid Co., 343 U.S. 470, 485 (1952) (Jackson, J., dissenting).

60. Auerbach, *Should Administrative Agencies Perform Adjudicatory Functions?,* 1959 WIS. L. REV. 95, 103. The FTC's authority stands in contrast to the more typical agency to which Congress assigns both rulemaking and adjudicatory powers, thus affording flexibility in policy development. *Id.* at 101.

and prejudgment suspected, these persons turned to the courts for relief.[61]

The personalities of the individuals in control, the perceptions of the agency as inclined toward bias and prejudgment, and the FTC's mandate to proceed by adjudication were all factors which the Commission did not have in common with other agencies. These suggest some explanation of why bias and prejudgment in the FTC have been the source of an unexpectedly large number of the significant decisions on the subject. Of course, individuals may pass from the scene, perceptions may fade or alter, and procedural mandates are not immutable. The last factor is especially relevant to the issue of prejudgment in rulemaking because of the significance which the court attached to the traditional dichotomy between rulemaking and adjudication in *Association of National Advertisers.*

B. Development of Policy Through Administrative Adjudication and Rulemaking in the FTC

Section 5 of the Federal Trade Commission Act of 1914 declared unlawful "unfair methods of competition."[62] The Wheeler-Lea amendment to section 5 added the prohibition of "[u]nfair or deceptive acts or

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61. The National Labor Relations Board, an agency which has had a choice between rulemaking and adjudication for developing policy, has consistently rejected rulemaking and favored adjudication. It has done so notwithstanding frequent criticism. *See, e.g.,* Bernstein, *supra* note 32; Kahn, *The NLRB and Higher Education: The Failure of Policymaking through Adjudication,* 21 U.C.L.A. L. REV. 64 (1973); Peck, *supra* note 35; Peck, *The Atrophied Rulemaking Powers of the National Labor Relations Board,* 70 YALE L. J. 729 (1961); *but see* Note, *NLRB Rulemaking: Political Reality Versus Procedural Fairness,* 89 YALE L. J. 982 (1980). The agency has not been swayed by intimations from the courts that rulemaking is preferable. *See generally* NLRB v. Wyman-Gordon Co., 394 U.S. 759 (1969); Comment, *Rulemaking and Adjudication in Administrative Policymaking:* NLRB v. Wyman-Gordon Co., 11 B.C. INDUS. & COM. L. REV. 64, 65, 75 (1969).

In light of this calculated reliance on adjudication it is interesting and perhaps not surprising that the NLRB has been as prolific a contributor to developments in the law of bias and prejudgment as the FTC. *See, e.g.,* NLRB v. Pittsburgh S.S. Co., 337 U.S. 656 (1949); NLRB v. Donnelly Garment Co., 330 U.S. 219 (1947); NLRB v. Dennison Mfg. Co., 419 F.2d 1080, 1085 (1st Cir. 1969); NLRB v. American Art Indus., Inc., 415 F. 2d 1223, 1226-27 (5th Cir. 1969); NLRB v. Bush Hog, Inc., 405 F.2d 755, 756 (5th Cir. 1968); Tele-Trip Co. v. NLRB, 340 F.2d 575, 581 (4th Cir. 1965); Hendrix Mfg. Co. v. NLRB, 321 F.2d 100, 103 (5th Cir. 1963); NLRB v. Federal Dairy Co., 297 F. 2d 487, 488 (1st Cir. 1962); Bituminous Material & Supply Co. v. NLRB, 281 F.2d 365, 372 (8th Cir. 1960); NLRB v. C. & J. Camp, Inc., 216 F. 2d 113, 116 (5th Cir. 1954); Local No. 3 v. NLRB, 210 F.2d 325, 329-30 (8th Cir. 1954); NLRB v. Bryan Mfg. Co., 196 F. 2d 477, 478 (7th Cir. 1952); NLRB v. Phelps, 136 F.2d 562 (5th Cir. 1943); NLRB v. Acme-Evans Co., 130 F. 2d 477, 479-83 (7th Cir. 1942); NLRB v. Air Assocs., Inc., 121 F.2d 586, 588-90 (2d Cir. 1941); Berkshire Employees Ass'n v. NLRB, 121 F. 2d 235, 238-39 (3rd Cir. 1941); NLRB v. Washington Dehydrated Food Co., 118 F. 2d 980 (1941); Montgomery Ward & Co. v. NLRB, 103 F.2d 147, 149-57 (8th Cir. 1939).

62. Act of Sept. 26, 1914, PUB. L. No. 203, § 5(a)(1), 38 Stat. 25.

practices in commerce. . . ."[63] No effort was made to give statutory meaning to the terms "unfair methods of competition" and "unfair or deceptive acts or practices."[64] Instead Congress relied on the Commission to proceed by complaint and administrative hearing whenever the Commission had "reason to believe that any ... person, partnership, or corporation has been or is using any unfair method of competition or unfair or deceptive act or practice. . . ."[65] The Commission was empowered to issue cease and desist orders following completion of the adjudicatory administrative procedures specified. These orders were then subject to judicial review in a United States court of appeals.[66]

For decades it was accepted that this was the Commission's primary method of formulating policy. Thus, few would have disagreed with the Attorney General's Committee on Administrative Procedure in 1941 when it observed that the FTC's "principal duty is enforcement, by decision of cases, of certain statutory prohibitions . . .,"[67] nor with Dean Landis who noted that "the picking out of such rules as alone can make real the nature of 'unfair ... competition' was to come from the process of adjudication"[68] rather than rulemaking.

The requirement that the FTC rely on adjudication was not without its early critics. Long before the virtues of rulemaking became widely heralded, Professor Handler suggested that:

> [t]he definition of unfair competition by administrative legislation is incomparably superior to definition by administrative decision. The method of judicial exclusion and inclusion does not permit of a sustained, consistent, comprehensive and speedy attack upon the trade practice problem. The case by case determination

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63. Act of Mar. 21, 1938, PUB. L. NO. 447, 52 Stat. 111. The purpose of the 1938 amendment was to make "the consumer, who may be injured by an unfair trade practice, of equal concern, before the law, with the merchant or manufacturer injured by the unfair methods of a dishonest competitor." H.R. REP. NO. 1613, 75th Cong., 1st Sess. 3 (1937). *Accord,* S. REP. NO. 1705, 74th Cong., 2d Sess. 2-3 (1936).

64. *See* S. REP. NO. 597, 63d Cong., 2d Sess. 13 (1914); H. R. CONF. REP. NO. 1142, 63d Cong., 2d Sess. 19 (1914); Baker & Baum, *Section 5 of the Federal Trade Commission Act: A Continuing Process of Redefinition* , 7 VILL. L. REV. 517 (1962).

65. 15 U.S.C. § 45(b) (1976).

66. *Id.* §§ 45(b), 45(c). Although the statute gave the FTC certain additional powers generally investigatory in nature, administrative adjudication was the principal element in the legislative design. The FTC was empowered, for example, to investigate business activities, conduct and practice, require reports, investigate compliance with antitrust decrees, investigate alleged violations of the antitrust laws at the request of the President or Congress, and publish information and reports. *Id.* § 45(a)-(d), (f). On the subject of rulemaking, the act simply granted the FTC as one of its additional powers the authority "[f]rom time to time ... to make rules and regulations for the purpose of carrying out the provisions of this subchapter." *Id.* § 46(g). *See* text accompanying notes 94-98 *infra.*

67. ADMINISTRATIVE PROCEDURE IN GOVERNMENT AGENCIES: REPORT OF THE COMMITTEE ON ADMINISTRATIVE PROCEDURE, S. DOC. NO. 8, 77th Cong., 1st Sess. 58 (1941). *See* Kintner, *A Government Lawyer Comments on the Davis Treatise,* 43 MINN. L. REV. 620, 634 (1959).

68. J. LANDIS, THE ADMINISTRATIVE PROCESS 149-50 (1938).

> takes years to cover even a narrow field; it leaves wide lacunae; false starts are difficult to correct and the erroneous decision is just as prolific as a sound ruling in begetting a progeny of subordinate rules.[69]

Nonetheless, the prevailing view was that the FTC was without authority to engage in substantive rulemaking. For years the FTC conceded that section 6(g) of the FTCA did not constitute a grant of authority to make substantive rules.[70] In the absence of an express grant of such authority,[71] and in the face of statutory language and legislative history suggesting congressional intent that the FTC proceed by adjudication,[72] it is not surprising that the issue was at best "open and debatable."[73]

During this period, however, the FTC did make some effort to issue pronouncements of general applicability. These broad pronouncements had the quality, if not the effect, of rules. As early as 1919, trade practice conferences and agreements were instituted to develop agency policy.[74] These were undertaken despite the absence of delegated authority and despite their lack of legal effect.[75] In 1955, the Commission moved a step closer to traditional rulemaking when it began issuing informal interpretative rules known as "guides."[76] These represent early efforts within the agency to develop policy by means other than adjudication.

Seven years later, the FTC's attitudes began to change on the desirability of rulemaking as a means of policy development. Chairman Dixon observed that after nearly a half century of adjudicatory experience, "we are now in a position to promulgate 'rules and regulations' that will state with some clarity at least some of the substantive requirements. . . ."[77] Occasionally, the FTC asserted the power to promulgate binding trade regulation rules under section 6(g).[78] For example, one commissioner took the position that, at a minimum, a violation of a trade regulation rule would constitute a prima facie showing of violation of the prohibitions against unfair methods of competition,

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69. Handler, *Unfair Competition,* 21 IOWA L. REV. 175, 259 (1936).

70. Asimow, *Public Participation in the Adoption of Interpretative Rules and Policy Statements,* 75 MICH. L. REV. 520, 561 (1977).

71. J. LANDIS, *supra* note 68, at 149.

72. Asimow, *supra* note 70, at 561.

73. Robinson, *supra* note 32, at 492.

74. Long, *The Administrative Process: Agonizing Reappraisal in the FTC,* 33 GEO. WASH. L. REV. 671, 690 (1965).

75. R. CUSHMAN, THE INDEPENDENT REGULATORY COMMISSIONS 220-22 (1941).

76. Asimow, *supra* note 70, at 528; Long, *supra* note 74, at 690.

77. Dixon, *Practice and Procedure Before the Federal Trade Commission,* 9 N.Y.L.F. 31, 61 (1963). *See* Elman, *supra* note 52, at 1047-48; Fuchs, *Agency Development of Policy Through Rule-Making,* 59 NW. U. L. REV. 781, 781 (1964).

78. Robinson, *supra* note 32, at 491-92. *See* Long, *supra* note 74, at 688-89; Nelson, *The Politicization of FTC Rulemaking,* 8 CONN. L. REV. 413, 419 (1976).

and unfair or deceptive acts or practices under section 5 of the act.[79] Sometimes the Commission argued that the power to promulgate such rules was implicit in its grant of adjudicatory authority.[80] In either case the result was an aggressive program of trade regulation rule proceedings.[81]

Notwithstanding the uncertainties concerning the source of its authority, the FTC was entering the "age of rulemaking."[82] By the end of the 1960's one Commissioner would even go as far as to suggest that adjudication was not the primary function of the FTC,[83] noting that "[a]djudication was not intended to be, and should not be, the principal mechanism relied on for articulation and enforcement of agency policy. Indeed, it is questionable whether the Commission should continue to adjudicate on a case by case basis."[84] The zeal and enthusiasm with which the FTC embraced the rulemaking alternative assured that the issue of statutory authority would not go unnoticed and unchallenged.

By 1974 the FTC's authority to promulgate substantive trade regulation rules having the force and effect of law was bolstered when the Supreme Court denied certiorari in the case of *National Petroleum Refiners Association v. FTC.*[85] At issue was the FTC's authority to promulgate a trade regulation rule announcing that failure to post octane ratings on the pumps at gasoline service stations was an unfair method of competition and an unfair or deceptive act or practice.[86] The Court of Appeals for the District of Columbia, held that section 6(g) authorized the Commission "to promulgate rules defining the meaning of the statutory standards of the illegality the Commission is empowered to prevent."[87] It set about the task of resolving issues of legislative intent concerning section 6(g) with the goal of fulfilling "our duty . . . to favor an interpretation which would render the statutory design effective in terms of the policies behind its enactment and to avoid an interpretation which would make such policies more difficult of fulfillment. . . ."[88]

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79. MacIntyre & Volhard, *supra* note 52, at 763.

80. Robinson, *supra* note 32, at 492-96.

81. One of the more notable proceedings involved cigarette advertising. *See* Elman, *Administrative Reform of the Federal Trade Commission,* 59 GEO. L. J. 777, 828 (1971); Elman, *Rulemaking Procedures in the FTC's Enforcement of the Merger Law,* 78 HARV. L. REV. 385, 385 (1964); Robinson, *supra* note 32, at 490-92; Rogge, *An Overview of Administrative Due Process,* Part II, 19 VILL. L. REV. 197, 261 (1973).

82. Pedersen, *supra* note 32, at 38.

83. Elman, *supra* note 81, at 781.

84. *Id.* at 804.

85. 482 F.2d 672 (D.C. Cir. 1973), *cert. denied,* 415 U.S. 951 (1974).

86. *Id.* at 674.

87. *Id.* at 698.

88. *Id.* at 689.

Thus, the court was influenced by current trends giving preference to rulemaking. It noted the "obvious judicial willingness to permit substantive rule-making to undercut the primacy of adjudication in the development of agency policy. . . ."[89] The court noted several reasons underlying the trend; the flexibility, efficiency, practicality and fairness of rulemaking in lieu of adjudication.[90]

In this manner the FTC, an agency which viewed itself and which was viewed by others as a prosecuting and adjudicatory body, was transformed. Its inclination to make rules was clear; its authority to make rules was established. It now had a choice between rulemaking and adjudication for policy development. However, there were lingering fears concerning how the FTC would exercise its choice. The court in *National Petroleum Refiners Association* had attempted to assuage these fears with the promise of judicial vigilance:

> Any fears that the agency could successfully use rule-making power as a means of oppressive or unreasonable regulation seem exaggerated in view of courts' general practice in reviewing rules to scrutinize their statement of basis and purpose to see whether the major issues of policy pro and con raised in the submissions to the agency were given sufficient consideration. The Commission is hardly free to write its own law of consumer protection and antitrust since the statutory standard which the rules may define with greater particularity is a legal standard. Although the Commission's conclusions as to the standard's reach are ordinarily shown deference, the standard must "get its final meaning from judicial construction."[91]

There was less reason for those who would be affected by Commission rules to be sanguine and to take solace in the court's obvious faith in the utility of judicial review in assuring that only rules harmonious with the "legal standard" would be promulgated. As recently as 1972 the United States Supreme Court in *FTC v. Sperry & Hutchinson Co.*[92]

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89. *Id.* at 679.

90. *Id.* at 681-83. Subsequently, Judge Wright, who authored the opinion in *National Petroleum Refiners Association,* described the willingness and now established authority of the FTC to proceed by rule rather than "in a piecemeal fashion through adjudication ... [as a] healthy and welcome development." Wright, *supra* note 32, at 375.

91. National Petroleum Refiners Ass'n v. FTC, 482 F.2d 672, 692-93 (D.C. Cir. 1973), *cert. denied,* 415 U.S. 951 (1974) (citations omitted).

92. 405 U.S. 233 (1972). The Supreme Court has noted that:

> legislative and judicial authorities alike convince us that the Federal Trade Commission does not arrogate excessive power to itself if, in measuring a practice against the elusive, but Congressionally mandated standard of fairness, it, like a court of equity, considers public values beyond simply those enshrined in the letter or encompassed in the spirit of the antitrust laws.

Id. at 244. The case involved an FTC adjudication under § 5 with respect to trading stamp practices, but the standard which the FTC was in a position to "define with greater particularity" by

broadly interpreted the FTC's mandate in the context of adjudication. Thus, the significance of *National Petroleum Refiners Association* was to leave the FTC free to act through rulemaking, perhaps in the guise of some unheard of legislature of equity, considering and devining "public values" through rulemaking. All of this could be accomplished subject to no greater direct limitations than the notice-and-comment provisions utilized in informal rulemaking under section 553 of the APA[93] and the tenuous promise of judicial intervention and oversight. Others in Congress proved less optimistic and less inclined to leave the Commission's recently discovered power to make rules unstructured and unchecked.

C. "Hybrid" Rulemaking and the FTC — The Magnuson-Moss Warranty — Federal Trade Commission Improvements Act

The enactment of the Magnuson-Moss Warranty — Federal Trade Commission Improvements Act[94] altered the FTC's freedom to choose between adjudication and informal rulemaking in development of policy. The act changed dramatically FTC rulemaking authority regarding unfair or deceptive acts or practices by requiring procedures which went beyond those required under the APA for informal rulemaking, but which fell short of those required for formal rulemaking.[95] The result was a procedural path for FTC rulemaking which has been characterized as "hybrid" or "APA-plus."[96] Express authorization was given to the FTC to promulgate not only interpretive rules and statements of policy,[97] but also rules which "define with specificity acts or practices which are unfair or deceptive. . . ."[98] The effect has been to

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rule after *National Petroleum Refiners Association* was hardly the precise kind of standard which would compel a court to conclude that the FTC acted ultra vires in promulgating a particular rule. Indeed, it seems that the Commission could very well write its own law of consumer protection. This case has been described as "a bit of judicial legislation" with the suggestion that "the present breadth of FTC authority resulted primarily neither from express congressional will nor from the gradual accretion of powers through the administrative process," but rather from the Court's decision. Nelson, *supra* note 78, at 413-14.

93. *See* National Petroleum Refiners Ass'n v. FTC, 482 F.2d 672, 681-83 (D.C. Cir. 1973), *cert. denied,* 415 U.S. 951 (1974).

94. Magnuson-Moss, Pub. L. No. 93-637, 88 Stat. 2183 (1975), *amending* 15 U.S.C. §§ 45(a)(1), (g), 46(a)-(b), (g)-(h), 49, 50, 52(a), 56, 57(a)-(c) (Supp. V 1975).

95. *See* notes 13 & 14 *supra.*

96. Although the basic requirements of § 553 of the APA for informal rulemaking were applied to Magnuson-Moss rulemaking, they were only a point of departure which Magnuson-Moss went beyond. At the same time Congress also put to rest any lingering uncertainty concerning the FTC's authority to make such rules and eliminated any possibility of retreat from the result in *National Petroleum Refiners Association.* Kestenbaum, *supra* note 16, at 679. The characterization of this variety of rulemaking as "hybrid" requires a note of caution. The term is applied with a loose interchangeability to cases in which courts require procedures beyond informal rulemaking and on occasion to formal rulemaking as well. The context in which the term is used is ordinarily readily discernible.

97. Magnuson-Moss, 15 U.S.C. § 57a(a)(1)(A) (1976).

98. *Id.* § 57a(a)(1)(B).

blur the traditional dichotomy between rulemaking and adjudication and between formal and informal rulemaking.[99] The Administrative Conference of the United States has not welcomed the legislative "hybrids" in rulemaking.[100] Some commentators have lamented aspects of the legislative "hybrids,"[101] while others have been supportive.[102] Nevertheless, the legislative "hybrid" has become common in rulemaking, and Magnuson-Moss is "[p]erhaps the most elaborate legislative example of these new developments. . . ."[103]

The Federal Trade Commission Improvements Act of 1980[104] has altered the procedural requirements for Magnuson-Moss rulemaking. Included in the 1980 amendments are provisions for advance notice of proposed rulemaking,[105] insulation of officers presiding in rulemaking

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Although Magnuson-Moss focused exclusively on the FTC, it did not represent a unique development or special preoccupation with a single agency. Legislative imposition of additional procedures in rulemaking has been common in the past decade. *See* note 16 *supra*. The reality is that there has been a decline in the confidence and faith of legislators in many of the administrative bodies they have created. Kestenbaum, *supra* note 16, at 680. Congress has had "serious misgivings about pure notice-and-comment rulemaking," Hamilton, *supra* note 14, at 1277, and "discerned the need for some protection against administrative action that is heedless of or unresponsive to, the popular will." Nelson, *supra* note 78, at 414. There has been, as a result, a "fluctuating endeavor to enhance the procedural framework of rule making" in which Congress has not worked alone; the courts have joined this effort. Kestenbaum, *supra* note 16, at 680. What is characteristic of rulemaking today is a "spectrum of procedures" ranging from informal on one end to formal on the other. Magnuson-Moss represents but one of numerous points on the continuum. Verkuil, *supra* note 16, at 187.

Many aspects of rulemaking under Magnuson-Moss justified its "hybrid" classification. *See* Nelson, *supra* note 78, at 439-47 for a detailed comparison of rulemaking under § 553 of the APA and Magnuson-Moss rulemaking. The basic requirements of § 553 of the APA for informal rulemaking were applied to Magnuson-Moss rulemaking, but only as a point of departure. Yet, Magnuson-Moss provided that rules defining unfair or deceptive acts or practices were to be promulgated in accordance with § 553 of the APA without regard to any reference in § 553 to §§ 556 and 557. The effect of this was to assure that the provisions of § 553 relating to formal rulemaking would not apply. Magnuson-Moss, 15 U.S.C. § 57a(b) (1976). *See generally* note 194 *infra*.

99. *See* Auerbach, *Informal Rule Making: A Proposed Relationship Between Administrative Procedures and Judicial Review*, 72 NW. L. REV. 15, 16, 31 (1977); Gifford, *supra* note 54, at 260-62; Hobbs, *Legal Issues in FTC Trade Regulation Rules*, 32 FOOD DRUG COSM. L. J. 414, 416 (1977); Verkuil, *supra* note 16, at 187.

100. Kestenbaum, *supra* note 16, at 690.

101. *See, e.g.*, Auerbach, *supra* note 99, at 16, 31; Kestenbaum, *supra* note 16, at 690; Verkuil, *The Emerging Concept of Administrative Due Process*, 78 COLUM. L. REV. 258, 317-18 (1978).

102. *See, e.g.*, Hamilton, *supra* note 14; Murphy & Hoffman, *Current Models for Improving Public Representation in the Administrative Process*, 28 AD. L. REV. 391, 407-09 (1976); Nelson, *supra* note 78.

103. Nathanson, *Probing the Mind of the Administrator: Hearing Variations and Standards of Judicial Review Under the Administrative Procedure Act and Other Federal Statutes*, 75 COLUM. L. REV. 721, 768 n.209 (1975).

104. Pub. L. No. 96-252, 94 Stat. 374 (1980).

105. Prior to publication of notice of proposed rulemaking the Commission now must publish an advance notice in the Federal Register. The advance notice must describe the area of inquiry, the FTC's objectives and regulatory alternatives which the FTC has under consideration. Interested person are entitled to comment on the advance notice and suggest alternative courses of

proceedings from influences both within and without the FTC and from ex parte contacts,[106] limitations on ex parte contacts with the Commission in connection with rulemaking proceedings,[107] and regulatory analyses in conjunction with rulemaking proceedings.[108] The effect of the amendments is to establish that Magnuson-Moss rulemaking is truly a hybrid whose place is somewhere between formal and informal rulemaking.

D. Procedural Modes: Prejudgment and the Pertschuk Disqualification

Twenty years ago, the issue of Chairman Pertschuk's continued participation in the *National Association of Advertisers* proceeding would have arisen in connection with an administrative adjudication. The Commission would have elected to institute a proceeding with the objective of ordering the advertisers named in the complaint to cease and desist the allegedly unfair practices. Ten years ago, the issue might have unfolded within the context of informal rulemaking when the Commission was discovering the utility of rulemaking as a substitute for adjudication and probing the boundaries of its rulemaking authority. However, the issue of Chairman Pertschuk's disqualification arose in connection with "hybrid" Magnuson-Moss rulemaking because the Commission elected to proceed by rule and by 1978, when its notice of proposed rulemaking appeared in the Federal Register,[109] Magnuson-Moss was the single source of relevant procedure for the advertising to children proceeding. Informal rulemaking under section 553 of the APA was not available to the FTC as an alternative.

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action. The FTC is required to submit the advance notice to specified Congressional committees as well. *Id.* § 8 (to be codified at 15 U.S.C. § 57a(b)).

106. Officers who preside over FTC rulemaking proceedings now are responsible only to a chief presiding officer who is not to be responsible to any other officer or employee of the Commission. Generally, presiding officers are not to consult anyone concerning facts in issue unless notice and an opportunity to participate is given to all parties. *Id.* § 9(a)(2) (to be codified at 15 U.S.C. § 57a(c)(1)).

107. The FTC is now required to promulgate rules governing ex parte outsider contacts with the Commission concerning rulemaking proceedings. The FTC's rule on the subject must provide for notice of such meetings in any weekly calendar prepared by the Commission and for a verbatim record or summary of such meetings which must be made available to the public and part of the rulemaking record of the proceeding. It is also required to promulgate a rule prohibiting contacts between investigatory staff and Commissioners and their personal staffs concerning facts which are relevant to the merits and which are not part of the rulemaking record, unless such contacts are made available to the public and part of the rulemaking record. *Id.* § 12 (to be codified at 15 U.S.C. § 57a(j), (k)).

108. In conjunction with its rulemaking activities the FTC now is required to prepare both preliminary and final regulatory analyses for the general purpose of assessing the projected benefits and adverse consequences of proposed rules. *Id.* § 15 (to be codified at 15 U.S.C. § 22).

109. 43 Fed. Reg. 17,967 (1978).

The FTC could have addressed the issue of children's advertising either by means of adjudication or Magnuson-Moss rulemaking. This raises the question of what significance should attach to the procedural mode selected. For advertisers, the procedural form results in few practical differences. The ultimate result of an adjudicatory proceeding against specific advertisers to ban certain advertising would be an order to cease and desist in the future. Had the matter been disposed of by informal rulemaking ten years ago, the ultimate result would have been the same although the one rule would apply to all advertisers. Once a rule is adopted, the advertiser may seek pre-enforcement judicial review or may ignore the rule until the FTC brings an enforcement action. However, if the rule is upheld by the courts, there is no alternative but to cease and desist. The effect is identical to that of an adjudicatory proceeding: the advertising is off the air. Similarly, Magnuson-Moss today provides that "[w]hen any rule . . . takes effect a subsequent violation thereof shall constitute an unfair or deceptive act or practice in violation of section 45(a)(1) . . ."[110] which declares such acts or practices unlawful.[111] If the FTC were successful in promulgating its rule, advertising within the rule would be prohibited in the future.[112] Its rule would be the functional equivalent of a cease and desist order arising out of an adjudication.

The FTC has a greater interest in the form of the proceeding. From its perspective, adjudication for the purpose of addressing the matter of advertising to children probably would be the least efficient and

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110. 15 U.S.C. § 57a(d)(3)(1976). The FTC's authority in the advertising to children rulemaking matter is no longer as expansive as it was when it instituted the proceeding. The Federal Trade Commission Improvement Act of 1980 expressly denies any authority to declare such advertising unlawful on the ground of unfairness. *See* Pub. L. 96-252 § 11(a)(1)(1), 94 Stat. 378 (1980) (to be codified at 15 U.S.C. § 57a).

111. 15 U.S.C. § 45(a)(1)(1976).

112. Although the procedural distinctions between adjudication, informal rulemaking and Magnuson-Moss rulemaking lead to the same end result, there may be an effect on the length of the proceeding and even its outcome.

In adjudicatory proceedings, nonparty advertisers are not bound by the decision. However, once the order issues, the ability of the nonparty advertiser to continue to advertise may be limited. The precedent established in the adjudication alone should cause the nonparty advertiser to retreat, and if it does not, it should attract the FTC's attention. Armed with its precedent, the FTC would be justified in instituting another adjudicatory proceeding. Mindful of this possibility, the prudent and responsible nonparty would be expected to cease and desist once the cause in essence had been lost in the initial proceeding. It is also unlikely that broadcasters would continue to accept such advertisements. Thus, subject to these modest refinements, the practical realities would be identical without regard to the mode of procedure. This effect is in great measure attributable to the nature of FTC cease and desist orders. Like rules, they look to the future; they govern and affect future acts and practices. Past practices are not penalized except in the sense that they are prohibited in the future. Whether the form of the proceeding will affect its outcome depends very much on one's perception of the degree of the difference, if any, between the role the courts are likely to play in judicial review of rulemaking and adjudication.

arguably the least effective procedure. The procedures surrounding the issuance of a cease and desist order are complicated and potentially time consuming. Adjudication also presents the problem of ensuring compliance among those not subject to the order. In contrast, informal rulemaking presents the simplest, most efficient and effective alternative for the FTC. Publishing notice of the proposed rule, accepting and digesting written comments, and publishing a final rule would accomplish the ban on advertising, subject to probable judicial review. With its added procedures, Magnuson-Moss lies somewhere in between on the spectrum of efficiency and effectiveness. However, because informal rulemaking is not an option, Magnuson-Moss rulemaking is still preferable to adjudication for the FTC. Yet, in terms of the final result, a ban on certain advertising to children, the FTC still is capable of achieving its objective no matter how it elects to proceed.

An important question remains concerning what standard for disqualification is to be applied in rulemaking and whether that standard will be different from that applied in adjudication. Specifically, the question is whether a Commissioner will be entitled to prejudge issues in rulemaking while being precluded from doing so in adjudication. If so, this distinction must be justified under circumstances where the policy objective is the same, regardless of the mode of procedure selected. This issue is central to an assessment of the appropriate standard for disqualification by reason of prejudgment in rulemaking.

The result of *Association of National Advertisers* was to grant a license to prejudge in rulemaking, but not in adjudication. An adjudicator is to be disqualified if a "disinterested observer may conclude that [the decisionmaker] has in some measure adjudged the facts as well as the law of a particular case in advance of hearing it."[113] A rulemaker is to be disqualified "only when there is a clear and convincing showing that he has an unalterably closed mind on matters critical to the disposition of the [rulemaking]."[114] These strikingly contrasting standards for disqualification can make a difference to all concerned: advertiser, Commissioner and the public at large. The contrasting standards bear directly on how administrative officials will behave, think and speak about matters before them. They also bear directly on how those officials will be perceived by others.

If an agency official states that neither Constitution nor statute requires an oral hearing, cross-examination, or fully developed findings of fact, the persons affected may be dissatisfied with the result and feel unfairly treated. It is qualitatively another matter if the official states that I may behave as I will, think as I will, speak as I will, indeed pre-

113. 627 F.2d at 1168.
114. *Id.* at 1170.

judge as I will, unless you can show clearly and convincingly that my mind is unalterably closed on matters critical to the disposition of the case. With a passing reference to the tautology that nothing is unalterable, the official is perhaps free to prejudge. The level of dissatisfaction and sense of unfair treatment among persons affected in that event are predictable. The prejudgment issue involves more than how a decision is made; it involves the nature of the decisionmaker. Consequently, the issue of the appropriate standard for dealing with prejudgment includes the issue of whether the law does and should allow the decisionmaker to choose not only the mode of procedure, but also the kind of decisionmaker he will be. The court in *Association of National Advertisers* allows this choice.

Appreciation of these considerations is enhanced in the atmosphere of a specific factual setting. Otherwise, the risk is that an air of abstraction will permeate the prejudgment question itself. The circumstances surrounding Chairman Pertschuk's role in the advertising to children rulemaking proceeding are convenient and useful for purpose of focusing analysis. The rulemaking proceeding on children's advertising was not a spontaneous product of FTC initiative. Two groups, Action for Children's Television (ACT)[115] and the Center for Science in the Public Interest, filed petitions in 1977 requesting that the FTC promulgate rules limiting television advertising of certain products containing sugar to children.[116] That the idea for the rule came from outside the Commission did not restrict its freedom in the matter. It was not required to propose the rule; it might have elected to consider the subject of the petitions through adjudication or not at all. Nevertheless, it did decide to proceed by rule and on April 27, 1978 published a notice of proposed rulemaking pursuant to Magnuson-Moss.[117] The Commission indicated that it had decided to propose the rule after considering a staff report which found facts suggesting certain advertising to children might be unfair and deceptive. The proposed rule contained three principal limitations on advertising to children.[118] First, it proposed a ban on any televised advertising for any product when the audience consists of a significant proportion of children too young to understand the selling

115. ACT's petition for rulemaking was only the most recent of that organization's efforts to limit advertising to children. In 1970 ACT approached the Federal Communications Commission for the purpose of having it require children's programming without advertisements as part of the public service obligation of broadcasters. ACT was unsuccessful, and in 1974 the FCC concluded that rulemaking was unnecessary. Industry self-regulation measures apparently influenced the FCC. Comment, *supra* note 42, at 684.

116. 43 Fed. Reg. 17,967, 17,968-69 (1978). Subsequently in 1978 the FTC received a third petition on the subject from the Consumers Union of America and the Committee on Children's Television Inc.

117. 43 Fed. Reg. 17,967 (1978).

118. *Id.* at 17,968.

purpose or otherwise comprehend or evaluate the commercial message. Second, it proposed a ban on televised advertising of sugared food products when the audience consists of a significant proportion of older children and the consumption of the products poses the most serious dental health risks. Finally, with regard to those sugared food products not covered by the preceding prohibition, it proposed that their advertising be balanced by nutritional and/or health disclosures funded by the advertisers.[119]

An intense battle over the proposal was inevitable. A group of associations representing advertisers moved quickly to eliminate Chairman Pertschuk from the proceeding. On May 8, 1978, the Chairman received a petition to recuse himself on the grounds that his public statements on the subject of advertising to children showed prejudgment of factual issues germane to the proceeding.[120] What Chairman Pertschuk had done to attract this attention was make a speech, grant an interview or two with the press, appear on television, and write some letters. None of these activities are out of the ordinary for a public official. It was their substance which triggered the charge of prejudgment.

The Chairman's activities and statements stand for themselves.[121] Yet perceptions and reactions to them are the result of a multi-faceted process of filtering. Included among these filters which may shade and alter one's views on the propriety of the Chairman's conduct are judgments on: television in general; Saturday morning "kidvid," in particular; health and nutrition; the quality of the American food supply; capitalism and free enterprise; government regulation of private conduct; the first amendment; administrative agencies in general, the FTC in particular; the role of the courts and Congress in controlling administrative action; and, in this instance, the desirability of the FTC's specific proposal on advertising to children. These factors also affect how judges and lawyers perceive the applicable legal standard for determining whether disqualifying prejudgment is present. This is illustrated in the opinions of the judges in *Association of National Advertisers.*

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119. *Id.* at 17,969.

120. Association of Nat'l Advertisers, Inc. v. FTC, 627 F.2d 1151 (D.C. Cir. 1979), *cert. denied,* 100 S. Ct. 3011 (1980). It is noteworthy that the associations made no claim of institutional bias requiring recusal of the entire Commission. The conduct of only a single member of the FTC, its Chairman, inspired this challenge.

121. Remarks of Chairman Pertschuk to the Action for Children's Television Research Conference (Nov. 8, 1977). *See* Appendix I. *See also* Letter from Michael Pertschuk to Donald Kennedy (Nov. 17, 1977), *reprinted in* Association of Nat'l Advertisers, Inc. v. FTC, 627 F.2d 1151, 1191 (D.C. Cir. 1979). Other evidence pertaining to the issue of the Chairman's prejudgment is presented in the opinion of the court. *Id.* at 1188-92. *See* Appendix II *infra* for a reprint of the letter.

One judge viewed the Chairman's November, 1977, speech to the Action for Children's Television Research Conference as "discussion, and perhaps advocacy, of the legal theory that might support exercise of the Commission's jurisdiction over children's advertising."[122] In his view the Chairman was merely presenting legal and policy arguments which necessarily required certain factual assumptions.[123] This judge believed that the speech was "the most important evidence submitted by the appellees . . ."[124] and that the other materials submitted "demonstrated only that Chairman Pertschuk articulated the legal theory put forth in the ACT speech. . . ."[125] In contrast, the dissenting judge considered the majority treatment of the evidence illustrative of "how strong evidence of prejudgment can be played down to almost sanitize the attitudes expressed."[126] He examined and analyzed exactly what the Chairman had said and written and concluded that

> if the Notice of Rulemaking were truthful, so far as Chairman Pertschuk's view were concerned, it would have stated in substance: The commission has decided to make a fundamental assault upon Children's Advertising on TV because we are convinced that it is *evil,* unfair and allowed solely because of the moral myopia of the public and the industry. We solicit comments as to whether it should be prohibited entirely or to some degree.[127]

One significant difference affecting these two approaches was the judges' perceptions of the applicable legal standard. The majority applied the new "unalterably closed mind" standard. The dissent applied neither it nor the adjudicatory standard. The dissent believed that the appropriate standard should be that "the moving party must show by a preponderance of the evidence that the decisionmaker could not participate fairly in the formulation of the rule because of substantial bias or prejudgment on any critical fact that must be resolved in such formulation."[128] However, the dissent felt that the Chairman had violated even the majority's standard.[129] Nonetheless, the matter of the relevant standard may affect the outcome of a prejudgment case. The relevant standard also may facilitate an outcome toward which a judge is otherwise independently inclined.

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122. *Id.* at 1171.
123. *Id.* at 1171-72.
124. *Id.* at 1171.
125. *Id.* at 1173 n.56.
126. *Id.* at 1188.
127. *Id.* at 1192.
128. *Id.* at 1197.
129. *Id.* at 1181, 1195-96.

III. STANDARDS FOR DISQUALIFICATION OF CHAIRMAN PERTSCHUK: THE ALTERNATIVES

There are a number of approaches and alternatives available for dealing with issues of prejudgment in rulemaking. One possibility is that there be no limitations placed on the decisionmaker's freedom to prejudge issues in rulemaking proceedings. However, the effect of total freedom to prejudge would be to erode the significance of all administrative procedure. In all likelihood administrative procedure would take on even greater ritualistic overtones. Growth in this brand of cynicism is not in the interests of the administrative process. Consequently, this possibility should not be entertained as a serious alternative. Something more is required. There are three tenable alternatives which may be applied to disqualification in the context of rulemaking. First are self-imposed standards, allowing the individual agency official the power to recuse himself voluntarily on prejudgment grounds. Second, the agency itself may impose standards giving other agency peers the ability to disqualify an individual colleague. Lastly, legislative and judicial bodies may impose standards upon the agency.

A. Self-Imposed Standards

An individual agency official may develop his own self-imposed standards for guidance in situations involving voluntary recusal. The appeal of self-imposed standards is that ultimately the issue of prejudgment goes to the state of mind of the decisionmaker.[130] Speeches, writings, public pronouncements and the like are only external evidence which afford a glimpse of the true state of mind of the decisionmaker. Decisionmakers alone possess all of the information pertinent to resolution of an issue of prejudgment.[131] This commanding position which the decisionmaker holds over the relevant information raises the alternative of leaving the development or the application of standards to the decisionmaker.

While the imposition of self-imposed standards allow for greater access to information, there are obvious defects. First, only the rarest human being will view inclinations towards bias and prejudice as prized

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130. Comment, *Prejudice and the Administrative Process*, 59 NW. L. REV. 216, 233 (1964).

131. As Commissioner Dixon of the FTC once observed in connection with a charge of disqualifying prejudice against him, "[t]he state of a man's mind is by the nature of things known only to him and his Maker." American Cyanamid Co., [1961-63] TRADE REG. REP. ¶ 15727; at 20551 (1962). There was, nevertheless, in this instance sufficient external evidence for the judiciary to gain admittance to this select club and conclude that his prior activities as counsel to a congressional committee precluded his participation in the case before the FTC. American Cyanamid Co. v. FTC, 363 F.2d 757 (6th Cir. 1966).

virtues.[132] Since reluctance to find oneself biased or given to prejudgment is predictable and natural, others would suspect the objectivity of personal determinations of an absence of prejudgment. Others are likely to fear that the decisionmaker has been placed in the position of judge in his own cause — the cause of positive self-image. This suggests that standards developed and applied externally are essential to a credible solution to issues of prejudgment, although this does not render self-imposed standards a nullity. There remains a place for self-imposed standards because the alternatives for providing means of routine access to the mind of the administrator conflict with traditional principles of administrative law. While at one time there was a position which would permit a probe of the decisionmaker's mind to determine the propriety of his action,[133] there has since been a retreat from this posture.[134] Today courts are unlikely to allow administrative officials to be examined at all concerning their decisionmaking and certainly will not on a regular basis.[135] As Justice Marshall observed in *Citizens to Preserve Overton Park, Inc. v. Volpe,*[136]

> [t]he court may require the administrative officials who participated in the decision to give testimony explaining their action. Of course, such inquiry into the mental processes of administrative decisionmakers is usually to be avoided. And where there are administrative findings that were made at the same time as the decision, as was the case in *Morgan,* there must be a *strong showing of bad faith or improper behavior* before such inquiry may be made.[137]

In *Overton Park* the Supreme Court was willing to permit the district court, if it chose, to engage in such an inquiry, apparently influenced by the Secretary of Transportation's failure to make administrative findings at the time he had approved federal funds for a highway.[138] In the more typical case involving findings contemporaneous with the deci-

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132. *See* Comment, *supra* note 130, at 234-35.

133. *See* Morgan v. United States, 298 U.S. 468, 480-82 (1936).

134. On a fourth and final occasion the matter of the Secretary of Agriculture's efforts to establish maximum rates for the services of market agencies at the Kansas City Stockyards came before the Supreme Court. Justice Frankfurter made clear that the deposition of the Secretary and his appearance at trial in the district court to determine the process by which he reached his decision never should have occurred. Mental processes of administrators were not to be probed by the courts. United States v. Morgan, 313 U.S. 409, 421-22 (1941).

135. *See, e.g.,* National Nutritional Foods Ass'n v. FDA, 491 F.2d 1141, 1145-46 (2d Cir. 1974), *cert. denied,* 419 U.S. 874 (1974).

136. 401 U.S. 402 (1971).

137. *Id.* at 420 (emphasis added) (citations omitted).

138. *Id.*

sion, the Court would require a strong showing of bad faith or improper behavior.

In a case involving an issue of prejudgment, evidence sufficient to meet this test of bad faith or improper behavior would probably be sufficient to disqualify no matter what the standard for disqualification. Because this evidentiary burden is onerous to overcome, the internal workings of the decisionmaker's mind are effectively foreclosed to those suspecting prejudgment.[139] The improbability of access to the recesses of the decisionmaker's mind justifies emphasis and reliance, in part, on self-imposed standards. Administrators must not proceed unmindful of the fact that there is a point at which there is no recourse but to rely on their good faith, good will, sense of duty and conscientiousness to step aside when they have prejudged a case. For example under the "unalterably closed mind" standard of *Association of National Advertisers,* only the individual member of the FTC may know with certainty whether disqualification is in order.

The danger of self-imposed standards lies in an administrator's ability to use silence as an effective means to preserve what he deems to be an absolute right to prejudge. Silence will assure that there is no external evidence which could be used to bring him to task.[140] The practical impact is that a self-imposed standard may really be no standard at all. Little can be done to guide administrators on self-imposed standards other than to urge that when considering requests for voluntary recusal, they apply standards which are no more lenient than the external standards developed by others, that they give due recognition to the factors and motivations which inevitably must cloud their judgment, and that they take into account the extent to which the integrity and credibility of the process they serve depends on their good faith.

B. Agency-Imposed Standards

Understandably, self-imposed standards, although important, should not be exclusively relied upon to deal effectively with the prejudgment issue. Another standard which might be implemented is the agency-imposed standard. These are standards which an agency may develop by rule, guideline, or practice for guidance in situations involving

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139. An intriguing possibility for dealing with administrators with a demonstrated proclivity to prejudge would be a special rule for recidivists. Bad faith or improper behavior might be presumed of those administrators previously disqualified for prejudgment, thus allowing an inquiry into their mental processes in subsequent proceedings. This approach would introduce inefficiency into the process, but perhaps deter future prejudgment.

140. This possibility may even influence the design of a standard for dealing with the issue. One commentator has suggested that to require actual openmindedness is "ineffectual" and therefore that the standard focus on the appearance of prejudgment alone. Note, *Regulator Disqualification in Rulemaking Proceedings,* 57 TEX. L. REV. 1193, 1215 (1979).

voluntary or involuntary recusal. For example, in cases involving allegations of prejudgment concerning officials other than the agency head, the agency head is available for review of the issue.[141] In cases involving multi-member agencies such as the FTC, other commissioners can serve the same function when one of their own is charged with prejudgment and refuses to remove himself voluntarily from a proceeding.[142]

The principal difficulty in relying on agency-imposed standards to dispose of questions of prejudgment is that members of multi-member commissions have not been inclined to disqualify colleagues.[143] Perhaps this reluctance is attributable to professional courtesy; perhaps it reflects a tendency to close ranks. As a result, the motion to have other members of an agency disqualify one of its own would probably be denied. In any case there are inadequacies in the current FTC rules for dealing with issues surrounding disqualification of individual Commissioners.[144] It is not at all clear that the procedures for disqualification of administrative law judges are intended to apply when a Commissioner is sitting in the more usual "appellate" capacity of reviewing a decision of an administrative law judge; the language of the rules suggests that they are not. Therefore, an appeal of a refusal of an individual member to recuse himself to his peers would appear to be little more than a necessary step in the process of exhausting administrative remedies before turning to the courts.

A related problem in using an agency-imposed standard arises under the rule requiring independence, impartiality and integrity in government. These requirements apply to commissioners only insofar as statutory and Executive Order provisions are concerned.[145] This may

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141. With respect to adjudications, the APA provides that "[o]n the filing in good faith of a timely and sufficient affidavit of personal bias or other disqualification of a presiding or participating employee, the agency shall determine the matters as a part of the record and decision in the case." 5 U.S.C. § 556(b) (1976). Although one effect of this provision is to preclude an interlocutory appeal from a refusal of an administrative law judge to recuse himself, it also establishes that there may be subsequent agency review of the judge's decision to continue in the case.

142. On the other hand, in agencies with only a single person at the top, internal review based on agency-imposed standards is not realistic; in such instances the self-imposed and agency-imposed standard are likely to be one and the same.

143. *See, e.g.*, Kennecott Copper Corp., [1970-73] TRADE REG. REP. ¶ 19,619 (1971); Standard Oil Co. of Cal. [1971] TRADE REG. REP. (BNA) ¶ 19,588, 19,692; Comment, *supra* note 130, at 235-37; Annot., 8 A.L.R. FED. 300, 304 (1971).

144. 16 C.F.R. § 3.42(a) (1980). They provide for filing of a motion to disqualify along with supporting affidavits stating the alleged grounds. Should the Commissioner refuse to disqualify himself within ten days, he is required to certify the motion to the Commission which will promptly consider the validity of the motion. *Id.* § 3.42(g). Other FTC rules provide that Commission employees are to avoid any actions "which might result in, or create the appearance of . . . [l]osing complete independence or impartiality . . . [or] [a]ffecting adversely the confidence of the public in the integrity of the Government." *Id.* § 5.10(d).

145. *Id.* § 5.4(b).

mean that they are of limited application to individual commissioners. Furthermore, the only standard in the rules with any degree of preciseness is a lenient one where only the fact or appearance of a complete loss of independence or impartiality is prohibited. Presumably it is contemplated that something less than a total loss would be permissible. All of this suggests that the Commission has not really focused on the procedures and standards for disqualification of individual commissioners.

For the future there would be merit in the articulation and meaningful enforcement of standards for disqualification of individual agency members by the agency. The prospect of serious consideration by other members of a request for disqualification could only enhance the perception of the fairness of the agency. It also might serve to deter those individuals with a tendency to prejudge. However, because agencies such as the FTC have been unwilling to take this course and in effect have left it to the discretion of the individual to judge the legitimacy of claims of prejudice,[146] agency-imposed standards have proved to be of only slightly greater utility than self-imposed standards. Consequently, it is necessary to look outside the agencies for standards and their effective implementation.

C. Standards Developed and Imposed from Outside the Agency

Courts and legislatures have the authority to develop standards concerning prejudgment in administrative proceedings.[147] The standards developed to deal with prejudgment in settings other than rulemaking provide models which might be employed to deal with prejudgment in rulemaking itself.

For instance, in the *Association of National Advertisers* Judge Leventhal suggested that the "unalterably closed mind" standard is similar to the standard for recusal of judges.[148] He observed that:

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146. The reluctance of agency members to review issues of prejudice on the part of one of their own number has been justified on various grounds, including the fear of a lack of objectivity, the perceived impossibility of evaluating the state of mind of another and the fear of abuse in exercising such review functions. These concerns have been persuasively rebutted. Comment, *supra* note 130, at 236-39.

147. Typically the courts have been more active than the legislatures in the development and the enforcement of standards governing prejudgment in a variety of settings. Apparently the difference is attributable to the role which constitutional principles have played in the courts in dealing with prejudgment. At the federal level there has been legislative activity on the subject of disqualification of judges. *See* 28 U.S.C. §§ 144, 455 (1976). However, Congress has addressed disqualification in administrative proceedings in only a limited fashion. The APA provides that formal adjudications "shall be conducted in an impartial manner" and that personal bias may form the basis for disqualification. *See* 5 U.S.C. § 556(b)(3) (1976).

148. Association of Nat'l Advertisers, Inc. v. FTC, 627 F.2d 1151, 1175 (D.C. Cir. 1979), *cert. denied,* 100 S. Ct. 3011 (1980).

> even judges are not disqualified merely because they have previously announced their positions on legal issues, even as to announcements outside the course of written decisions. Judicial disqualification cannot be based on general frame reference, attitudes or assumptions as to the processes of society. And even a judge's public comment giving a general impression of a state of facts does not present a rigidity against refinement and reflection that disqualifies him from sitting in judgment on a particular fact issue.[149]

The implication of this commentary is that Chairman Pertschuk, had he been a judge, would not have been required to recuse himself. Indeed, the statutory and case law pertinent to the disqualification of federal judges indicates that a federal judge who made statements comparable to those made by Chairman Pertschuk and then proceeded to sit in judgment on the case would probably be disqualified.[150]

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149. *Id.* at 1177 (footnotes omitted).

150. The appropriate ground for disqualification of a judge in this case would be prejudgment of facts in issue. This conclusion depends upon how one reads the statements of the Chairman in relation to the issue involved. As noted, reasonable people may differ in the application of a prejudgment standard to the facts of a particular case for a variety of reasons. *See* text accompanying notes 121-29 *supra*.

It is interesting to note that at common law, judges were disqualified only for direct pecuniary interest. Frank, *Disqualification of Judges,* 56 YALE L. J. 605, 609-11, 618 (1947); Note, *The Disqualification of Judges,* 20 COLUM. L. REV. 594, 596 (1920); Note, *Disqualification of Administrative Officials for Bias,* 13 VAND. L. REV. 712, 713-14 (1960). Eventually, legislative intervention was necessary to expand this limited view of disqualification. In 1911, a federal statute was enacted which provided for disqualification of judges in cases of "personal bias or prejudice." Act of Mar. 3, 1911, ch. 231, 3 Stat. 1090. There were early indications from the Supreme Court that this statute would prove effective in dealing with judicial bias and prejudice. Berger v. United States, 255 U.S. 22 (1921). In this case the Supreme Court held that a trial judge could do no more in entertaining an affidavit of personal bias or prejudice than assess the legal sufficiency of the affidavit, determine compliance with the statute and make certain that the factual assertions in the affidavit were not totally without merit. The Court did not interpret the disqualification statute to permit a trial judge to pass on the truth or falsity of the allegations made against him. *Id.*

Subsequent interpretations of the statute strictly against persons seeking disqualification reduced its effectiveness. The principle that the appearance of bias was insufficient to disqualify a judge developed into a requirement that bias be shown in fact. Frank, *supra,* at 628-30.

This was accompanied by the view that in close cases judges had a duty to sit rather than disqualify themselves. Note, *Disqualification of Federal Judges for Bias or Prejudice,* 46 U. CHI. L. REV. 236, 238-39 (1978). Discontent arose concerning these developments in disqualification standards at the federal level, and in 1974 the federal standards for disqualification of judges were amended to provide for disqualification where a judge "has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding. . . ." 28 U.S.C. § 455(b) (1976). *See also* Frank, *Disqualification of Judges: In Support of the Bayh Bill,* 35 L. & CONTEMP. PROBS. 43 (1970); Frank, *Commentary on Disqualification of Judges — Canon 3C,* 1972 UTAH L. REV. 377 (1972). The apparent effect of the 1974 amendment was the adoption of an appearance of bias test which replaced the bias in fact test. Note, *Disqualification of Federal Judges for Bias or Prejudice,* 46 U. CHI. L. REV. 236, 242-50 (1978). Note, *Judicial Disqualification in the Federal Courts: Maintaining an Appearance of Justice Under 28 U.S.C. § 455,* 1978 U. ILL. L. F. 863 (1978). On the other hand, it has been suggested that there will be few cases where

The applicable standard also would have been markedly different had Chairman Pertschuk been involved in formal administrative adjudication. The standard for disqualification by reason of prejudgment in cases of formal administrative adjudication is well established. The applicable standard in FTC adjudications is reflected in *Cinderella Career & Finishing Schools, Inc. v. FTC.*[151] It focuses on whether "a disinterested observer may conclude that [the agency] has in some measure adjudged the facts as well as the law of a particular case in advance of hearing it."[152] It is significant because it established that the appearance of prejudgment is sufficient to justify disqualification and prejudgment in fact need not be demonstrated.[153]

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judicial disqualification will be required in the absence of an additional showing of specific interest in the outcome or personal hostility towards a party. Strauss, *supra* note 2, at 1012-13.

Resolving the question of the significance of the 1974 amendments may depend considerably on one's underlying outlook on the need for disqualification, yet the origins of the amendment suggest that something less than bias in fact may result in disqualification of a judge. The appearance of bias and impropriety would seem to be enough. Note, *Disqualification of Federal Judges for Bias or Prejudice,* 46 U. CHI. L. REV. 236, 242-50 (1978).

151. 425 F.2d 583 (D.C. Cir. 1970).

152. *Id.* at 591, *quoting* Gilligan, Will & Co. v. SEC, 267 F.2d 461, 469 (2d Cir. 1959). This standard is relevant to administrative adjudication generally. Koch, *supra* note 2, at 222-28; Comment, 82 DICK. L. REV. 671, 681 (1978); Note, *Regulator Disqualification from Rulemaking Proceedings,* 57 TEX. L. REV. 1193, 1196-98 (1979).

The origin of the test lies in the application of constitutional principles concerning the right to an impartial tribunal in administrative proceedings and in the intent of Congress concerning the conduct of administrative adjudications reflected in the APA. J. FREEDMAN, CRISIS AND LEGITIMACY — THE ADMINISTRATIVE PROCESS AND AMERICAN GOVERNMENT 192-203 (1978); *See* Comment, *Due Process in FTC Rulemaking,* 1979 ARIZ. ST. L. J. 543, 555-57; Note, *Due Process and the Combination of Functions: A Balancing Approach,* 63 IOWA L. REV. 1186, 1193-96 (1978); Note, *Bias in Administrative Rulemaking After* Association of National Advertisers v. Federal Trade Commission, 54 NOTRE DAME LAW. 886, 887, 892-901 (1979); Note, *Regulator Disqualification from Rulemaking Proceedings,* 57 TEX. L. REV. 1193, 1196-98 (1979). Section 556(b) provides for disqualification of administrators for bias. A duty of impartiality is imposed upon them by statute. 5 U.S.C. § 556(b) (1976). Congress intended this result: "They must conduct the hearing in a strictly impartial manner, rather than as the representative of an investigative or prosecuting authority." ADMINISTRATIVE PROCEDURE ACT: LEGISLATIVE HISTORY, S. Doc. No. 248, 79th Cong., 2d Sess. 204 (1946). It is this test which the district court applied to Chairman Pertschuk's conduct in the advertising to children proceeding and on which it based its finding that his disqualification was required. Association of Nat'l Advertisers, Inc. v. FTC, 460 F. Supp. 996, 997-98 (D. D.C. 1978).

153. It is not unreasonable to conclude, as did Judge Gesell in the district court, that Chairman Pertschuk's conduct would have required disqualification under this standard. It is likely that even Judge Tamm and Judge Leventhal, who determined that the adjudicatory standard was not applicable to the advertising to children proceeding, would have required disqualification if it had been. Although Judge Tamm in examining the evidence of the Chairman's prejudgment did observe that the Chairman's "conclusions are broad and general, far removed from the narrow, detailed facts that are at the heart of the Cinderella case," Association of Nat'l Advertisers, Inc. v. FTC, 627 F.2d at 1172, with the apparent implication that the *Cinderella* rule would not require disqualification, it would seem curious that he devoted so much attention to explaining why the *Cinderella* rule should not apply to Chairman Pertschuk in this case and went on to devise the "unalterably closed mind" standard. As Judge Tamm noted emphatically elsewhere in the opinion, "[w]e never intended the *Cinderella* rule to apply to a rulemaking proceeding such as the one under review." *Id.* at 1168.

The traditional argument against invoking the *Cinderella* rule in particular cases to which it applies is that the administrative official is entitled to address and speak out on issues of law and policy, although not allowed to prejudge factual issues. This was the position of the FTC in support of its assertion that even if Chairman Pertschuk's conduct were subject to the adjudicatory standard for disqualification, the standard had not been violated. Almost all but the FTC seemed to have had difficulty accepting this position .[154]

In actuality Chairman Pertschuk was not acting in the capacity of a federal judge or a traditional administrative adjudicator in the advertising to children rulemaking proceeding. Nevertheless, the standards for prejudgment disqualification applicable to a judge or an adjudicator are instructive on how the conduct would have been judged in other settings and on the question of what standards might have been applied. Although there are substantial similarities between "hybrid" rulemaking under Magnuson-Moss and formal adjudication, and these similarities were sufficient to convince Judge Gesell in the district court to apply the adjudicatory standard on prejudgment, the similarities were not sufficient in the minds of a majority in the court of appeals. In contrast, developments in the principles of English natural justice place less emphasis on the form of administrative proceeding. Another question is how Chairman Pertschuk's conduct would have been judged under the principles of English natural justice, acting as he in fact did as an administrative official in a "hybrid" rulemaking proceeding.

The principles of English natural justice are considered the counterpart to procedural due process in the United States.[155] Although these principles first developed in the setting of traditional judicial proceedings,[156] in time they were extended to administrative agencies.[157] The two basic principles of English natural justice are that persons who

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154. *See* Association of Nat'l Advertisers, Inc. v. FTC, 460 F. Supp. 996 (D. D.C. 1978); *see also* note 153 *supra*. For example, in a letter to the Commissioner of Food and Drugs, Chairman Pertschuk began with the statement that "[s]*etting legal theory aside,* the truth is that we've been drawn into this issue because of the conviction, which I know you share, that one of the evils flowing from the unfairness of children's advertising is the resulting distortion of children's perception of nutritional values." *See* note 121 *supra* (emphasis added). This sentence is merely illustrative and hardly supports the conclusion that the Chairman was confining his remarks to relevant issues of law and policy. The reasonable conclusion is that disqualification would have been required if the standard applicable to administrative adjudications had been applied.

155. H. WADE, ADMINISTRATIVE LAW 393 (4th ed. 1977); *see generally* Sullivan, *supra* note 26, at 76-80.

156. Dr. Bonham's Case, 77 Eng. Rep. 638 (1610); *See generally* S. DE SMITH, JUDICIAL REVIEW OF ADMINISTRATIVE ACTION 215-18 (3d ed. 1973). "So universal are they, so 'natural,' that they are not confined to judicial power."

157. H. WADE, *supra* note 155, at 394-95. It is, however, accepted that the principles of natural justice do not apply to traditional legislative action. J. GARDNER, ADMINISTRATIVE LAW 127 (4th ed. 1974); S. DE SMITH, *supra* note 156, at 219.

may be directly affected by judicial or administrative action are entitled to (1) notice and an opportunity to be heard, and (2) a disinterested and impartial tribunal, the latter being encapsulated in the phrase "nemo judex in causa sua" meaning simply that no one is to be judge in his own cause.[158] It is this second principle which is relevant to issues of disqualifying interest, bias and prejudgment. At one time this second principle of English natural justice applied principally to bias in fact, but today it addresses the issue of the appearance of bias as well.[159]

With the development of administrative institutions of government there was little difficulty in applying the second principle to administrative actions judicial in nature.[160] In fact, at one time it appears that both principles of English natural justice "were applied to everybody who had a duty to decide anything."[161] However, concern arose over applying the principles to administrative action of a non-judicial nature; thus, the courts developed a distinction between quasi-judicial action and administrative action of an executive or ministerial nature.[162] A disqualification, such as Chairman Pertschuk's, would not be subject to the second principle of English natural justice unless it also were assumed that Magnuson-Moss rulemaking is quasi-judicial in nature.

What is distinctive is the perception that the second principle has been extended in recent years to apply to administrative action generally and not simply administrative adjudication. Professor H.W.R. Wade has noted that today "the principles of natural justice apply to administrative acts generally."[163] The effect of this view is that it is not necessary to label administrative action as quasi-judicial in order to bring the principles to bear. There has been uncertainty concerning whether these developments represent an across-the-board application of the principles of natural justice to non-adjudicatory administrative action. Certainly it would be a surprising result if the duty of the first principle to afford notice and an opportunity to be heard were applied to administrative action generally. It has been suggested that there are

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158. S. DE SMITH, *supra* note 156, at 215; note 26 *supra*.

159. S. DE SMITH, *supra* note 156, at 218; H. WADE, *supra* note 155, at 410-12.

160. S. DE SMITH, *supra* note 156, at 219-20.

161. D. HEWITT, NATURAL JUSTICE 319 (1972).

162. D. FOULKES, INTRODUCTION TO ADMINISTRATIVE LAW 155 (4th ed. 1976); J. GARDNER, *supra* note 157, at 127; D. HEWITT, *supra* note 161, at 320; Fuchs, *supra* note 32, at 11 n.27. This is consistent with the distinction which has been developed in American Law and carried to the present in cases such as *Association of National Advertisers*.

163. H. WADE, *supra* note 155, at 418. *See also* D. FOULKES, *supra* note 162, at 156-57 which notes in some recent decisions "a refusal to be strait jacketed in the judicial-administrative dichotomy and the introduction of the idea of fairness." R. WRAITH & P. HUTCHESSON, ADMINISTRATIVE TRIBUNALS 343-44 (1973); Note, *The Duty to Act Fairly*, 36 MOD. L. REV. 93 (1973). *But see* D. HEWITT, *supra* note 161, at 320.

cases where principles of natural justice do not apply and yet in which the administrative official still has duty to act fairly.[164] This has been characterized as "mini-natural justice" which may or may not represent a separate principle, or simply a lower standard of natural justice in a non-adjudicatory administrative proceeding. Yet the commentator who coined the phrase observed that:

> [i]t is now well settled that a statutory body which is entrusted by statute with a discretion must act fairly. It does not matter whether its functions are described as judicial or quasi-judicial on the one hand or as administrative on the other hand, or what you will. Still it must act fairly.[165]

At least one other commentator has been more bold and suggested that it would be unfortunate to conclude that persons acting judicially must act in accordance with natural justice while those acting administratively need only act fairly; his preference is simply to state that "there is a general duty to act fairly" which includes the avoidance of the appearance of bias as well as actual bias.[166]

Commentators in Canada have observed these developments in the English courts, but noted that Canada has not yet dealt with the numerous English cases "which apply the rule of natural justice wherever the decision-maker has a general 'duty to be fair,' regardless of the characterization of the function as quasi-judicial."[167] Canada has also been less anxious to adopt the appearance of bias test even in adjudicatory administrative proceedings[168] and continues to observe the dichotomy between quasi-judicial and other administrative action for purposes of applying the principles of natural justice.[169] Thus, the evolution of a duty to act fairly without regard to the form of administrative action has not yet crossed the Atlantic.

Subject to the by now normal qualification that different persons may reach different conclusions in applying facts to a standard for prejudgment no matter what that standard, it does not seem unreasonable to suggest that the actions and conduct of Chairman Pertschuk might

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164. J. GARDNER, *supra* note 157, at 127-28.

165. *Id.* at 130.

166. D. FOULKES, *supra* note 162, at 158. *But see* S. DE SMITH, *supra* note 156, at 223 which suggests that the test in such cases should be whether the decisionmaker had "irrevocably decided" the matter before comments had been received, or whether he had "acted in bad faith for an improper purpose. . . ."

167. Jones, *Institutional Bias: The Applicability of the Nemo Judex Rule to Two-Tier Decisions,* 23 MCGILL L. J. 605, 606 (1977).

168. R. REID, ADMINISTRATIVE LAW AND PRACTICE 238-42 (1st ed. 1971); Jones, *Administrative Law — Natural Justice — Nemo Judex Rule — The Appearance of Justice,* 55 CAN. B. REV. 718, 731-33 (1977).

169. R. REID, *supra* note 168, at 234-35; Reid, *Bias and the Tribunals,* 20 U. TORONTO L. J. 119, 124-27.

be viewed differently under a standard which imposed a duty to act fairly without regard to the form of administrative proceeding when appearance of acting unfairly could provide the basis for disqualification just as well as the fact of acting unfairly. The English experience is instructive as a demonstration that the forms of administrative action do not create barriers to the application of principles of fairness if fairness is considered a worthy objective. Furthermore, the apparent willingness of the British courts to extend the second principle of natural justice to non-adjudicatory administrative action has not been a product of insensitivity to the needs of the administrative process. Rather it has been the result of a sensitivity to other needs which must be weighed in the balance. As Professor Wade had observed, "[p]rocedure is not a matter of secondary importance. As governmental powers continually grow more drastic, it is only by procedural fairness that they are rendered tolerable."[170] Insurmountable barriers to the application of principles of fairness to non-adjudicatory administrative action need not exist. In this light the decision of the court in the *Association of National Advertisers* case deserves closer examination.

IV. THE "UNALTERABLY CLOSED MIND" STANDARD FOR DISQUALIFICATION IN RULEMAKING

A. The Nature and Origins of the Standard

In holding that the *Cinderella* standard for disqualifying prejudgment in administrative adjudication did not apply to Magnuson-Moss rulemaking, the court announced: "[a]n agency member may be disqualified from such a proceeding only when there is a clear and convincing showing that he has an unalterably closed mind on matters critical to the disposition of the rulemaking."[171] The standard represents virtually a verbatim acceptance of the test suggested by the agencies interested in the outcome of the proceeding.[172]

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170. H. WADE, *supra* note 155, at 393.

171. Association of Nat'l Advertisers, Inc. v. FTC, 627 F.2d at 1154. The court found that the appellees had failed to show that Chairman Pertschuk had violated this standard. In dissent Judge MacKinnon expressed the view that the Chairman had violated the majority standard, although he proposed a different and less demanding standard from the perspective of those seeking disqualification which would require a showing "by a preponderance of the evidence that the decisionmaker could not participate fairly in the formulation of the rule because of substantial bias or prejudgment on any critical fact that must be resolved in such formulation." *Id.* at 1197.

172. Brief for Independent Regulatory Agencies as Amici Curiae at 14-15, Association of Nat'l Advertisers, Inc. v. FTC, 627 F.2d 1151 (D.C. Cir. 1979). In the brief counsel for the Civil Aeronautics Board, the Consumer Products Safety Commission, the Federal Energy Regulatory Commission, the Federal Communications Commission, the Federal Maritime Commission, the Interstate Commerce Commission, and the Securities and Exchange Commission suggested "a standard which would allow for disqualification in rulemaking — any kind of rulemaking — only

The majority found support for their position in two United States Supreme Court decisions. In *Hortonville Joint School District No. 1 v. Hortonville Education Association,* [173] the school board dismissed striking teachers under state law. The teachers argued that they had been denied due process because the school board had also negotiated renewal of the contract with the teachers. The strike was a result of the inability of the board and the teachers to reach agreement on a new contract. The Supreme Court indicated that a decisionmaker need not be disqualified "simply because he has taken a position, even in public, on a policy issue related to the dispute, in the absence of a showing that he is not 'capable of judging a particular controversy fairly on a basis of its own circumstances.' "[174] In refusing to find that the board was disqualified from deciding whether the teachers participating in the strike should be discharged, the Court reasoned in part that familiarity with the facts of a case and public statements on policy issues alone would not justify disqualification. The Court was influenced by the fact that a decision to disqualify would undermine school board familiarity with the circumstances of contract negotiations and thus make it more difficult to have school policy made at the local level.[175]

The second case, *FTC v. Cement Institute,*[176] seems more closely related to the majority's standard for disqualification in rulemaking. In *Cement Institute,* the Supreme Court faced the issue of disqualification in the context of an FTC challenge to a system of multiple basing point delivered prices. Following a lengthy adjudicatory proceeding within the FTC, the Commission issued a cease and desist order upon finding that the pricing system was an unfair method of competition in violation of section 5 of the FTCA and also resulted in unlawful price discrimination under section 2 of the Clayton Act.[177] One contention was that the Commission has prejudged the issues before it and was in-

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when there has been a clear and convincing showing that the agency member has an unalterably closed mind on matters critical to the disposition of the proceeding."

173. 426 U.S. 482 (1976); *see* Note, Hortonville Joint School District No. 1 v. Hortonville Education Ass'n: *Impartiality And Separation Of Functions In Administrative Hearings,* 13 WILLAMETTE L.J. 537 (1977).

174. Hortonville Joint School Dist. No. 1 v. Hortonville Educ. Ass'n, 426 U.S. at 493.

175. *Id.* at 491-96.

176. 333 U.S. 683 (1948). This was an early and important case in the development of the law of prejudgment in adjudicatory proceedings. Interestingly, it was the "irrevocably closed" mind standard suggested in *Cement Institute* which the court turned to in justifying its standard in rulemaking. Judge Tamm described the latter as "[a] similar standard [which] is applicable to section 18 rulemaking." Association of Nat'l Advertisers, Inc. v. FTC, 627 F.2d at 1170. It is difficult to fathom how the strict adherence to the dichotomy between adjudication and rulemaking which the majority believed precluded the application of the *Cinderella* standard to Magnuson-Moss rulemaking did not dictate a similar result in its consideration of *Cement Institute* because both cases involved traditional adjudicatory proceedings under section 5 of the Federal Trade Commission Act.

177. FTC v. Cement Institute, 333 U.S. at 688-89.

capable of providing a fair hearing. This issue had been raised before the Commission which had refused to disqualify itself; a position upheld by the court of appeals.[178] The Court indicated that statements by the Commission "did not necessarily mean that the minds of [Commission] members were irrevocably closed,"[179] and disqualification was not required.

The statements which formed the basis for the claim of disqualifying bias were contained in the Commission's reports to Congress as well as in testimony by members of the Commission before congressional committees. The Supreme Court saw this evidence as making "it clear that long before the filing of this complaint the members of the Commission had at that time, or at least some of them, were of the opinion that the operation of the multiple basing point system as they had studied it was the equivalent of a price fixing restraint in violation of the Sherman Act."[180] However, the Court then made a fundamental assumption which colored at least part of its holding that the Commission was not disqualified. The opinion provided: "[w]e therefore decide this contention, as did the Circuit Court of Appeals, on the assumption that such an opinion had been formed by the entire membership of the Commission as a result of its prior investigations."[181] The significance of this is that if the Court had required disqualification, it would have been impossible for the Commission to have discharged its statutory responsibility to report to Congress and the President and later institute adjudicatory proceedings in the subject areas of its report. However, what was sought in the *Cement Institute* case was not simply disqualification of a single member of the Commission, but of the entire Commission. This was also true in the school board decision. This is fundamentally different than the Pertschuk case which concerned a single member. Disqualification of Chairman Pertschuk would not have rendered the Commission impotent.

Neither of these cases, however, established a standard as imposing as the "unalterably closed mind." The majority in *Association of National Advertisers* supported their formulation by relying primarily on broad inferences based on their understanding of the proper relationship between administrative agencies and the judiciary, and the objectives of administrative procedure. To produce clear and convincing evidence of an unalterably closed mind on matters critical to the disposition of a proceeding is a formidable obstacle. Furthermore, to show that anything is unalterable is all but impossible. One seeking disqualifi-

178. Marquette Cement Mfg. Co. v. FTC, 147 F.2d 589 (7th Cir. 1945).
179. FTC v. Cement Institute, 333 U.S. at 701.
180. *Id.* at 700.
181. *Id.*

cation under this standard would confront the added task of showing that the matters on which the allegations of prejudgment were based were critical to the rulemaking proceeding. It is unlikely that an administrative official could say or do anything which would result in disqualification under this standard, short of an open declaration of an unalterably closed mind on critical issues. Clearly the majority sided with those within the agencies rather than with those who must deal with the agencies.

B. Justifications for the Standard

Both judges in the majority in the court of appeals conceded that in rulemaking there is "a right to a fair and open proceeding [and] that right includes access to an impartial decisionmaker."[182] Yet, as Judge Leventhal noted, "the standards [in rulemaking] are not identical with those pertinent for judicial-type decisionmaking in adjudicatory actions."[183] Thus, the majority concluded that a distinct standard is required for disqualification in each type of proceeding. The reasoning justifying this result took several paths.

First, the majority examined the nature of Magnuson-Moss rulemaking. It rejected the finding of the district court that although this kind of rulemaking was neither wholly legislative nor adjudicatory, it was more adjudicatory in nature and required application of the adjudicatory standard for prejudgment.[184] The majority found that the APA allowed no room for intermediate or "hybrid" categories of administrative action in between adjudication and rulemaking.[185] Due to their insistence on a strict dichotomy between rulemaking and adjudication the majority was unwilling to view the added statutory procedural elements of Magnuson-Moss rulemaking as converting the proceeding to something beyond rulemaking and in the nature of adjudication.[186] In reaching its conclusion the majority noted that rules typically govern future conduct, in contrast to adjudication which is to examine, control and sanction past conduct.[187] The majority also emphasized the difference between the nature of the facts involved in rulemaking and adjudication and concluded that even though Magnuson-Moss provides for an

182. Association of Nat'l Advertisers, Inc. v. FTC, 627 F.2d at 1174.

183. *Id.* at 1176.

184. *Id.* at 1161-64.

185. *Id.* at 1160.

186. *Id.* at 1160-61. In dissent Judge MacKinnon observed that "[t]he Court's opinion is couched too much in a rulemaking/adjudication dichotomy and tries to pigeonhole Commission action into one or the other." *Id.* at 1184.

187. *Id.* at 1161. *See generally* text accompanying notes 110-12 *supra* for a discussion of the similarity between Magnuson-Moss rulemaking and adjudicatory cease and desist orders in their impact on affected persons.

evidentiary hearing on specific facts, this procedural element did not change the proceeding or the facts at issue to adjudicatory.[188] Consequently, the majority concluded that neither the procedures nor the kind of facts involved in Magnuson-Moss rulemaking allowed it to apply the disqualification standard for adjudication.

A second element in the majority's justification was its emphasis on the similarity between rulemaking and legislative action. Since the majority equated traditional legislation and administrative legislation in the form of rulemaking, it did not feel compelled to impose significantly greater standards for prejudgment in rulemaking than would be imposed in legislating.[189]

A third consideration influencing the court was the concern for administrative efficiency in rulemaking. Judge Tamm wrote that the *Cinderella* standard for disqualification was "an inapposite role model for an administrator who must translate broad statutory commands into concrete social policies."[190] His fear was that to impose the adjudicatory standard in rulemaking would have the effect of limiting desirable discussion of policy questions. In contrast, he felt that the "unalterably closed mind" standard would allow rulemakers to discharge their policy making responsibilities while disqualifying only those who were unable to give meaningful consideration to the issues in rulemaking.[191] He believed that any other result would "eviscerate the proper evolution of policy making were we to disqualify every administrator who has opinions on the correct course of his agency's future action."[192]

A final rationale for the decision was the majority's fear that any other standard for disqualification would draw the judiciary improperly into the political process. As Judge Tamm noted, "[w]e are concerned that implementation of the *Cinderella* standard in the rulemaking context would plunge courts into the midst of political battles concerning the proper formulation of administrative policy. We serve as guarantors of statutory and constitutional rights, but not as arbiters of the political process."[193]

Out of these lines of reasoning the "unalterably closed mind" stand-

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188. *Id.* at 1161-64.

189. *Id.* at 1165-68. Although the majority did not go so far, the logical implication of this analogy would have been to impose no limitation on prejudgment in rulemaking. For this reason the majority was not willing to recognize any due process rights to a limitation on prejudgment in rulemaking. It noted in passing that due process does not normally require added procedures in rulemaking and that this is necessary to preserve the virtues of rulemaking. *Id.*

190. *Id.* at 1168-69.

191. *Id.* at 1170.

192. *Id.* at 1174.

193. *Id.* at 1174-75.

ard developed. In the process, a strict dichotomy between rulemaking and adjudication was asserted and maintained. The administrative rulemaker on matters of prejudgment was treated only slightly more harshly than elected legislator, administrative officials were left free to discuss policy questions in rulemaking even at the risk of prejudgment and the courts were left theoretically free of, or at least above, the political process of rulemaking. The implications of the majority's decision seem rather clear; their desirability is another matter.

C. *A Critique of the Standard*

In rejecting the adjudicatory standard for disqualifying prejudgment, the majority refused to attach significance to the many procedural elements in Magnuson-Moss rulemaking which go beyond notice-and-comment rulemaking under section 553 of the APA.[194] These include the provisions for an evidentiary hearing on disputed issues of material fact, with the accompanying opportunity for interested persons to pre-

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194. Magnuson-Moss, 15 U.S.C. § 57a (1976). In many ways Magnuson-Moss rulemaking procedures exceeded those required in informal rulemaking, including the following:

(1) A notice of proposed rulemaking was required to be published in the Federal Register in all cases of substantive rulemaking. *Id.*

(2) The notice was required to state "with particularity the reason for the proposed rule. . . ." *Id.*

(3) The Commission was required to provide an opportunity for an informal hearing on the proposed rule. *Id.*

(4) At the informal hearing interested persons were entitled to present their positions by oral or written presentation or both. *Id.* § 57a(c)(1)(A).

(5) Should the Commission determine that there were "disputed issues of material fact" which required resolution, interested persons were entitled to present such rebuttal submissions and conduct such cross-examination as the Commission determined to be appropriate and required for a full and true disclosure of these issues. *Id.* § 57a(c)(1)(B).

(6) The opportunity to make oral presentation and conduct cross-examination at the informal hearing was, however, subject to limitation by the Commission in order to avoid unnecessary costs or delay. Reasonable time limits could be imposed on oral presentations, and under some circumstances the Commission could conduct cross-examination on behalf of interested persons, *id.* § 57a(c)(2), and limit the number of persons cross-examining when a group of persons with similar interests was involved. *Id.* § 57a(c)(3)(A).

(7) Both the submissions received on the proposed rule and a verbatim transcript of the informal hearing were required to be made available to the public. *Id.* § 57a(b), (c)(4).

(8) A final rule was required to be accompanied with a detailed statement of the basis and purpose for the rule which included statements as to the prevalence of the acts or practices governed by the rule, the manner and context in which they were unfair or deceptive, and the anticipated economic impact of the rule. *Id.* § 57a(b), (d)(1).

(9) A final rule was required to be based on the matter in the rulemaking record. *Id.* § 57a(b). The rulemaking record was to consist of the rule itself, the statement of basis and purpose, the transcript of the informal hearing, written submissions received and "any other information the Commission considers relevant to such rule." *Id.* § 57a(e)(1)(B).

(10) Interested persons dissatisfied with a final rule, including consumers or consumer organizations, were assured pre-enforcement review in a court of appeals upon petition filed within 60 days of promulgation of the rule. *Id.* § 57a(e)(1)(A).

(11) In performing its function of judicial review the court of appeals was not limited to the traditional standards for judicial review of rulemaking. *Id.* § 57a(e)(3). One important additional provision required the court to hold the rule unlawful and set it aside if it found "the Commission's action [was] not supported by substantial evidence in the rulemaking record . . . taken as a whole. . . ." *Id.* § 57a(e)(3)(A).

sent rebuttal submissions and conduct cross-examination, and the expanded scope of judicial review which requires a court to hold a rule unlawful if it is found that "the Commission's action is not supported by substantial evidence in the rulemaking record . . . taken as a whole. . . ."[195] Yet in treating Magnuson-Moss rulemaking as no different than informal, notice-and-comment rulemaking for purposes of a standard for disqualification, the majority's view ran counter to a position the District of Columbia Court of Appeals had helped shape. There has been a trend to blur the distinction between the standard of judicial review in cases of informal and formal administrative action.[196]

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195. *Id.* §§ 57a(c)(1)(B),(b),(d)(1) (1976). Both the majority and dissenting opinions in the *Association of National Advertisers* case turned to the legislative history of Magnuson-Moss for guidance on the importance to be given these added procedures. Perhaps it is in the nature of legislative history that both sides found support for their positions in the legislative history. *See* Association of Nat'l Advertisers, Inc. v. FTC, 627 F.2d at 1163-64, 1185-87. Nevertheless, this careful dissection of legislative history, especially by the majority, is interesting because it reflects judicial resistance to giving weight to the added procedures of Magnuson-Moss rulemaking and procedures on the assumption that there is a point at which rulemaking mystically becomes adjudication with no added significance arising out of how close or how far removed a particular proceeding is to that mystical point.

196. Under the APA itself a sharp distinction is made between judicial review in cases of informal rulemaking and adjudication on the one hand and formal rulemaking and adjudication on the other. This statutory scheme provides that the former are subject to review for arbitrariness and capriciousness while the latter are subject to review under the substantial evidence test. *See* 5 U.S.C. § 706(2)(A)-(E) (1976). Typically the substantial evidence test has been viewed as affording more stringent and rigorous review. *See,* Note, *NLRB Rulemaking: Political Reality Versus Procedural Fairness,* 89 YALE L. J. 982, 992 (1980).

However, discontent arose due to the feeling that the "arbitrary and capricious" standard was not sufficiently demanding and did not provide adequate judicial review of informal administrative action. *See* Verkuil, *supra* note 16, at 209. During the 1970's a movement for more intensive judicial review over informal administrative action developed.

The Supreme Court case of *Citizens to Preserve Overton Park, Inc. v. Volpe,* 441 U.S. 402 (1971), was instrumental in altering the scope of judicial review over informal administrative action. In reviewing the action of the Secretary of Transportation approving federal funds for a highway, the Court determined that the decision was not subject to substantial evidence review under the APA, but it also stressed that in the course of judicial review a "substantial inquiry" and "thorough, probing, in-depth review" were in order. This decision has been perceived as blurring the line between the scope of judicial review in informal and formal administrative action. *See, e.g.,* Leventhal, *Environmental Decisionmaking and the Role of the Courts,* 122 U. PA. L. REV. 509, 512-13 (1974); Pedersen, *supra* note 32, at 46-49; Note, *Judicial Review of the Facts in Informal Rulemaking: A Proposed Standard,* 84 YALE L. J. 1750, 1753 (1975). As one commentator has observed, the "result has been to transform the arbitrary and capricious test into something very close to substantial evidence review." Pedersen, *supra* note 32, at 48-49. Indeed, at least one would go so far as to suggest that the substantial evidence test should be read to apply to judicial review of informal rulemaking. Note, *Judicial Review of the Facts in Informal Rulemaking: A Proposed Standard,* 84 YALE L. J. 1750, 1750, 1759 (1975).

Debate concerning the implications of substantial evidence review in the context of informal administrative action has been extensive and intense. This has been the case when Congress has imposed substantial evidence review in the context of rulemaking as in Magnuson-Moss. Some believe the substantial evidence review in such cases is no stricter than the traditional arbitrary and capricious or rational basis test. Nelson, *supra* note 78, at 417. *See also* Gifford, *supra* note 54, at 265-66 (suggesting that it is merely an added test whose purpose is to assure the rationality of the

There are a number of reasons why the majority in *Association of National Advertisers* reasserted the traditional learning within administrative law.[197] The most prominent is found in part VI of the ma-

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process); Hobbs, *supra* note 99, at 421 (suggesting that it constitutes a clear departure from the "arbitrary and capricious test"); Scalia & Goodman, *supra* note 16, at 936 (suggesting that it is nothing more than a different way of stating the arbitrary and capricious test for informal rulemaking); Verkuil, *supra* note 16, at 222 (suggesting that it clearly does not go so far as to trigger formal rulemaking proceedings under the APA). Others have viewed the debate as a "semantic war." Friendly, *"Some Kind of Hearing,"* 123 U. PA. L. REV. 1267, 1313 (1975), and as "chiefly liturgical in character . . . with no more substance at the core than a seedless grape. . . ." Gellhorn & Robinson, *Perspectives on Administrative Law,* 75 COLUM. L. REV. 771, 779 n.23, 780 (1975).

Lower federal courts have also contributed to blurring the lines in judicial review of administrative action. *See, e.g.,* American Public Gas Ass'n v. FPC, 567 F.2d 1016 (D.C. Cir. 1977); Industrial Union Dept., AFL-CIO v. Hodgson, 499 F.2d 467 (D.C. Cir. 1974); Chicago v. FPC, 458 F.2d 731 (D.C. Cir. 1973); International Harvester Co. v. Ruckelshaus, 478 F.2d 615 (D.C. Cir. 1973). *See generally* Pierce, *The Choice Between Adjudication and Rulemaking for Formulating and Implementing Energy Policy,* 31 HASTINGS L. J. 1, 57-72 (1979).

197. There are also less convincing reasons which can be identified. One lies in the dichotomy between rulemaking and adjudication. As has been noted, the majority places great emphasis on the idea that administrative action must be one or the other and that there is nothing in between. *See* text accompanying notes 184-86 *supra.* With pristine symmetry the majority divides the universe of administrative action into formal and informal rulemaking and formal and informal adjudication. Association of Nat'l Advertisers, Inc. v. FTC, 627 F.2d at 1160-61. Do these dichotomies demand that Magnuson-Moss rulemaking be treated simply as rulemaking for purposes of a standard governing prejudgment? The majority's conclusion suggests an affirmative answer to this question. The answer is a curious one in light of the tendency in recent years to blur the line between rulemaking and adjudication in the same way in which the line between respective scopes of judicial review has been blurred. The breakdown in the dichotomy has been widely recognized. *See, e.g.,* Asimow, *supra* note 70, at 523; Auerbach, *Informal Rulemaking: A Proposed Relationship Between Administrative Procedure and Judicial Review,* 72 Nw. U. L. REV. 15, 16 (1977); Bruff & Gellhorn, *supra* note 32, at 1376; DeLong, *Informal Rulemaking and the Integration of Law and Policy,* 65 VA. L. REV. 257, 259-60 (1979); Gardner, *Federal Courts and Agencies: An Audit of the Partnership Books,* 75 COLUM. L. REV. 800, 806 (1975); Gifford, *supra* note 54, at 255-60; Leventhal, *supra* note 196, at 511; Pedersen, *supra* note 52, at 1016-17, 1025-26; Robinson, *supra* note 37, at 224-28; Sinaiko, *supra* note 37, at 909-17; Williams, *"Hybrid Rulemaking" Under the Administrative Procedure Act: A Legal and Empirical Analysis,* 42 U. CHI. L. REV. 401, 402, 425-36 (1975); Verkuil, *supra* note 101, at 260, 284-89.

Not all have welcomed these developments. Wright, *supra* note 32, at 379-80; Wright, *Commentary — Rulemaking and Judicial Review,* 30 AD. L. REV. 461, 462 (1978); Note, *The Judicial Role in Defining Procedural Requirements for Agency Rulemaking,* 87 HARV. L. REV. 782, 796-805 (1974).

Even more striking is the prominent role which the Court of Appeals for the District of Columbia has taken in this area. *See, e.g.,* Home Box Office, Inc. v. FCC, 567 F.2d 9 (D.C. Cir. 1977); Portland Cement Ass'n v. Ruckelshaus, 486 F.2d 375 (D.C. Cir. 1973), *cert. denied,* 417 U.S. 921 (1974); Mobil Oil Corp. v. FPC, 483 F.2d 1238 (D.C Cir. 1973); International Harvester, Inc. v. Ruckelshaus, 478 F.2d 615 (D.C. Cir. 1973); Kennecott Copper Corp. v. EPA, 462 F.2d 846 (D.C. Cir. 1972); Walter Holm & Co. v. Hardin, 449 F.2d 1009 (D.C. Cir. 1971); Automotive Parts & Accessories Ass'n v. Boyd, 407 F.2d 330 (D.C. Cir. 1968). This too, has been widely recognized. *See, e.g.,* Barr, *Judicial Review of Informal Rulemaking Procedure: When May Something More Formal Be Required?* 27 AM. U. L. REV. 781, 797 (1978); Fuchs, *supra* note 33, at 108-10; Gelpe & Tarlock, *The Uses of Scientific Information in Environmental Decisionmaking,* 48 S. CALIF. L. REV. 371-78 n.17 (1974); Kestenbaum, *supra* note 16, at 688; Rodgers, *A Hard Look at* Vermont Yankee: *Environmental Law under Close Scrutiny,* 67 GEO. L. J. 699, 704 (1979); Verkuil, *supra* note 101, at 291; Note, *Ex Parte Communications in Rulemaking:* Home

jority's opinion.[198] Part VI reveals a fear that application of the ad-

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Box Office *and* Action for Children's Television, 1978 ARIZ. ST. L. J. 69; Note, *Informal Rulemaking,* 46 GEO. WASH. L. REV. 442, 446, 460 n.133 (1976); Casenote, 28 CATH. U. L. REV. 411, 419 (1976). In light of this trend, the traditional dichotomy between rulemaking and adjudication does not explain the unexpected action on part of the majority.

The majority devotes considerable attention to the distinction between legislative and adjudicative facts in support of its conclusion that the adjudicatory standard is inapplicable to Magnuson-Moss rulemaking. 627 F.2d at 1161-65. Yet it is also unlikely that this particular dichotomy necessitated the treatment of Magnuson-Moss rulemaking as ordinary rulemaking. The distinction between legislative and adjudicative fact has been viewed as not especially helpful because it is "susceptible to semantic manipulation to achieve the result desired." Robinson, *supra* note 32, at 503. *See also* Crampton, *A Comment on Trial-Type Hearings in Nuclear Power Plant Siting,* 58 VA. L. REV. 585, 591 (1972); Friendly, *supra* note 196, at 1268; Kestenbaum, *supra* note 16, at 691-92; Verkuil, *supra* note 16, at 193; Nathanson, Book Review, 70 YALE L. J. 1210, 1211 (1961). Even one who finds the distinction useful prefers that the nature of the decision rather than the nature of the facts be the focus of analysis. Pedersen, *supra* note 52, at 1012-13. Once more an element in the majority's decision is at best controversial to a degree that it is difficult to conclude that it led inexorably to the result in the *Association of National Advertisers* case.

Another explanation would be that the majority is simply committed to the preservation of virtues of rulemaking and administrative freedom and flexibility in the rulemaking process. This explanation might have more appeal had the D.C. Circuit not been so active in the past decade in the implication of adjudicatory procedures to the rulemaking sphere. Another explanation might be that the majority took to heart the sharp rebuke of the Supreme Court in Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519 (1978). This decision condemned the actions of lower federal courts in imposing additional procedures in the context of informal rulemaking. It has been viewed as a reassertion of the dichotomy between adjudication and rulemaking, Hahn, *Procedural Adequacy in Administrative Decisionmaking,* 30 AD. L. REV. 467, 468 (1978), and as preventing the kind of judicial activism in rulemaking which had become prevalent in courts of appeals. *See* Barr, *Judicial Review of Informal Rulemaking Procedure: When May Something More Formal Be Required,* 27 AM. U. L. REV. 781, 799 (1978); Breyer, Vermont Yankee *and the Courts' Role in the Nuclear Energy Controversy,* 91 HARV. L. REV. 1833 (1978); Bruff, *Presidential Power and Administrative Rulemaking,* 88 YALE L. J. 451, 459 (1979); Byse, Vermont Yankee *and the Evolution of Administrative Procedure: A Somewhat Different View,* 91 HARV. L. REV. 1824 (1978); Carberry, *supra* note 37, at 95; Pedersen, *supra* note 52, at 1016-17; Note, *Ex Parte Communications in Rulemaking:* Home Box Office *and* Action for Children's Television, 1978 ARIZ. ST. L. J. 69, 71-95; Note, *Ex Parte Communication During Informal Rulemaking,* 14 COLUM. J. L. & SOC. PROB. 269, 289-90 (1979); Case Note, 19 SANTA CLARA L. REV. 799, 801-06 (1979). Others have found the inhibiting effect of *Vermont Yankee* less obvious and predictable. Rodgers, *A Hard Look at* Vermont Yankee: *Environmental Law Under Close Scrutiny,* 67 GEO. L. J. 699, 715-18 (1979); Note, Vermont Yankee, 9 ENV. L. 653, 653-58 (1979); Comment, 1979 WIS. L. REV. 314, 328-35 (1979). Perhaps it was *Vermont Yankee* which caused the majority to refuse to import the adjudicatory standard for disqualification to even "hybrid" rulemaking such as Magnuson-Moss.

Two commentators have noted that "*Vermont Yankee* may restrain the judicial inclination to demand other, non-statutory procedural safeguards in rulemaking" and that the majority in the *Association of National Advertisers* case, "[r]elying heavily on *Vermont Yankee,* . . . also found that in rulemaking due process does not ordinarily demand procedures that are more rigorous than those Congress had provided." J. MASHAW & R. MERRILL, INTRODUCTION TO THE AMERICAN PUBLIC LAW SYSTEM 61 (Supp. 1980). Yet the majority cites *Vermont Yankee* only in Judge Tamm's opinion to note that "[w]hen a proceeding is classified as rulemaking due process ordinarily does not demand procedures more rigorous than those provided by Congress." 627 F.2d at 1165-66. In dissent Judge MacKinnon observed that *Vermont Yankee* was not relevant because a requirement of a fair decisionmaking is not a "procedure." *Id.* at 1194. If *Vermont Yankee* has been so dispositive of the case in the mind of the majority, it is surprising that it devoted so little attention to its implications and so much to so many other issues.

198. Association of Nat'l Advertisers, Inc. v. FTC, 627 F.2d at 1174-75.

judicatory standard for disqualification to rulemaking would deprive administrative officials of the opportunity to speak out without fear of disqualifying retribution. Implicit in this is the thought that the adjudicatory standard would result in greater numbers of disqualifications or reticence and perhaps silence on the part of administrative officials. This seems less a matter of preservation of the virtues of rulemaking and more a matter of preservation of administrative freedom to formulate policy in free-wheeling fashion. A second, and more important, element in part VI was the court's fear that the adjudicatory standard for disqualification would introduce the court into the political process. In this there may be an unarticulated fear that the courts would suffer some loss of dignity if compelled to enter the fray of politics. The message may be nothing more complicated than that the majority does not want courts to become involved in the politics of rulemaking anymore than is absolutely necessary. The majority was not willing, to paraphrase its language, to do so as a guarantor of constitutional right, and it did not find it necessary to do so as a guarantor of statutory right because Congress has not specifically directed the courts to oversee prejudgment in rulemaking in any meaningful fashion.[199] The reasons given in part VI are not fully developed and articulated. It would have been useful if the court had done so. The majority's opinion in its entirety leaves a suspicion that the court has not been as candid as it might have been in explaining its result. Candor to a greater extent would be of benefit to both the Supreme Court and Congress in determining whether the majority was fulfilling its responsibility in control of administrative action, including prejudgment in rulemaking.

The problem with the apparent motivation for the majority's opinion is that it fails to recognize the unitary nature of the administrative process. Rulemaking is a political process,[200] but the entire administrative process is political in nature. Regulatory policy in its varying forms is shaped by political forces.[201] To suggest that a part of the administrative process is political, and another is not, is to deny the realities of the situation. Furthermore, from the perspective of the public and those who must deal with administrative agencies, there is reason to believe that their perception of whether an agency official is biased will not vary with the form of administrative proceeding. Only those initiated to the nuances of the distinctions between rulemaking and adjudication are likely to appreciate that there are different standards at work

199. *Id.*

200. Gellhorn & Robinson, *supra* note 196, at 778-79; Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667, 1790 (1975).

201. Cutler & Johnson, *Regulation and the Political Process*, 84 YALE L. J. 1395 (1975); Jaffe, *The Illusion of the Ideal Administration*, 86 HARV. L. REV. 1183, 1183-88 (1973).

governing prejudgment. The majority fails to take into account the consideration that public perception of unfairness in any facet of the administrative process does not serve the long range interest of that process. Public discontent with the administrative process is common today;[202] it should be avoided and not nurtured. Indeed, the only persons who would be benefited by the creation of the "unalterably closed mind" standard are those in the courts and in the agencies. Under the "unalterably closed mind" standard the courts will be essentially free to disregard conduct of administrative officials in rulemaking. Similarly, administrative officials will have unparalleled freedom of conduct in rulemaking, even though they are not elected officials serving in a representative institution of government.[203] Thus, the result in *Association of National Advertisers* is to serve the interest of the courts and the agencies. By no means is it obvious that it serves the interest of the public. For this reason alternatives must be found, considered and implemented as substitutes for the "unalterably closed mind" standard.

V. THE DUTY TO ACT FAIRLY: A SUBSTITUTE FOR THE "UNALTERABLY CLOSED MIND" STANDARD FOR DISQUALIFICATION IN RULEMAKING

Disenchantment with the "unalterably closed mind" standard is not universal. Unquestionably, federal administrative agencies are pleased with the standard; they are among those who suggested it. The Administrative Conference of the United States (ACUS) has been slightly less than adamant in support of the standard, yet its recommendation regarding rulemaking proceedings suggests a preference for limiting the cases in which prejudgment in rulemaking may result in disqualification to those in which "adjudicative" or "specific" facts require resolution on an evidentiary record.[204] Even in those cases the Conference would require "at least a preponderant showing that an agency member or decisional employee has a closed mind regarding those facts."[205] The similarities between the ACUS position and the "unalterably closed mind" standard are clear; the distinctions are subtle.

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202. *See* Auerbach, *supra* note 60, at 115; Robinson, *The Federal Communications Commission: An Essay on Regulatory Watchdogs*, 64 VA. L. REV. 169, 170, 201-02 (1978); Note, *Congressional Oversight of Administrative Discretion: Defining the Proper Role of the Legislative Veto*, 26 AM. U. L. REV. 1018, 1055 (1977).

203. ADMINISTRATIVE PROCEDURE ACT: LEGISLATIVE HISTORY, S. DOC. NO. 248, 79th Cong., 2d Sess. 19 (1946): "An administrative agency . . . is not ordinarily a representative body. . . . Its deliberations are not carried on in public and its members are not subject to direct political controls as are legislators."

204. ADMINISTRATIVE CONFERENCE OF THE UNITED STATES, RECOMMENDATION 80-4 on "DECISIONAL OFFICIALS' PARTICIPATION IN RULEMAKING PROCEEDINGS." ADMINISTRATIVE CONFERENCE OF THE UNITED STATES, RECOMMENDATIONS, 45 Fed. Reg. 46,771 (1980) (to be codified in 1 C.F.R. § 305.80-4).

205. *Id.* at 46,777.

Commentary to date on the standard has been mixed. It has been suggested that much of what is alleged as constituting evidence of prejudgment in rulemaking is in the nature of "indecorous behavior" which is best dealt with politically through "congressional reaction, loss of public acceptance, and collegial censure."[206] In contrast, concern has been expressed concerning the impact of the "unalterably closed mind" standard on the effective functioning of the rulemaking process.[207] The concerns are the appearance of impropriety in administrative proceedings, including informal rulemaking, and the impact on the integrity of the process. It has been suggested that courts should intervene and adopt the appearance of bias standard based on the intent of Congress implicit in the scheme for notice-and-comment rulemaking under section 553 of the APA.[208] It has also been suggested that the courts intervene constitutionally by finding a due process right to fairness in informal rulemaking,[209] or that the courts adopt a case-by-case approach and determine the nature of the individual interests involved in each administrative proceeding and balance these against considerations of efficiency to determine the relevant standard for disqualification.[210]

For those who view prejudgment in rulemaking a problem, the solu-

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206. Strauss, *supra* note 2, at 1049. Professor Strauss' article was based on a report which he prepared for the Administrative Conference of the United States on the subject of disqualification in rulemaking. His report formed the basis for the Conference's Recommendation 80-4.

207. Note, *Regulator Disqualification from Rulemaking Proceedings,* 57 TEX. L. REV. 1193, 1217-18 (1979).

208. The analysis in support of this position is that notice-and-comment rulemaking under the APA itself imposes upon administrative officials a duty to remain open to all points of view and to take into account all relevant facts and policy in the course of adopting rules. Judicial intervention is recommended in cases where an administrative official is perceived as having a closed mind on important policy issues in order to assure effective functioning of the rulemaking process. *Id.* at 1210-18.

Implicit in the idea that a biased decisionmaker is inconsistent with the statutory scheme for notice-and-comment rulemaking is the conclusion that the decisionmaker is acting ultra vires. "Prejudging the issue and deciding the matter in accordance with preconceived ideas may be described as a form of bias, but it would seem logical to discuss the vitiating element under procedural *ultra vires*. . . ." J. GARDNER, *supra* note 157, at 126. *See* H. WADE, *supra* note 155 at 394-95.

209. Comment, *Due Process in FTC Rulemaking,* 1979 ARIZ. ST. L. J. 543, 561-62. This comment was written in response to and in support of the decision of the district court in *Association of National Advertisers* and before the decision of the court of appeals reversing the district court.

210. Note, *Bias in Administrative Rulemaking After* Association of National Advertisers v. Federal Trade Commission, 54 NOTRE DAME LAW. 886, 907-10 (1979). This note was written subsequent to the decision of the district court and prior to the decision of the court of appeals in the *Association of National Advertisers* case. It expressed concern that the district court in applying the adjudicatory model to Chairman Pertschuk's disqualification had failed to give adequate consideration to rulemaking characteristics of Magnuson-Moss and the needs for efficiency in rulemaking. In order to accommodate this interest, the note recommended as an alternative that courts "examine the nature of the interests involved on a case-by-case basis to determine whether an allegation of bias and prejudgment in a hybrid procedure warrants disqualification." *Id.* at 910.

tions suggesting judicial intervention are inadequate. Neither constitutional analysis, nor statutory interpretation, will address the matter of prejudgment adequately so long as the courts are unwilling to intervene. This is not to suggest that the courts could not. The experience in the application of English principles of natural justice to administrative proceedings demonstrates the opposite, and the Supreme Court's *Vermont Yankee* decision is at best an excuse, and not a barrier to similar judicial action in the United States. However, so long as the attitude expressed by the majority in the *Association of National Advertisers* case is shared by others, and there is reason to believe that it is, the fear that an appearance of prejudgment standard "would plunge courts into the midst of political battles concerning the proper formulation of administrative policy,"[211] will render judicial resolution of the prejudgment problem impossible. It is futile to expect the courts to do what they are unwilling to do and what a substantial body of opinion believes they should not do. Traditionally, courts are deferential to administrative expertise, and in this instance the experts within the agencies have told the courts that an appearance of prejudgment standard would undermine, if not destroy, their ability to function effectively as rulemakers.

The realistic alternative is not in any expectation of judicial intervention, but in legislative action. If Congress determines that administrative decisionmakers must be free of prejudgment in fact and appearance in any or all administrative proceedings, the courts can be expected to implement the will of Congress. They will do so even if that places them in what they may perceive as the distasteful role of "arbiters of the political process."[212] This is why legislative intervention is required to achieve what courts abroad have moved toward under principles of natural justice. Specifically, what is needed is amendment of the APA to eliminate the dichotomy between the "unalterably closed mind" standard in rulemaking and the appearance of prejudgment standard in adjudication.

The objective of a uniform standard for prejudgment might be realized in a number of ways. Individual statutes governing specific agencies might be amended for this purpose. However, one of the virtues of comprehensive administrative procedure legislation is that it assures wider application and uniformity. The APA is a preferable vehicle for achieving a uniform standard.

One approach to the task of amending the APA would be statutory enactment of the disqualification standard for prejudgment in adjudicatory proceedings developed by the courts. The difficulty with this

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211. Association of Nat'l Advertisers, Inc. v. FTC, 627 F.2d at 1174-75.
212. *Id.*

approach is that the standard is couched in the language of administrative adjudication and burdened by a judicial history which ties it to adjudication. In light of the demonstrated reluctance of the courts to extend this principle beyond adjudication, an effort to extend it by statute to other forms of administrative action might be frustrated by judicial inertia, unintentional or otherwise. The better approach would be to recognize by statute a new and uniform standard which applies to administrative action in most of its forms. Coupled with appropriate legislative history, the new standard could incorporate the best elements of the adjudicatory standard and offer a greater opportunity for success without risk of judicial retrenchment or backsliding.

The basic concept of the duty to act fairly as it has developed under principles of natural justice provides a model for drafting the uniform standard. This standard might be applied to administrative action in all its forms. It does not seem too much to ask for fairness in all facets of the administrative process. However, the APA has never purported to address in great detail a number of kinds of administrative action, including the significant quantity of administrative action which constitutes informal adjudication.[213] For the present it would not be desirable to fill only one part of a large void by imposing standards for prejudgment to informal adjudication. A more modest step would be to apply a uniform duty to act fairly in the more structured kinds of administrative action which are addressed in greater detail by the APA. Administrators involved in formal adjudication; rulemaking on-the-record; informal, notice-and-comment rulemaking; and all forms of "hybrid" rulemaking which are subject at least in part to APA procedures for informal rulemaking[214] should be subject to the "duty to act fairly" standard for disqualification.

A uniform duty to act fairly should be applied to all agency employees with decisionmaking responsibilities. This would include the heads of agencies, the members of the body comprising an agency, as

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213. Informal adjudication itself has "no commonly accepted meaning." Verkuil, *A Study of Informal Adjudication Procedures,* 43 U. CHI. L. REV. 739, 739 n.1 (1976). More certain is what informal adjudication is not — rulemaking or formal adjudication. Dean Verkuil recommends that the "rampant proceduralization" he notes elsewhere in the administrative process not be extended to informal adjudication. *Id.* at 796.

214. Under this proposal the duty to act fairly would apply at a minimum to (1) rulemaking subject to notice-and-comment procedures under section 553 of the APA, (2) all rules required by statute to be made on the record after an opportunity for agency hearing pursuant to the last sentence of section 553(c) of the APA, (3) unless otherwise exempted, all adjudications required by statute to be determined on a record after an opportunity for agency hearing pursuant to section 554 of the APA, and (4) all rulemaking which is subject to at least section 553 notice-and-comment procedures, or comparable procedures. The latter would accommodate and include rulemaking such as Magnuson-Moss which builds upon the basic requirements of notice-and-comment rulemaking with the addition of statutory procedures.

well as administrative law judges in those proceedings which involve them. The duty need not apply to agency employees engaged in investigatory or prosecutory functions when these functions are performed at levels below the top of the agency where one is more accustomed to attitudes and behavior which may rise to the level of prejudgment or the appearance of prejudgment. To the extent that advocacy is necessary to the proper development of a case on behalf of the agency, prejudgment may be tolerable at such levels. Still, it would not be unreasonable to demand fairness on the part of all who serve the public in official capacities. It has been suggested in recent years that agencies generally have moved away from their more traditional role as advocates of the public interest.[215] If this is the case, perhaps all within the agencies should, to the fullest extent possible, discharge their responsibilities as umpires rather than as partisans.

Once identified, those persons within an agency subject to the duty to act fairly would be required to conduct themselves in a fair manner in the course of formal and informal rulemaking, and formal adjudication and hybrid rulemaking. At the same time, the present requirement of impartiality applicable only to formal rulemaking and formal adjudication should be eliminated, with the duty to act fairly substituted. Under the statute, persons affected could be allowed to disqualify themselves from participating in any of these functions at any time in the manner provided at present for disqualification under section 556(b) of the APA.[216] Similarly, the statute could provide for filing of an affidavit of unfairness with the accompanying requirements of timeliness and good faith. An affidavit of this nature would be required in order to raise the issue of violation of the duty to act fairly subsequently, either within an agency or in the courts. The statute should make clear that the burden of proof is on the person seeking disqualification. It also would be desirable to address in the statute the issue of the quantity of proof required in support of disqualification. In *Association of National Advertisers,* the majority was inclined to require a "clear and convincing

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215. *See generally* Stewart, *The Reformation of American Administrative Law,* 88 HARV. L. REV. 1667, 1670-1762 (1975); Williams, *Fifty Years of the Law of the Federal Administrative Agencies — And Beyond,* 29 FED. B. J. 267, 275-76 (1970).

216. On the subject of disqualification in formal adjudication and formal rulemaking, section 556(b) of the APA provides that:

> the functions of presiding employees and other employees participating in decisions in accordance with section 557 of this title shall be conducted in an impartial manner. A presiding or participating employee may at any time disqualify himself. On the filing in good faith of a timely and sufficient affidavit of personal bias or other disqualification of a presiding or participating employee, the agency shall determine the matter as a part of the record and decision in the case.

5 U.S.C. § 556(b) (1976).

showing"[217] in applying their standard for disqualification, while the dissent would have required a preponderance of the evidence under his proposed standard. Either might be acceptable for addressing unfairness, although the preponderance of the evidence seems likely to prove less an obstacle to the moving person. This observation may be little more than a matter of subjective semantics. Nevertheless, the result would be to impose a burden on the moving party to show by a preponderance of the evidence that the administrative official was incapable of conducting the proceeding in question in a fair manner.

It would not be impossible to delineate the elements and circumstances of unfairness in the statute itself. This approach has been taken with respect to judicial disqualification.[218] The difficulty with this approach is that unfairness in its many potential manifestations is difficult to articulate in the abstract. Unfairness is best assessed in the context of a particular factual situation. For that reason, a statute imposing a duty to act fairly should and need not be overly specific. Yet in light of the recent developments in the area of prejudgment in rulemaking, it would not be desirable for Congress to delegate the task of determining unfairness to the judiciary without guidance. This might result in an early resurrection of the distinctions which the legislation would be intended to overturn.

Congressional guidance can be provided. A well developed legislative history, with as little ambiguity as possible, could make clear that administrative decisionmakers are not to be unfair in fact, or to appear to be unfair. The legislative history could also develop the point that Congress anticipates that most administrative officials are not likely to be disqualified under the unfairness standard in light of experience which demonstrates that most administrative officials neither are, nor appear to be, unfair in the discharge of their responsibilities. It could further indicate that what is expected and required of administrative officials is that they be circumspect and decorous as they carry out their duties, giving due weight to variations in individual personality and style. It might also express the congressional prediction that preconceived views on law and policy are not as likely to contribute to a finding of unfairness and that prejudgment on facts, whether they be called legislative, adjudicative or whatever, is likely to result in unfairness no matter what the nature of the administrative proceeding. Hopefully, this last point could be made without undue risk that the courts would resurrect the kind of distinction which produced some of the debate in the *Association of National Advertisers* case. With the benefit of this legislative

217. Association of Nat'l Advertisers, Inc. v. FTC, 627 F.2d at 1154. *See* Strauss, *supra* note 2, at 1039.

guidance the courts would then be in a position to develop the law of unfairness in administrative proceedings in the context of individual cases as they arose, and they would do this with full knowledge of what Congress had repudiated in enacting the duty to act fairly as well as the knowledge of what Congress generally intended the duty to mean.

The duty to act fairly would not constitute a dramatic shift in standards for disqualification in adjudicatory proceedings. It would constitute a change in the law governing informal and hybrid rulemaking. Many would view this development as disruptive, and even devastating, to the administrative process. Views of this nature, however, must be put in perspective. If the case law on disqualification for prejudgment in adjudicatory proceedings is symptomatic, and there is no reason to believe that it is not, the vast majority of administrative adjudications unfold without apprehensions of unfairness among persons affected by them. Within the normal confines of human frailty, most administrative decisionmakers do attempt to be fair in all of their activities, and persons affected by their actions apparently feel that their cases have not been prejudged even though they may not be pleased with their outcome. If this were not the case, one would expect the number of disqualification cases in adjudication to be significantly greater.

Nevertheless, a principle such as the duty to act fairly, without regard to the form of administrative proceeding, is needed to deal with the very few administrative officials who are in fact unfair and the somewhat greater number who appear to be unfair. This is because the few in this instance work to the detriment of all administrative officials. A duty to act fairly is not likely to frustrate the free flow of ideas in policy formulation in administrative agencies. Nor is it likely to silence administrative officials who seek to be fair-minded and conscientious as they carry out their duties. It is true that the duty to act fairly may very well silence those few who are not similarly inclined. But the benefit of adopting a duty to act fairly in administrative proceedings could be great. Those who perceive the agencies which govern them as unfair are more likely to engage in the kind of frontal assault which has characterized the Pertschuk years at the Federal Trade Commission.[219] The result of such challenges may be legislative elimination of entire

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218. *See* 28 U.S.C. §§ 144, 455 (1976).

219. The Federal Trade Commission Improvements Act of 1980 limited the powers of the Commission in numerous respects. The statute restricted its ability to regulate the funeral industry, agricultural cooperatives and the insurance industry. It also provided for congressional review of Commission rules. Further procedural requirements were imposed in Magnuson-Moss rulemaking as well. Pub. L. 96-252, 94 Stat. 374 §§ 19, 20, 5(a), 21, 8(a), 9(a), 12, 15 (1980). None of these limitations on the Commission's authority were necessarily inevitable. The more plausible explanation is that they reflect congressional reaction to what were viewed as excesses on the part of the Commission.

agencies, or drastic contraction of their roles. It would be ironic if perceptions of unfairness on the part of the FTC, even in part, resulted in the limitation of its ability to deal with what it viewed as unfairness outside of the FTC. Had the FTC been perceived as fair, Congress might not have limited its authority to deal with unfair practices as it did in the Federal Trade Commission Improvements Act of 1980.[220] This is why the imposition of a duty to act fairly without regard to the form of administrative proceeding would be in the ultimate interest of all concerned, including the agencies.

220. § 11(a)(1) of the Federal Trade Commission Improvements Act of 1980 provided that "[t]he Commission shall not have any authority to promulgate any rule in the children's advertising proceeding pending on May 28, 1980, or in any substantially similar proceeding on the basis of a determination by the Commission that such advertising constitutes an unfair act or practice in or affecting commerce." *Id.* at § 11(a)(1) (codified at 15 U.S.C. § 57a(i)).

APPENDIX I

On November 8, 1977, Chairman Pertschuk made the following remarks to the Action for Children's Television Research Conference.

No one has been more eloquent than Peggy Charren in portraying the moral myopia of children's television advertising. No one, that is, except the Christian Broadcasting Company which placed the following ad in Broadcasting Magazine for WXNE T.V.

> *Kid Power is coming to Boston.* If you're selling, Charlie's mom is buying. But you've got to sell Charlie first.
>
> His allowance is only 50¢ a week but his buying power is an American Phenomenon. He's not only tight with his mom, but he has a way with his dad, his grandma and Aunt Harriet, too.
>
> When Charlie sees something he likes, he usually gets it. Just ask General Mills, McDonald's or Mattel.
>
> Of course, if you want to sell Charlie, you have to catch him when he's sitting down. Or at least standing still. And that's not easy. Lucky for you, Charlie's into T.V. And just waiting for WXNE-T.V. 25 to hit the air this Fall. That's when you'll be able to reach Charlie with your client's message every day, Monday thru Friday, from 2:30 to 8:00 p.m.
>
> And of course, Charlie won't be watching alone! You'll also be reaching Jeff and Timmy, Chris and Susie, Mark and his little brother John. Not to mention mom when she's serving the cookies.
>
> That's what we mean by kid power. . . . So, whether its toothpaste or toy trucks, burgers or bionic dolls . . . Charlie's mom is buying.
>
> But you've got to sell Charlie first.

This ad, headlined in bold block letters KID POWER, is illustrated by a photograph of a contented 5 or 6 year old sitting amid his toys.

WXNE's enthusiasm — if not its ethical sensibilities — is understandable. The broadcasters' "take" from advertising on children's television shows is now approaching 600 million dollars. The rates are high, and growing faster than ad rates for adult programming. There's gold in Charlie and his friends.

ACT and other public interest groups have asked the FTC to focus on the advertising of highly sugared foods — advertising which compounds the problem of child-directed commercial appeals with the danger of significant health risks. The Commission will be meeting shortly to formulate its response. The views I express today are my own and not those of my four fellow Commissioners who must also grapple with the issues you have raised.

The advertiser and the broadcaster say to us: "OK kid vid offends you. That's your privilege but the products are lawful; what makes the advertising unlawful?"

To the young child at home, T.V. is a trusted companion, a teacher, a window on the world. A study performed recently, sponsored in part by the NAB, demonstrated that many children have only a minimal understanding of what T.V. commercials are and what they do. Advertisers seize on the child's trust and exploit it as a weakness for their gain. Children trust T.V. because it is part of their world — it is everywhere. It is impossible to shield a child from a sense of familiarity and comfort with T.V. It is no surprise that Charlie believes that "Cereal A makes the monsters go away." If he didn't see it on T.V., Jane, who told him so, did.

Commercials do not disclose their nature — that is, the economic interest of the advertiser in convincing the viewer. To the small child it is as if a trusted friend urged the consumption of a particular product, not for a personal gain, but solely out of concern for the child.

Even if a disclosure were made of the commercial nature of the message, the youngest children simply would not understand. The FCC has found that "psychological and . . . behavioral questions can seldom be resolved to the point of mathematical certainty. . . . The evidence confirms, however, what our accumulated knowledge, experience and common sense tell us: that many children do not have the sophistication or experience needed to understand that advertising is not just another form of informational programming."

T.V. commercials to children rarely try to communicate the rational objective merits of products. Instead, using sophisticated techniques like fantasy and animation, they manipulate children's attitudes. These techniques may be tolerable when they are directed toward adults — but are they when directed toward children? Justice Holmes once wrote that small children will "follow a bait as automatically as a fish."

Section 5 of the Federal Trade Commission Act prohibits "unfair or deceptive acts or prac-

tices in or affecting commerce." I am concerned that children's television advertising may, especially advertising for highly sugared products, violate the statutory standard of fairness.

Why am I concerned? Advertisers ask if the legal concept of unfairness is not an unbounded invitation to the five members of the Commission to substitute their own moral precepts for the commercial freedom of the advertiser to seek his markets where he can find them.

Fortunately, the Supreme Court has given us guidance in circumscribing the legal concept of unfairness. Five years ago, in a landmark case, the Court indicated that in determining the lawfulness of commercial practices under the unfairness portion of Section 5, the Commission could consider "whether the practice, without necessarily having been previously considered unlawful, offends public policy as it has been established by statutes, common law or otherwise. . . ." The Commission may also consider "whether it causes substantial injury to consumers." These are the touchstones of the law of unfairness.

If there is one salient public policy which rises commandingly from centuries of common and statutory law, it is that the commercial exploitation of children is repugnant to a civilized society.

This principle is as old as the law. Under the Code of Hammurabi, commercial exploitation of a child, in some instances, was punishable by death. Our law of contracts protects not only the preliterate child but extends that protection to the adolescent who is almost old enough to vote. So firmly entrenched is this solicitude for the commercial vulnerability of the child that the Courts refuse to enforce a child's contract against him, even where the child's parent knew of and approved of the contract. To protect the child against the consequences of his or her unformed commercial judgment, the law prevents children from buying, and sellers from selling to them, otherwise legal products such as cigarettes, liquor and rifles. A child is not free to choose a life of freedom from school, or drive a car or marry.

Legal recognition of children's lack of evaluative capacities is also expressed in the "attractive nuisance" doctrine of tort law. A person who maintains premises that are both enticing and dangerous to small children, such as a swimming pool or a construction site, bears the risk of any injury that may befall a child. A child may know of the risk, but the law takes cognizance of the child's inability to withstand temptation.

Not only does the law seek to protect children directly; it also seeks to protect the family as an institution on which children depend for nuture [sic] and guidance. Nine years ago, the Supreme Court reaffirmed that;

> [T]he parent's claim to authority in their own home to direct the rearing of their own children is basic to the structure of our society.

The Court recognized that it is proper to:

> conclude that parents and others, teachers for example, who have the primary responsibility for children's well being, are entitled to the support of laws designed to aid discharge of that responsibility.

Why isn't this principle applicable to television advertising directed at young children? Why shouldn't established legal precedents embodying this public policy be applied to protect children from this form of exploitation? In short, why isn't such advertising unfair within the meaning of the Federal Trade Commission Act and, hence, unlawful?

Moreover, children have become the target market for products that promise immediate satisfaction. With food, this often means instant pleasure — and the danger of long term malnutrition. Children lack the judgment and experience to see that something that looks good to them in the short run can hurt them in the long run. They cannot protect themselves against adults who exploit their present-mindedness.

Cumulatively, commercials directed to children tend to distort the role of food. "Consumer, stuff thyself" is the message. Rarely is there emphasis on good nutrition, or any suggestion that eating too much of any food can be bad.

Finally, advertising often fails to disclose specific material risks. Of imminent concern, of course, is the conclusion of many experts that sugar, especially sticky sugar, is the preeminent cause of tooth decay. Other experts find sugar to be linked to the national epidemic of obesity.

General Mills has, perhaps, said it best, in a booklet called "Meal Planning for Young Children."

> Watch the teeth. Use sparingly foods high in sugar. They take away the appetite for more basic foods, provide only calories and quick energy and encourage tooth decay. No coaxing is necessary to get children to eat candy, cookies, cake or drink carbonated beverages.

> Teaching a preference for other types of foods *must* begin early in the highchair stage. Offer sweets *only* at the end of the meal.

But at the food store, parents who seek to follow General Mills' sound advice run head-on into the attitudes of their children — attitudes which are generated by ads for the very products about which General Mills cautions us.

We are also indebted to General Mills for documenting the resulting family discord. Its *American Family Report* for 1976 and '77 tells us that the "major nagging problem in raising children who are 12 years or under" is that children are addicted to snacks between meals.

Shouldn't society apply the law's strictures against commercial exploitation of children, and the law's solicitude for the health of children to ads that threaten to cause imminent harm — harm which ranges from increasing tooth decay and malnutrition to injecting unconscionable stress into the parent-child relationship?

What I've talked about so far, the unfairness of advertising aimed at children, follows from the premise that children are not adults in miniature. Instead, they bring to advertising a special perspective and sensibility — a credulousness that comes from inexperience — which advertisers exploit. But even if you close your eyes and ears to this reality, that's not the end of it under the FTC Act. For even then, children's advertising would have to pass the traditional tests for nondeceptiveness. It must not be misleading.

Section 15 of the FTC Act provides that advertising is misleading — and hence unlawful — if material facts are omitted. As I've already observed, there is scientific evidence that health problems may result from the use of sugared products. Yet the advertising of sugared products does not warn of potential dangers like tooth decay. Any child who has experienced the discomfort and pain of having a cavity filled would want this "material" information.

Instead, the commercials are filled with audio and visual effects that highlight the "fun" or general desirability of these foods. We cannot assume that somehow children are aware that there is also a risk. As the Commission has held, even with respect to advertising directed to adults:

> Too much is at stake, especially in matters of safety, to make any assumptions about consumer knowledge.

With children's health at stake, presuming knowledge would be even more impermissible. Even if a child were considered a suitable recipient of commercial messages, that child would be entitled to all relevant information.

Early in December the full FTC will decide whether to take action on children's advertising of sugared products. If the Commission decides that something must be done, the question then becomes, what action? It may be that only a ban on the advertising of these products on programs directed towards the young child can remedy their inherent defect, although we must explore all remedial approaches to the problem.

I cannot pretend that we are entering upon a well trodden or clearly marked path. Although children's television advertising is a relatively recent phenomenon in our society, there are those who find it unthinkable to challenge so pervasive an institution. While I have sketched for you the legal authority which would support Commission action, there are respectable countervailing views.

Following my meeting with ACT and other spokesmen for children, the cereal manufacturers have asked for an opportunity to present their views and concerns about these issues. I intend to give them that opportunity. If the Commission decides to proceed further, you can be certain that those whose economic interests are at stake will effectively marshall both facts and legal theory in support of their position.

If the Commission is to reach sound and reasoned judgments, it must also hear from the parents, the teachers, the pediatricians, the dentists, those health and education specialists on whom we rely for the advocacy of our children's best interest. We must be rigorous and open-minded in our analysis of both law and fact. At stake are fundamental questions about the extent to which our society will permit the treatment of children as commercial objects rather than formative human beings entrusted to our care. Remarks of Michael Pertschuk, Chairman Federal Trade Commission Before ACT Research Conference (Nov. 8, 1977).

APPENDIX II

Following is a letter which the Chairman wrote to the Commissioner of Food and Drugs on the subject of children's advertising.

November 17, 1977

Honorable Donald Kennedy
Food and Drug Administration
Parklawn Building
5600 Fishers Lane
Rockville, Maryland 20852
Dear Don:

Setting legal theory aside, the truth is that we've been drawn into this issue because of the conviction, which I know you share, that one of the evils flowing from the unfairness of children's advertising is the resulting distortion of children's perceptions of nutritional values. I see, at this point, our logical process as follows: children's advertising is inherently unfair. As a policy planning agency we have to make judgments as to our priorities. The first area in which we choose to act is an area in which a substantial controversy exists as to the health consequences of encouraging consumption of sugared products (not just cereals). With this formulation we do not have to prove the health consequences of sugared cereals. What we do have to prove is that there is a substantial health controversy regarding the health consequences of sugar — a much lower burden of proof.

I'm convinced that the convergence of public policies regarding the commercial exploitation of children with the health controversy over sugared products give us a stronger base and frankly deal directly with the underlying concerns which prompt our action.

Sincerely yours,
Michael Pertschuk

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NOTES

Commercial Speech and the FTC: A Point of Departure From Traditional First Amendment Analysis Regarding Prior Restraint

The Federal Trade Commission (FTC) has long been recognized by the courts as being the expert in determining the existence of trade regulations.[1] The statute directing the Commission's activities and establishing its powers employs sweeping language defining the scope of the FTC's operation.[2] In its consumer protection role,[3] the FTC is

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1. The Supreme Court of the United States has held, that "as an administrative agency which deals continually with cases in the area, the Commission is often in a better position than are courts to determine when a practice is 'deceptive' within the meaning of the Act." Colgate-Palmolive v. FTC, 380 U.S. 374, 385 (1965) (where the Commission's cease and desist order regarding a falsified demonstration of an admittedly truthful fact was upheld by the Supreme Court). It has been further held that "[t]he Commission is the expert body to determine what remedy is necessary to eliminate the unfair or deceptive trade practices which have been disclosed." Jacob Siegel Co. v. FTC, 327 U.S. 608, 612 (1946) (where a blanket cease and desist order by the Commission was modified where the court found such modification appropos). *See also* Moog Industries, Inc. v. FTC, 355 U.S. 411 (1958) (where the Court upheld the discretion of the FTC to selectively apply a cease and desist order prohibiting actions of one firm before imposing similar restraints against competitors).

2. Federal Trade Commission Act of 1914,15 U.S.C. § 45 (1976), 15 U.S.C. § 45(b) (1976) provides:

> Whenever the Commission shall have reason to believe that any such person, partnership, or corporation has been or is using any unfair method of competition or unfair or deceptive act or practice in or affecting commerce, and if it shall appear to the Commission that a proceeding by it in respect thereof would be to the interest of the public, it shall issue and serve upon such person, partnership or corporation a complaint stating its charges in that respect and containing a notice of a hearing upon a day and at a place therein fixed at least thirty days after the service of said complaint. The person, partnership, or corporation so complained of shall have the right to appear at the place and time so fixed and show cause why an order should not be entered by the Commission requiring such person, partnership, or corporation to cease and desist from the violation of the law so charged in said complaint. Any person, partnership, or corporation may make application, and upon good cause shown may be allowed by the Commission to intervene and appear in said proceeding by counsel or in person. The testimony in any such proceeding shall be reduced to writing and filed in the office of the Commission. If upon such hearing Commission shall be of the opinion that the method of competition or the act or practice in question is prohibited by this Act, it shall make a report in writing in which it shall state its findings as to the facts and shall issue and cause to be served on such person, partnership, or corporation an order requiring such person, partnership, or corporation to cease and desist from using such method of competition or such act or practice. Until the expiration of the time allowed for filing a petition for review, if no such petition has been duly filed within such time, or, if a petition for review has been filed within such time then until the record in the proceeding has been filed in a court of

charged with investigating, determining, and remedying[4] commercial practices which are "unfair and deceptive."[5] This broad mandate has seldom been questioned, and it has been upheld by the courts on many occasions since the Act's inception.[6] These broad objectives are best expressed in the Wheeler-Lea Amendment to the Act of 1938.[7] The amendment provides for the protection of both consumers and

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> appeals of the United States, as hereinafter provided, the Commission may at any time, upon such notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any report or any order made or issued by it under this section. After the expiration of the time allowed for filing a petition for review, if no such petition has been duly filed within such time, the Commission may at any time, after notice and opportunity for hearing, reopen and alter, modify, or set aside, in whole or in part, any report or order made or issued by it under this section, whenever in the opinion of the Commission conditions of fact or of law have so changed as to require such action or if the public interest shall so require: Provided, however, that the said person, partnership, or corporation may, within sixty days after the service upon him or it of said report or order entered after such a reopening, obtain a review thereof in the appropriate court of appeals of the United States, in the manner provided in subsection (c) of this section.

15 U.S.C. § 45(a) (1976) provides in pertinent part: "Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are hereby declared unlawful." Congress declined to specifically define the scope of "unfair and deceptive acts" in favor of allowing the Commission to evolve its own standards with experience. *See* note 7 *infra*.

3. The Act was made specifically applicable to protecting consumer transactions by the Wheeler-Lea Amendment of 1938. Act of Mar. 21, 1938, ch. 49, § 3, 52 Stat. 111, § 5(a), which states: "Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are hereby declared unlawful. . . . The Commission is hereby empowered and directed to prevent persons, partnerships or corporations . . ., from using unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce."

4. *See* 15 U.S.C. § 45(b) (1976). The principle remedial method used by the Commission is the cease and desist order. Once an unfair act or practice is discovered by the Commission, it will issue the order which generally entails complete cessation of the sanctioned activity by the party the order is issued against.

5. *See* 15 U.S.C. § 45(a) (1976).

6. *See* Warner-Lambert Co. v. FTC, 562 F.2d 749 (D.C. Cir. 1977), *cert. denied,* 435 U.S. 950 (1977). *See also* National Comm'n on Egg Nutrition v. FTC, 570 F.2d 157 (7th Cir. 1978), *cert. denied,* 439 U.S. 821 (1978). 15 U.S.C. § 45(c) (1976) states in pertinent part:

> Any person, partnership, or corporation required by an order of the Commission to cease and desist from using any method of competition or act or practice may obtain a review of such order in the [circuit] court of appeals of the United States, within any circuit where the method of competition or the act or practice in question was used or where such person, partnership, or corporation resides or carries on business, by filing in the court, within sixty days from the date of the service of such order, a written petition praying that the order of the Commission be set aside. . . . Upon such filing of the petition the court shall have jurisdiction of the proceeding and of the question determined therein concurrently with the Commission until the filing of the record and shall have power to make and enter a decree affirming, modifying, or setting aside the order of the Commission, and enforcing the same to the extent that such order is affirmed and to issue such writs as are ancillary to its jurisdiction or are necessary in its judgment to prevent injury to the public or to competitors pendente lite. . . . To the extent that the order of the Commission is affirmed, the court shall thereupon issue its own order commanding obedience to the terms of such order of the Commission. . . . The judgment and decree of the court shall be final, except that the same shall be subject to review by the Supreme Court upon certiorari, as provided in section 240 of the Judicial Code.

7. Wheeler-Lea Amendment, Act of Mar. 21, 1938, ch. 49, § 3, 52 Stat. 111 (current version at 15 U.S.C. §§ 45, 52-55 (1976)).

businesses from the excesses of unscrupulous commercial activity.[8] The FTC's many functions pursuant to their consumer potection mandate include the search for and suppression of false advertising and product misrepresentation by sellers. A combination of events in the last five years has served to raise questions concerning the FTC's activities. First, the Commission may have become overzealous in its efforts to sanction companies whose activities may be indiscreet rather than clearly illegal, thereby exceeding the mandate of the Federal Trade Commission Act (FTCA).[9] More importantly, however, beginning in 1976, the United States Supreme Court expressly recognized that truthful advertising, or commercial speech, is protected by the first amendment.[10]

At first glance, the recent line of Supreme Court cases regarding commercial speech does not appear to effect the FTC's activities. The Supreme Court was careful to qualify the altered status accorded to commercial speech,[11] limiting protection only to commercial speech

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8. Prior to passage of the Wheeler-Lea Amendment, it was necessary to show that the "unfair practice was injurious to a competitor." 83 CONG. REC. 391 (1938). The Congress felt that this requirement unduly limited the Commission's power. Thus, the amendment expanded the Commission's jurisdiction to embrace all commercial activity:

> The demand for full protection to the public can only be met, in view of the decided cases, by expanding the scope of the Act beyond unfair methods in competition to include unfair or deceptive acts or practices in commerce. . . . It . . . is . . . the purpose of the Congress to protect the consumer as well as the honest competitor. The Commission should have power and authority to prevent the use of unfair or deceptive acts or practices in commerce, regardless of whether such unfair practices injuriously affect a competitor or a consumer.

Id. at 395.

9. *See* Standard Oil Co. of Cal. v. FTC, 577 F.2d 653 (9th Cir. 1978) (Commission ordered to modify holding due to excess); Beneficial Corp. v. FTC, 542 F.2d 611 (3d Cir. 1976) (valuable business asset found as basis for modifying order). In these cases the courts found the Commission to have exceeded the regulatory mandate contemplated by the Act.

10. *See* Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748 (1976) (prescription drug price advertising protected). *See also* Bates v. State Bar of Ariz., 433 U.S. 350 (1977) (attorney advertising protected by the first amendment). The first amendment provides: "Congress shall make no law . . . abridging the freedom of speech. . . ." U.S. CONST. amend. I. For a discussion regarding the distinction between commercial and political speech, *see* notes 169-84 and accompanying text *infra*. The commercial speech doctrine was applied in appropriate circumstances by courts, usually where there was no political speech right at stake, to exempt the speech in issue from the broad protection of the first amendment. *See* notes 109-14 and accompanying text *infra*. The presence of paid advertising in the speech in question usually made the courts take an extremely close look at the speech to determine whether the commercial speech exception would apply. *See* notes 112-15 and accompanying text *infra*.

11. The Court has stated: "In concluding that commercial speech, like other varieties, is protected, we of course do not hold that it can never be regulated in any way. Some forms of commercial speech regulation are surely permissible." Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 770 (1976). "Obviously, much commercial speech is not provably false, or even wholly false, but only deceptive or misleading. . . . The First Amendment, as we construe it today, does not prohibit the State from insuring that the stream of commercial information flow cleanly as well as freely." *Id.* at 771-72.

which is both truthful and not misleading.[12] The policy underlying this limitation is in accord with stated and implied FTC goals.[13]

Raising commercial speech to full first amendment protection should theoretically entitle such speech to protection from prior restraint.[14] It is apparent, however, that commercial speech does not enjoy full first amendment protection.[15] Further, the cases establishing the limited protection which commercial speech now enjoys did not decide the issue whether the FTC may employ prior restraints when attempting to enforce its mandate.[16]

Recent federal cases have confirmed the FTC's power to require affirmative disclosures by advertisers who have been found in violation of FTC guidelines.[17] These advertisers have been required to retract their

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12. "The public and private benefits from commercial speech derive from confidence in its accuracy and reliability." Bates v. State Bar of Ariz., 433 U.S. 350, 383 (1977). For a view supporting this assertion *see* Reich, *Consumer Protection and the First Amendment: A Dilemma for the FTC?* 61 MINN. L. REV. 705 (1977).

> A free flow of commercial information will tend to alert consumers to available options, if there is a demand for different degrees of quality, service, or safety at corresponding prices, the market will be segmented according to this demand, and vendors will have an incentive to supply truthful information about their particular products in comparison to other products. As a result, consumers will easily find products that adequately fulfill their needs and desires.

Id. at 718.

13. The FTC is concerned with regulating false and misleading promotional claims as part of its overall responsibility to prohibit unfair acts and practices. *See* 15 U.S.C. § 45(a) & (b) (1976). *See* note 2 *supra*. A problem is encountered when the prior restraint of commercial speech is questioned. *See* notes 87-93 and accompanying text *infra*. If the promotion is truthful and not misleading, presumably it should be protected from prior restraint. Likewise, false or misleading claims would not merit such protection. The difficulty concerns the determination whether the imposition of sanctions prior to the publication of a promotion is constitutionally permissible. *See, e.g.*, New York Times Co. v. United States, 403 U.S. 713 (1971) (where a newspaper had secured classified government documents and started printing them serially). The government moved to censure further publication, but the Court held that the government interest in these documents was insufficiently vital to impose the requested censorship. *Id.* at 714.

14. Freedom from prior restraint is not an automatic consequence of protection for first amendment speech. Nevertheless, the state must satisfy a strict scrutiny standard of review by showing a compelling need for prior restraint. *See* W. BERNS, FREEDOM, VIRTUE AND THE FIRST AMENDMENT 78-80 (1969). In practice, prior restraint has occurred in very few instances, and these have usually involved matters of national defense. *See* New York Times Co. v. United States, 403 U.S. 713 (1971); Near v. Minnesota, 283 U.S. 697 (1931); United States v. Progressive, Inc., 467 F. Supp. 990 (W.D. Wis. 1979). *See also* G. GUNTHER, CASES AND MATERIALS ON CONSTITUTIONAL LAW 1320-31 (9th ed. 1975 & Supp. 1979); Monaghan, *First Amendment "Due Process,"* 83 HARV. L. REV. 518 (1970) for a discussion of when prior restraint may be applicable.

15. *See* Central Hudson Gas & Electric Co. v. Public Serv. Comm'n of N.Y., 100 S.Ct. 2343 (1980), which served to substantiate and quantify the vague suggestions of prior commercial speech cases that the first amendment protection to be accorded to commercial speech was limited. *See* notes 186-88 and accompanying text *infra*.

16. For a discussion of these cases, *see* notes 117-38 and accompanying text *infra*.

17. *See* Warner-Lambert Co. v. FTC, 562 F.2d 749 (D.C. Cir.), *cert. denied*, 435 U.S. 950 (1977); National Comm'n on Egg Nutrition v. FTC, 570 F.2d 157 (7th Cir.), *cert. denied*, 439 U.S.

previous claims.[18] This procedure appears to be in derogation of first amendment principles,[19] but in each instance the appeals courts have upheld the FTC order, with occasional modification.[20]

Before commercial speech was accorded first amendment protection, it was susceptible to prior restraint based either on content or on time, place and manner restrictions,[21] since commercial speech regulation was held to be a logical extension of the state's power to control business activity.[22] Elevation to the protected status engenders the inquiry as to whether that status is sufficient to entitle commercial speech to exemption from prior restraint. A recent federal case has suggested an answer in the negative,[23] and the Supreme Court in two of the cases establishing protection for commercial speech has left the question open.[24]

This Note will examine the FTC's use of prior retraints and consider whether it is consistant with the recent elevation of truthful commercial

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821 (1977). *See also* Encyclopedia Britannica, Inc. v. FTC, 605 F.2d 964 (7th Cir.), *cert. denied,* 445 U.S. 934 (1979).

18. In Warner-Lambert Co. v. FTC, 562 F.2d 749 (D.C. Cir.), *cert. denied,* 435 U.S. 950 (1977), the court said:

> By its terms [the disclosure requirement] continues until respondent has expended on Listerine advertising a sum equal to the average annual Listerine advertising budget for the period April 1962 to March 1972. That is approximately ten million dollars. Thus if petitioner continues to advertise normally the corrective advertising will be required for about one year. We cannot say that is an unreasonably long time in which to correct a hundred years of [false] cold claims. But to petitioner's distress, the requirement will not expire by mere passage of time. If petitioner cuts back its Listerine advertising, or ceases it altogether, it can only postpone the duty to disclose.

Id. at 763-64 (footnotes omitted).

19. "Congress shall make no law ... abridging the freedom of speech. . . ." U.S. CONST. amend. I.

20. In National Comm'n on Egg Nutrition v. FTC, 570 F. 2d 157 (7th Cir. 1977) the court found the sanctions to be properly aimed but somewhat broader than necessary to avoid consumer deception. Thus the Commission was instructed to retract a segment of its order to the company. *Id.* at 162.

21. Traditional first amendment speech has typically been subject only to time, place and manner restrictions, while content has never been permitted to act as the basis for state censorship by the courts. *See generally* G. GUNTHER, *supra* note 14, at 1142-53. Time, place and manner restrictions seek to protect the public from the excesses of public speakers and gatherings. *See* Niemotko v. Maryland, 340 U.S. 268 (1951) (Frankfurter, J., concurring).

22. *See* Valentine v. Chrestensen, 316 U.S. 52 (1942).

23. *See* Jay Norris Inc. v. FTC, 598 F.2d 1244 (2d Cir.) *cert. denied,* 444 U.S. 980 (1979). In its opinion, the court concluded that this was not a textbook case of prior restraint, but that prior Supreme Court opinions left the matter sufficiently open to lower court interpretation. That, combined with the hybrid nature of this case, led the court to conclude that prior restraint would be proper in this situation. 598 F.2d at 1252. *See* notes 93-95 and accompanying text *infra.*

24. *See* Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748 (1976):

> Attributes such as these, the greater objectivity and hardiness of commercial speech, may make it less necessary to tolerate inaccurate statements for fear of silencing the speaker. . . . They may also make it appropriate to require that a commercial message appear in such a form, or include such additional information, warnings, and

speech to first amendment protection. Section I examines the FTCA[25] and its effect on commercial speech. Section II will review judicial interpretations of the Act and the implications with respect to the conflict over prior restraint. Section III describes the concept of prior restraint and analyzes its role in the overall interpretation of the first amendment presently accorded to commercial speech. Section IV sets out a brief history of the commercial speech doctrine, its subsequent demise, and will attempt to define the amount of first amendment protection. Section V considers the conflict and presents arguments for and against the constitutionality of prior restraint in an attempt to discern an appropriate resolution of this dilemma.

I. THE FTC'S DISCRETIONARY POWER TO DETERMINE AND REMEDY COMMERCIAL MISREPRESENTATION

The FTC's power is derived from the FTCA.[26] The statute is very broad to the point of being vague, a characteristic built into the statute so that its scope could be developed by judicial and administrative interpretation.[27] The FTC is empowered to police the market place for "un-

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disclaimers, as are necessary to prevent its being deceptive. . . . They may also make inapplicable the prohibition against prior restraints.

Id. at 772 n.24 (citations omitted).

See also Bates v. State Bar of Ariz., 433 U.S. 350 (1977):

In holding that advertising by attorneys may not be subjected to blanket suppression, and that the advertisement at issue is protected, we, of course, do not hold that advertisement by attorneys may not be regulated in any way.

Id. at 383.

25. 15 U.S.C. § 41 *et seq.* (1976).

26. 15 U.S.C. § 45 (1976). The FTC's power to control commercial speech, or advertising, is placed in its Bureau of Consumer Protection. S. WAGNER, THE FTC 43 (1971). At the Act's inception in 1914, the Commission was given two major duties: "1) Prevention of unfair methods of competition in interstate commerce and 2) collection of information regarding corporations engaged in interstate commerce.... In both the aim is regulation, to be obtained in the first case by quasi judicial action, and in the other by means of publicity...." W. HOLT, THE FEDERAL TRADE COMMISSION: ITS HISTORY, ACTIVITIES AND ORGANIZATION 17 (1974). Amendments to the Act, most notably the Wheeler-Lea Amendment in 1938, enlarged this power to enable the Commission to determine and sanction "unfair and deceptive acts." Wheeler-Lea Amendment to the Federal Trade Commission Act of 1914, 15 U.S.C. § 45(a). In addition, the Commission's authority increased due to the undermining of the constitutional distinction between interstate and intrastate commercial activity. *See* S. WAGNER, *supra,* at 30. As a federal agency, the Commission has power only over activities involving interstate commerce. However, Supreme Court decisions over the past thirty years have led to the demise of the word intrastate in a commercial context. *See* United States v. Darby, 312 U.S. 100 (1941). *See also* Katzenbach v. McClung, 379 U.S. 294 (1964). The Bureau of Consumer Protection, through its office specializing in investigating advertisers now has the power to scrutinize and request a hearing regarding nearly any product promoter. FTCA, 15 U.S.C. § 45(b) (1976).

27. In the debates prior to the enactment of the Federal Trade Commission Act the need for flexibility in interpreting the new law was pronounced:

[T]here is a principle underlying every such phrase [unfair competition] if used in the common law; that there is an evil to be reached, and that when we employ such a word or

fair acts or practices in or affecting commerce."[28] The Commission investigates and brings cease and desist orders against companies when it finds an unfair act or practice.[29] Each new administrative proceeding and subsequent judicial review have served to further delineate what is meant by unfair and deceptive. "The proscriptions in s. 5 are flexible, 'to be defined with particularity by the myriad of cases from the field of business'."[30] Sub-section (c)[31] of the Act provides for judicial review of the Commission's determination of what constitutes an unfair act or practice. Thus, case by case development over the past forty-two years provides a definition of an "unfair or deceptive act or practice."[32]

Sub-section (b) grants the FTC a plenary mandate.[33] Using this directive as the basis for its operation, the FTC has diligently sought to curtail false, deceptive and misleading advertising whenever such practices are likely to cause a consumer or business to purchase a product or service.[34] The FTC is not limited to sanctioning present or past acts, but is also empowered to act prospectively. Thus, if an advertisement is potentially deceptive, the Commission will impose sanctions, whether or not there is evidence that any party has been harmed.[35]

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such a phrase we must keep in view all the while the principle upon which the definition or application was given to the word or phrase, and apply it from time to time in consonance with that principle. If that be true, the words 'unfair competition' can grow and broaden and mold themselves to meet circumstances as they arise . . ." 51 CONG. REC. 12871 (1914).

28. *See* 15 U.S.C. § 45(a) & (b) (1976).

29. 15 U.S.C. § 45(b) (1976) provides for the Commission to investigate businesses for wrong-doing and upon such a finding to order that wrongful conduct cease. *See* note 2 *supra,* for the text of the provision.

30. Colgate-Palmolive v. FTC, 380 U.S. 374, 385 (1965). The Court here paraphrases the intent of Congress.

31. 15 U.S.C. § 45(c) (1976).

32. *See* notes 8 & 27 *supra.*

33. 15 U.S.C. § 45(b) (1976) provides: "Whenever the Commission shall have reason to believe that any . . . person . . . has been or is using any unfair method of competition or unfair or deceptive act or practice in or affecting commerce . . . it shall issue . . . a complaint. . . ."

34. In FTC v. Algoma Co., 291 U.S. 67 (1934), the Commission brought a cease and desist order against a lumber company which sold inferior quality lumber as premium lumber. The Court said:

> The consumer is prejudiced if upon giving an order for one thing, he is supplied with something else. . . . In such matters, the public is entitled to get what it chooses, though the choice may be dictated by caprice or by fashion or perhaps by ignorance. Nor is the prejudice only to the consumer. Dealers and manufacturers are prejudiced when orders that would have come to them if the lumber had been rightly named are diverted to others whose methods are less scrupulous. "A method inherently unfair does not cease to be so because those competed against have become aware of the wrongful practice." The careless and the unscrupulous must rise to the standards of the scrupulous and diligent. The Commission was not organized to drag the standards down.

Id. at 78-79 (citations omitted).

35. 15 U.S.C. § 45(b) (1976) provides: "Whenever the Commission shall have reason to believe that any . . . corporation has been or is using any unfair method of competition or unfair or deceptive act or practice in or affecting commerce. . . ." Implicit in this language is the suggestion that the Commission may perceive a potential wrong and order the practice to cease before

II. JUDICIAL INTERPRETATIONS OF THE STATUTE

A. Basic Power to Determine Remedies

The Commission's power to investigate potential transgressions in commercial advertising is coupled with the authority to order remedies in situations where it concludes that a violation is present.[36] The Commission is empowered to analyze the effect of the unlawful practice and determine the appropriate remedy.[37] Further, the FTCA empowers the Commission to administer the Act's provisions in whatever way it deems most appropriate.[38] In the majority of cases, the remedy will consist of a cease and desist order.[39] In the commercial advertising field, remedies include requiring affirmative disclosure of past misrepresentation and the employment of prior restraints on unlawful advertisers.[40]

The courts have justified the placement of such extensive power in the Commission by concluding that "the Commission is the expert body to determine what remedy is necessary to eliminate the unfair or deceptive trade practices which have been disclosed."[41] "As an administrative agency which deals continually with cases in the area, the Commission is often in a better position than are courts to determine when a practice is 'deceptive' within the meaning of the Act."[42] The Commission is seen as a regulator in constant contact with the potential wrongdoers. It is able to judge the fruits of injurious activity, and is then held as the most likely determiner of proper redress for the injured party. The complexity involved in a commercial advertising situation regarding the effect on the public of certain promotional activities creates an environment where enlightened control of wrongful practices is most

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any party is damaged. *See, e.g.*, Thiret v. FTC, 512 F.2d 176 (10th Cir. 1975), *cert. denied*, 419 U.S. 896 (1974); Spiegel, Inc. v. FTC, 494 F.2d 59 (7th Cir.), *cert. denied*, 419 U.S. 896 (1974).

36. In Jacob Siegel Co. v. FTC,327 U.S. 608 (1946), the Court said: "[T]he Commission has wide discretion in its choice of a remedy deemed adequate to cope with the unlawful practices ... [discovered]." *Id.* at 611.

37. *See* notes 33-36 and accompanying text *supra.*

38. *See* notes 27 & 33 *supra,* and note 42 *infra.*

39. *See* Reich, *supra* note 12, at 708 n.13.

> After issuance of a complaint, the matter is heard by an Administrative Law Judge.... Upon appeal from or review of an initial decision, the Commission will exercise all powers that it could have exercised had it made the initial decision.... If the respondent is found in violation, the Commission will issue a cease and desist order.

Id. (citations omitted).

40. *See, e.g.*, Warner-Lambert Co. v. FTC, 562 F.2d 749 (D.C. Cir.), *cert. denied*, 435 U.S. 950 (1977).

41. Jacob Siegel Co. v. FTC, 327 U.S. 608, 612 (1946).

42. *Id.* at 611. In Colgate Palmolive v. FTC, 380 U.S. 374 (1965), the Court said: Although "the words deceptive practices set forth a legal standard [which] must get its final meaning from judicial construction," *Id.* at 384, "the Commission's judgment is to be given great weight by reviewing courts." *Id.* at 385 n.13.

desirable, if for no other reason than for expedition of the process of both finding unlawful activity and determining the appropriate sanctions.

The courts have specified definitive rules to act as a check on the Commission's remedial discretion. In practice, the rules are not significant, however, and act mainly as a procedural safeguard.[43] The courts have held that "[s]o long as the remedial order is reasonably related to the unlawful practices found to exist, the Commission's order[s] should be upheld."[44] This statement is reflected in *Moog Industries v. FTC*,[45] where the court said: "The FTC's discretionary determination may be overturned for a patent abuse of discretion."[46] Such "patent abuse" is rarely found on review by the appellate courts and such a finding generally leads to a judicial modification of the FTC remedial order to the extent necessary to keep it within the boundaries of the statute.[47] A further judicial check is the requirement that "cease and desist orders must be sufficiently clear and precise to avoid raising serious questions as to their meaning and application."[48] Again, a judicial finding of this type of indiscretion usually leads to a minimal modification of the Commission's order.[49] A corollary to this proscription against vaguely phrased orders is that "administrative agencies may not pursue rigorous enforcement to the extent of discouraging advertising with no concomitant gain in assuring accuracy and truthfulness."[50] This determination

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43. The impetus behind maintaining these judicial standards is clearly to delimit the discretion of the Commission. The rules serve to enforce a regular mode of allowing the Commission to scrutinize advertisers. Through the imposition of these rules, the Commission is deterred from short-circuiting the statutory plan, thus avoiding potential problems such as abuse of discretion. Unfortunately, the judicial evolution of these standards has been vague to the point of being of questionable effect. *See* notes 44-52 and accompanying text *infra*.

44. Fedders Corp. v. FTC, 529 F.2d 1398, 1402 (2d Cir. 1976). Generally the reasonableness standard will allow an agency determination to stand in all but the most blatant situations of legal overreaching. *Id.*

45. 335 U.S. 411 (1958).

46. *Id.* at 414.

47. *See, e.g.*, Standard Oil Co. of Cal. v. FTC, 577 F.2d 653 (9th Cir. 1978); Warner-Lambert Co. v. FTC, 562 F.2d 749 (D.C. Cir.), *cert. denied*, 435 U.S. 950 (1977); *accord*, Katherine Gibbs School v. FTC, 612 F.2d 658 (2d Cir. 1979). In *Katherine Gibbs*, an agency rule issued pursuant to § 6(g), 15 U.S.C. § 45(g) (1976), to halt abuses in correspondence school advertisements was found to be too vague for reasonable application and in excess of the legislative intent present in the enabling statute. The court remanded the case subject to agency modification of the rule. 612 F.2d at 670.

48. Trans-World Accounts, Inc. v. FTC, 594 F.2d 212, 216 (9th Cir. 1979), *quoting* FTC v. Henry Brock & Co., 368 U.S. 360, 367-68 (1962).

49. *Id.* The court said: Since "appellant acts at its peril if its commonsense definition of the word 'may' fails to comport with the statistical interpretation the FTC urges . . . the order is void for vagueness." *Id.* at 216. The result of this finding led to a rephrasing of the order by the Commission. *Id.* at 217.

50. Standard Oil Co. of Cal. v. FTC, 577 F.2d 653, 662 (9th Cir. 1978).

would result in court ordered modification of the Commission order.[51] Another requirement is that the FTC order be in the public interest. Plainly, this standard is subject to endless debate and can almost always be used to the benefit of the Commission.[52]

B. Recent Manifestations of the Remedial Power of the FTC

As noted previously, the Commission's remedial measures regarding unlawful advertising have taken some innovative steps. Rather than a simple cease and desist order, the Commission has recently imposed affirmative disclosure requirements upon advertisers who are in violation of the Act.[53] The disclosure requirements focus on undoing the harm done by these advertisers. The FTC's directions generally require the affected companies to acknowledge, in an appropriate forum, the unlawfulness of their prior unlawful assertions.[54]

This method was prompted by the particular nature of the effects of advertising. Where an advertiser publishes an unlawful representation, it might be a year or more before the unlawful ad is removed from cir-

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51. *See* 15 U.S.C. § 45(c) (1976). "The court ... shall have power to make and enter a decree affirming, modifying, or setting aside the order of the Commission." *Id.*

52. *See* Royal Milling Co. v. FTC, 288 U.S. 212 (1932). The FTC ordered the company engaged in selling flour to cease and desist in the use of the word "milling" in the trade name. Reversal by the court of appeals based on lack of public interest component in the order was reversed again by the Supreme Court, which held the FTC order sufficiently within the public interest, although too drastic and requiring modification. *Id.* at 216.

The public interest is defined in terms of the possible deception extant in a given ad:

> A good society depends upon promises being kept. And individuals in society have a right to be told the truth, so that their choices among products, or, as in this case, among offers, can be understandingly made. If sellers in our society are free to compete for consumers' patronage with others by unfair advertising, not only is the consumers' right violated, but our commitment to fair competition becomes a pretense. The courts "must set their faces" against those practices which are harmful to the public interest.

Spiegel, Inc. v. FTC, 494 F.2d 59, 63 (7th Cir. 1974).

In Spiegel, Inc. v. FTC, 494 F.2d 59 (7th Cir. 1974), the court embarked upon a detailed discussion of the nature and extent of the public interest to be protected by the FTCA, 15 U.S.C. § 45 (1976). The absolutist position taken by the court emphasizes that while the public interest must be at stake to justify a Commission order, no quarter shall be given to advertisers where there is the slightest possibility of a deceptive practice. 494 F.2d at 62-63. In addition, the Commission need only show that a reasonable person could have determined that there was a deceptive practice involved. *Id.* It is not difficult to arrive at the conclusion that the public interest requirement is an easy one for the Commission to satisfy.

53. *See, e.g.*, Warner-Lambert Co. v. FTC, 562 F.2d 749 (D.C. Cir.), *cert. denied*, 435 U.S. 950 (1977). *See also* National Comm'n on Egg Nutrition v. FTC, 570 F.2d 157 (7th Cir.), *cert. denied*, 439 U.S. 821 (1978).

54. In Warner-Lambert Co. v. FTC, 562 F.2d 749 (D.C. Cir. 1977), the Commission order required the advertiser to refute its prior erroneous claims in future ads to the extent that the prior ads promoted the false claims. *Id.* at 763-64. Only by the total cessation of all advertising would the promoter have been able to circumvent the Commission order. This is not a likely occurrence.

culation.[55] In the meantime, the public damage which the Commission intended to prevent would continue as a result of the running of the advertisement during the litigation.[56] The calculating and unscrupulous advertiser, observing the lag time between the initial cease and desist order and the eventual judicial affirmation of the order could plan to mislead the public through advertising. Once the cease and desist order was affirmed, the advertiser would quietly remove the ad from public circulation. Noting the short life of most ads it would appear likely that the misleading ad would have been retired by the advertiser prior to final adjudication.[57] In the meantime, the efforts of the Commission would be wasted.

Noting the potential uselessness of cease and desist orders pertaining to deceptive advertising, the Commission has recently come down with a series of orders requiring affirmative disclosure of past deceptions as part of the administrative remedy. The courts have, for the most part, affirmed these orders.[58] The landmark case involving affirmative disclosure as an available Commission remedy is *Warner-Lambert Co. v. FTC.*[59] Warner-Lambert, the manufacturer of Listerine mouthwash, represented in their advertising that the use of their product would promote both the prevention and cure of colds. The FTC determined that there was no scientific basis for these claims. The Commission instituted an action resulting in the imposition of affirmative disclosure

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55. A year is used as an arbitrary time frame taking notice of the typical time lag between the filing of an agency order and final disposition of the case by the court of appeals. *Id.* at 761-62 n.60.

56. The court in Warner-Lambert Co. v. FTC, 562 F.2d 749 (D.C. Cir. 1977) said:

> While we do not know and do not decide whether our petitioner made its false cold claims in good faith or bad, we do observe that for an advertiser who knowingly advertises falsely a simple cease and desist order provides no real deterrent. He has nothing to lose but attorneys' fees. He gets to use the deceptive advertisements until he is caught — more precisely, until Commission proceedings, which usually drag on for years, are completed against him. By the time the order has become final, the particular campaign has probably been squeezed dry, if not already discarded. In the meantime the seller has increased his market share and reaped handsome profits. The order to cease making the false claims takes none of this away from him. In short, [a] cease and desist order which commands the respondent only to 'go, and sin no more' simply allows every violator a free bite at the apple.

Id. at 761-62 n.60.

57. *Id.*

58. *See, e.g.,* Encyclopedia Britannica, Inc. v. FTC, 605 F.2d 964 (7th Cir.), *cert. denied,* 445 U.S. 935 (1979); National Comm'n on Egg Nutrition v. FTC, 570 F.2d 157 (7th Cir.), *cert. denied,* 439 U.S. 821 (1978); Warner-Lambert Co. v. FTC, 562 F.2d 749 (D.C. Cir.), *cert. denied,* 435 U.S. 950 (1977).

59. 562 F.2d 749 (D.C. Cir. 1977). The petitioner had been ordered by the Commission to stop claiming that its product, Listerine, was effective in preventing and curing colds. In addition, the Commission required that the producer place a disclaimer on future forms of advertising to the effect that Listerine did not prevent or cure colds. The advertiser was ordered to not only stop the deceptive ads, but to include disclaimers of those ads in all future promotions. *Id.* at 752-53.

requirements.[60] The Commission had determined that merely removing the advertisements from circulation would not suffice to vindicate the public interest concerning the prior deceptions. The petitioner argued that the Commission was forcing it to perform acts against its will and best interests, a far cry from a mere cease and desist order aimed at the alleviation of a past practice.[61] The court determined that the "Commission has the power to shape remedies which go beyond the simple cease and desist order,"[62] by concluding that "Congress must have intended to give it authority ... to deal with the evil at hand."[63] Thus, once again, the court deferred to the Commission's expertise in determining and remedying violations of the Act.[64]

The constitutional argument advanced by the petitioner in *Warner-Lambert* deserves special consideration. It was contended that corrective advertising was not a permissible remedy because it "trenches on the First Amendment."[65] This challenge was rebuked by the court: the court opted to apply a balancing test that would permit the Commission to impose corrective advertising to an extent sufficient to counter the prior negative effects of the advertisement.[66] The Commission was required to tailor its order so as not to force the advertiser to do any more than refute its dissemination of the unlawful claim. To require more would constitute an unequivocal encroachment on the first amendment rights of the advertiser.[67] The court had no trouble balancing the interest of the Commission with those of the petitioner in this case.[68] Since the order was addressed only to remedying the negative effects of

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60. *Id.*

61. The petitioner contested the propriety of the Commission's order on the grounds that it violated the first amendment. *Id.* at 757.

62. *Id.* at 757.

63. *Id.* at 756.

64. *Id.* at 756, 762.

65. *Id.* at 758.

66. In Warner-Lambert Co. v. FTC, 562 F.2d 749 (D.C. Cir. 1977), the court said: "[T]his [consideration] triggers a special responsibility on the Commission to order corrective advertising only if the restriction inherent in its order is no greater than necessary to serve the interest involved." *Id.* at 758.

67. This distinction focuses upon the similarity between orders which are intended to mend opprobrious behavior and those which would compel statements by advertisers which they would not make were it not for the agency order, despite a lack of agency justification for the order.

68. *See* Warner-Lambert Co. v. FTC, 562 F.2d 749 (D.C. Cir. 1977). There the court first examined the applicable agency standard, and then determined it to have been adequately considered:

> The Commission has adopted the following standard for the imposition of corrective advertising:
> '[I]f a deceptive advertisement has played a substantial role in creating or reinforcing in the public's mind a false and material belief which lives on after the false advertising ceases, there is clear and continuing injury to competition and to the consuming public as consumers continue to make purchasing decisions based on the false belief. Since this injury cannot be averted by merely requiring respondent to cease disseminating the adver-

the past acts and did not attempt to direct the petitioner's future promotional campaigns, the court felt that the public interest was satisfied without an unreasonable infringement of the petitioner's rights.[69]

Warner-Lambert also relied upon the recent extension of first amendment protection to truthful commercial speech, in arguing for prohibition of mandatory disclosure requirements.[70] The court distinguished this case by saying that "the First Amendment presents 'no obstacle' to government regulation of false or misleading advertising."[71] Since the mouthwash claims had been declared unlawfully deceptive, the court held that the ad would not be protected by the first amendment.[72] The court said: "[the Commission] may also make it appropriate to require that a commercial message appear in such a form, or include such additional information, warnings, and disclaimers, as are necessary to prevent its being deceptive."[73]

In *National Comm'n on Egg Nutrition v. FTC*[74] the Seventh Circuit Court of Appeals upheld a Commission order requiring the National Commission on Egg Nutrition (NCEN) to make affirmative disclosures

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tisement, we may appropriately order respondent to take affirmative action designed to terminate the otherwise continuing ill effects of the advertisement.'

We think this standard is entirely reasonable. It dictates two factual inquiries: (1) did Listerine's advertisements play a substantial role in creating or reinforcing in the public's mind a false belief about the product? and (2) would this belief linger on after the false advertising ceases? It strikes us that if the answer to both questions is not yes, companies everywhere may be wasting their massive advertising budgets. Indeed, it is more than a little peculiar to hear petitioner assert that its commercials really have no effect on consumer belief.

Id. at 762.

69. The Commission's claimed lack of effect on future advertising attempts by the petitioner is somewhat specious. The petitioner was banned from all advertising unless disclaimers regarding the past advertising were included in its future ads. The petitioners attempted to establish that, such being the case, the promotions which included the disclaimers would be the equivalent of pouring money down the drain. *Id.* at 763. The court affirmed the FTC in its position that this result was most supportive of the public interest. *Id.* at 771.

70. In Warner-Lambert Co. v. FTC, 562 F.2d 749 (D.C. Cir. 1977), the court endorsed the following agency rationale for affirmative disclosures:

[I]f a deceptive advertisement has played a substantial role in creating or reinforcing in the public's mind a false and material belief which lives on after the false advertising ceases, there is clear and continuing injury to competition and to the consuming public as consumers continue to make purchasing decisions based on the false belief. Since this injury cannot be averted by merely requiring respondent to cease disseminating the advertisement, we may appropriately order respondent to take affirmative action designed to terminate the otherwise continuing ill effects of the advertisement.

Id. at 762.

71. *See* Warner-Lambert Co. v. FTC, 562 F.2d 749, 758 (D.C. Cir. 1977), *quoting* Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 771 (1976).

72. 562 F.2d at 758.

73. *Id. See also* Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 771-72 n.24 (1976).

74. 570 F.2d 157 (7th Cir. 1978) (group of egg wholesalers banded together to promote egg consumption to counteract the wave of anti-egg information promoted by low cholesterol fanatics).

concerning their interest in promoting egg consumption.[75] The NCEN tried to distinguish their commercial speech from that involved in *Warner-Lambert* by asserting that the ad was a public service message designed to present one side of a public debate.[76] Neither the Commission nor the court accepted this argument.[77] Both the Commission and the court looked through the facial guise of a "National Committee" in determining this ad to be a commercial message subject to regulation.[78] As a result, the NCEN was ordered to use qualifying words when making their pro egg claims.[79] The intent of the remedial order is distinguishable from the one issued in *Warner* because "the record here, unlike that in *Warner* . . ., does not show a long history of deception which has so permeated the consumer mind that the 'claim was believed by consumers after the false advertising had ceased.' "[80] The *NCEN* court was concerned primarily with future deception.[81] Thus, the cases indicate that the Commission is accorded power by the courts to issue affirmative disclosure orders to remedy past unlawfulness and to prevent its future occurrence. This prospective power regarding affirmative disclosure parallels the basic FTC authority to maintain actions against advertisers without proof of present or past damages.[82]

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75. *Id.* at 165.

76. National Comm'n on Egg Nutrition v. FTC, 570 F.2d 157, 162-63 (7th Cir. 1978).

77. The substance of the egg ads were, if not clearly false, of a sufficiently doubtful nature as to invite Commission intervention. The Commission said: "NCEN has done more than espouse one side of a genuine controversy. . . . It has made statements denying the existence of scientific evidence which the record clearly shows does exist. These statements are, therefore, false and misleading." *Id.* at 161.

78. The Commission said:

> Publications designed to convey the point that consumption of a particular product will not increase the risk of heart disease, are clearly likely to induce the purchase of that product. The fact that the message is conveyed by means of selected quotations from the works of scientists and popular writers does not alter the commercial character of the publication. Nor is it altered by self-serving professions of eleemosynary intent. . . . If anything the misleading effect of respondents' advertisements is enhanced by casting them in the guise of a 'public service message' presented by an unidentified "National Commission."

Id. at 163.

79. The desired preventive effect can be achieved by requiring the disclosure that there is a controversy among the experts and NCEN in presenting its side of that controversy. The additional statement in the form now ordered by the FTC should be required only when NCEN chooses to make a representation as to the state of the available evidence or information concerning the controversy. As thus modified, the challenged condition would not unnecessarily curtail NCEN's right to present its position. *Id.* at 164.

80. National Comm'n on Egg Nutrition v. FTC, 570 F.2d 157, 164 (7th Cir. 1978), *quoting* Warner-Lambert Co. v. FTC, 562 F.2d 749, 771 (D.C. Cir. 1977).

81. 570 F.2d at 164.

82. *See* note 35 and accompanying text *supra*. A third case involving an affirmative disclosure order should be examined due to the different approach taken by the court in determining that such an order was proper. Quoting language from the United States Supreme Court, the court in Encyclopedia Brittanica, Inc. v. FTC, 605 F.2d 964 (7th Cir. 1979) held that past wrongful

In *Jay Norris, Inc. v. FTC,*[83] a mail order firm was ordered to stop making representations concerning their product line without substantial prior documentation pertaining to the truthfulness of the representations.[84] The company had been before the Commission twice in the previous fifteen years.[85] Its reputation preceded its call to the bench in its third agency appearance. The court said: "Only because of petitioner's business practices is truthful speech indistinguishable from deceptive speech except by reference to reasonable substantiation for the representation."[86] The court in *Norris* concluded that such business practices were not protected by the first amendment.[87]

The order in *Warner-Lambert Co. v. FTC*[88] was justified on the basis of the need to ameliorate past wrongs. The *NCEN*[89] order was defended by the Commission as necessary to avoid future deception despite the

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acts would serve to deprive the wrong-doer of certain rights in the future. *Id.* at 971. Thus, a "fencing-in doctrine" was applied via affirmative disclosures. The court said:

> We think it reasonable for the Commission to frame its order broadly enough to prevent respondents from engaging in similarly illegal practices in future advertisements. . . . '[T]he Commission is not limited to prohibiting the illegal practice in the precise form in which it is found to have existed in the past.' Having been caught violating the Act, respondents must 'expect some fencing in.'

Id. at 971, *quoting* FTC v. Rubberoid Co., 343 U.S. 470,473 (1952). The court cited language from cases where the propriety of simple cease and desist orders was being determined. The court used the "fencing in" concept, which developed in determining the appropriate broadness of cease and desist orders and transposed it onto the question of affirmative disclosures. The opinion in Fedders Corp. v. FTC, 529 F.2d 1398 (2d Cir. 1976), *cert. denied,* 429 U.S. 818 (1977) (where the FTC ordered the company to cease and desist in its air conditioner performance claims and was challenged unsuccessfully) gives a good background on the concept of fencing-in:

> The Commission is not limited to prohibiting "the illegal practice in the precise form" existing in the past. . . . This agency, like others, may fashion its relief to restrain "other like or related unlawful acts." . . . "One cannot generalize as to the proper scope of these orders. It depends on the facts of each case and a judgement as to the extent to which a particular violator should be fenced in."

529 F.2d at 1401-02 (citations omitted).

83. 598 F.2d 1244 (2d Cir. 1979), *cert. denied,* 444 U.S. 980 (1979).

84. 598 F.2d at 1246-47.

85. *Id.* at 1246 n.3.

86. *Id.* at 1252.

87. This conclusion was based on the theory that due to the advertiser's prior bad behavior, it had forfeited some of its constitutional rights and was subsequently not entitled to those protections. The court said:

> Under traditional First Amendment doctrine, the issue of prior restraint would still remain. We note, however, that even as the Supreme Court held certain commercial speech protected from absolute prohibition, it has seen fit to comment twice already in the short life of First Amendment protection for commercial speech that the doctrine of prior restraint may be inapplicable. . . . On this open question we hold only that because the FTC here imposes the requirement of prior substatiation [sic] as a reasonable remedy for past violations of the Act, there is no unconstitutional prior restraint of petitioners' protected speech.

Id. at 1252.

88. 562 F.2d 749 (D.C. Cir. 1977).

89. National Comm'n on Egg Nutrition v. FTC, 570 F.2d 157 (7th Cir. 1978).

lack of evidence of past unlawful practices.[90] Like *Warner-Lambert,* the *Norris*[91] decision emphasized the significance of past wrongs but did so in order to justify the requirement of future affirmative disclosure rather than the imposition of a prior restraint. It is difficult to define where affirmative remedial disclosure ends and prior restraint begins. Affirmative disclosure is similar to prior restraint, but is justified by the fencing-in doctrine.[92] The fencing-in doctrine allows the FTC to render cease and desist orders which apply generally to a person or company found in violation of trade regulations although the violation itself may be narrow and easy to specify.[93]

Although the Supreme Court has wavered on the question of prior restraint of commercial speech, it has been considered extensively in other contexts and has usually been found to violate the first amendment.[94] It is unclear whether prior restraint of truthful commercial speech is justifiable in light of the commercial speech doctrine.[95] The court in *Norris*[96] was able to justify prior restraint based on the facts of that case, although it is questionable whether that case presented the proper occasion for the court to embark on further expansion of the powers of the FTC.[97]

III. PRIOR RESTRAINT

The issue of prior restraint is most often discussed with regard to obscenity cases and cases involving the publication of news affecting

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90. *Id.* at 161.

91. Jay Norris, Inc. v. FTC, 598 F.2d 1244 (2d Cir. 1979).

92. *See* note 81 *supra.* Since affirmative disclosure orders have been deemed by the courts as within the Commission's discretionary power, such orders will be judicially corrected only where the reviewing court finds that the order was arrived at unreasonably. *See* Spiegel, Inc. v. FTC, 494 F.2d 59 (7th Cir. 1974). Balancing of interests would play a central role in this kind of evaluation. Traditionally, prior restraint has had to survive a much more critical level of justification to pass judicial review. *See* notes 96-102 and accompanying text *infra.*

93. *See* note 81 *supra.*

94. *See, e.g.,* Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546 (1975) (a theatre promoter who was banned from staging a production was held to have had his first amendment rights violated by the summary and arbitrary action of the city licensing board); NAACP v. Button, 371 U.S. 415 (1963) (a state statute forbade attorney-client solicitation of any kind; the Court held that within the facts of this case, involving a legal services firm interested in promoting the rights of certain minority groups, the 1st and 14th amendments protected such activity as modes of expression and association). *See also* W. BERNS, *supra* note 14, at 78-80.

95. *See* notes 103-96 and accompanying text *infra,* for a discussion of the commercial speech doctrine.

96. Jay Norris, Inc. v. FTC, 598 F.2d 1244 (2d Cir. 1979).

97. The petitioner in *Norris* was so clearly and blatantly in the wrong that the court chose to support the agency order due to its desire to see the ad practice terminated. To achieve this end the court was required to essentially overlook the constitutional considerations which became apparent when the prior clearance part of the order was considered and affirmed. *Id.* at 1252.

national defense interests.[98] The aversion to permitting prior restraint is premised on the deeply ingrained notion that "a free society prefers to punish the few who abuse the rights of speech after they break the law than to throttle them and all others beforehand."[99] The proscription against prior restraint is not absolute, however. "Prior restraints are not unconstitutional. . . . Labeling [an] action as prior restraint does not end [an] inquiry."[100] Where speech appears in a context not susceptible to strict judicial scrutiny, or where "a system of prior restraint avoids constitutional infirmity [by taking] place under procedural safeguards designed to obviate the dangers of a censorship system,"[101] prior restraint is permissable. "Any system of prior restraint, however, [bears] a heavy presumption against its constitutional validity."[102]

The FTC has developed considerable power over the business community due to its ability to prescribe remedies for unlawful activity which border on censorship. This power is presently described as the ability to require affirmative disclosures and administer "fencing-in" directives.[103] Requiring precise affirmative disclosures, tends to result in FTC prescription of the contents of future advertising. The need to control an unscrupulous mail-order firm brought one court to the brink of discussing whether prior restraints are permissable regarding advertising copy which is yet to be distributed but whose distributor holds a reputation for flagrant violation of the FTCA.[104] Clearly, such an option would be unavailable to the FTC if the general prohibition against prior restraint applied to advertising. This Note will now turn to an examination of the extent to which prior restraint considerations pertain to FTC control of advertisers in light of the new commercial speech doctrine.

IV. COMMERCIAL SPEECH

The commercial speech doctrine was developed as a means of distinguishing the first amendment protection accorded to political speech from that applied to product and service promotion.[105] One of

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98. *See, e.g.*, New York Times Co. v. United States, 403 U.S. 713 (1971); Times Film Corp. v. City of Chicago, 365 U.S. 43 (1961); Near v. Minnesota, 283 U.S. 697 (1931); United States v. Progressive, Inc., 467 F. Supp. 990 (W.D. Wis. 1979).

99. Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546 (1975).

100. *Id.* at 558.

101. *Id.* at 559 (citations omitted).

102. *Id.* at 558.

103. Encyclopedia Brittanica Inc. v. FTC, 605 F.2d 964 (7th Cir.), *cert. denied*, 445 U.S. 934 (1979); Warner-Lambert Co. v. FTC, 562 F.2d 749 (D.C. Cir.), *cert. denied*, 435 U.S. 950 (1977).

104. *See* Jay Norris, Inc. v. FTC, 598 F.2d 1244, 1252 (2d Cir. 1979).

105. The commercial aspect of the questioned speech in Valentine v. Chrestensen, 316 U.S. 52 (1942) and in Breard v. Alexandria, 341 U.S. 622 (1951) served to distinguish the protection

the greatest fears has arisen from the potential chilling effect on political speech if subjected to regulation.[106] Such an effect would be opposed to the principles of democratic government.[107] Commercial speech, on the other hand, is directed solely toward the narrow aim of promoting the sale of a product or service,[108] and therefore has not been seen as subject to the same vulnerability to unconstitutional regulation as political speech. It has generally been determined that if a certain mode of product promotion becomes regulated due to excess, the promoter will merely attempt to ascertain a method that will not be

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value of the speech for first amendment purposes, and put that speech outside of first amendment protection. In *Breard,* where a conviction for violation of an ordinance prohibiting door-to-door solicitation of magazines was upheld, the Court said: "The selling . . . brings into the transaction a commercial feature." *Id.* at 642. The commercial feature was the deciding characteristic for keeping this speech outside of first amendment protection. *See* Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 758 (1976).

106. *See* G. GUNTHER, *supra* note 14, at 1224. In New York Times Co. v. Sullivan, 376 U.S. 254 (1964) where the right of the press was squarely at issue regarding a defamation claim by a public figure, the Court said:

> A rule compelling the critic of official conduct to guarantee the truth of all his factual assertions — and to do so on pain of libel judgments virtually unlimited in amount — leads to a comparable "self-censorship." Allowance of the defense of truth, with the burden of proving it on the defendant, does not mean that only false speech will be deterred. Even courts accepting this defense as an adequate safeguard have recognized the difficulties of adducing legal proofs that the alleged libel was true in all its factual particulars. Under such a rule, would-be critics of official conduct may be deterred from voicing their criticism, even though it is believed to be true and even though it is in fact true, because of doubt whether it can be proved in court or fear of the expense of having to do so. They tend to make only statements "which steer far wider of the unlawful zone." The rule thus dampens the vigor and limits the variety of public debate.

Id. at 279.

This is a classic statement illustrating the judicial fear of chilling protected speech. *See also* Curtis v. Butts, 388 U.S. 130 (1966); Speiser v. Randall, 357 U.S. 513 (1958). The Court in *Sullivan* furthered its point by saying: "Even a false statement may be deemed to make a valuable contribution to public debate, since it brings about 'clearer perception and livelier impression of truth, produced by its collision with error.' " New York Times Co. v. Sullivan, 376 U.S. 254, 279 n.19 (1964), *quoting* J. MILL, ON LIBERTY 15 (Blackwell ed. 1947).

107. The role of free speech in a democracy was outlined by Justice Brandeis in Whitney v. California, 274 U.S. 357 (1927):

> Those who won our independence believed . . . that public discussion is a political duty; and that this should be a fundamental principle of the American government. They recognized the risks to which all human institutions are subject. But they knew that order cannot be secured merely through fear of punishment for its infraction; that it is hazardous to discourage thought, hope and imagination; that fear breeds repression; that repression breeds hate; that hate menaces stable government; that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies; and that the fitting remedy for evil counsels is good ones. Believing in the power of reason as applied through public discussion, they eschewed silence coerced by law — the argument of force in its worst form. Recognizing the occasional tyrannies of governing majorities, they amended the Constitution so that free speech and assembly should be guaranteed.

Id. at 375-76.

See also Curtis v. Butts, 388 U.S. 130 (1966); New York Times Co. v. Sullivan, 376 U.S. 254 (1964); United States v. Associated Press, 52 F. Supp. 362 (S.D.N.Y. 1943).

108. In Bates v. State Bar of Ariz., 433 U.S. 350 (1977), the Court said: "[A]ny concern that strict requirements for truthfulness will undesireably inhibit spontaneity seems inapplicable because commercial speech generally is calculated." *Id.* at 383.

regulated while still communicating his message to the public.[109] The calculated and commercial nature of advertising was traditionally determined to obviate any need for legal protection of such speech.[110]

The commercial speech doctrine had its origin in *Valentine v. Chrestensen,*[111] a decision Justice Douglas was later to call "casual, almost offhand."[112] The brief opinion in *Valentine* sustained a ban on distribution of handbill advertisements soliciting customers to pay admission to tour a submarine.[113] The Court viewed the ban as a regulation of business activity not affecting protected speech.

The commercial speech doctrine was employed sporadically, usually in situations involving questionable business practices.[114] As such, it stood in the role of a seldom used stopper upon which the Court could

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109. This is so, due to the impetus behind that product promoter's general need to advertise, *see* J. BACKMAN, ADVERTISING AND COMPETITION 154 (1967) and the calculate nature of the speech element involved in advertising. Bates v. State Bar of Ariz., 433 U.S. 350, 383 (1977). This scenario is actually the intended goal of FTC regulation of advertising, where the agency directs offending advertisers to communicate their message without deception. *See, e.g.,* Standard Oil Co. of Cal. v. FTC, 577 F.2d 653 (9th Cir. 1978); National Comm'n on Egg Nutrition v. FTC, 570 F.2d 157 (7th Cir. 1978).

110. *See* Valentine v. Chrestensen, 316 U.S. 52 (1942) (advertisement planted in speech of social concern found not protected by the first amendment).

111. *Id.* In *Valentine,* the Court said:

> This court has unequivocally held that the streets are proper places for the exercise of the freedom of communicating information and disseminating opinion and that, though the states and municipalities may appropriately regulate the privilege in the public interest, they may not unduly burden or proscribe its employment in these public thoroughfares. We are equally clear that the Constitution imposes no such restraint on government as respects purely commercial advertising. Whether, and to what extent, one may promote or pursue a gainful occupation in the streets, to what extent one may promote or pursue a gainful occupation in the streets, to what extent such activity shall be adjudged a derogation of the public right of user, are matters for legislative judgment.

Id. at 54.

See also Comment, *First Amendment Protection for Commercial Advertising: The New Constitutional Doctrine,* 44 U. CHI. L. REV. 205, 217 (1977).

112. Cammarano v. United States, 358 U.S. 498, 514 (1959) (Douglas, J., concurring).

113. 316 U.S. 52 (1942). The entrepreneur in this case printed his advertising message on one side of the circular, with a protest on the other side against the city's denial of permission to use a city pier for his exhibit. *Id.* at 53.

114. *See, e.g.,* Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U.S. 376 (1973), where the Court upheld an ordinance prohibiting newspapers from listing employment advertisements in columns according to whether male or female employees were sought to be hired. The Court characterized the ads as "classic examples of commercial speech." *Id.* at 385. However the Court upheld the ordinance on the ground that the restriction it imposed was permissible because the discriminatory hirings proposed by the ads, were themselves illegal. The Court said:

> Section 8(j) of the Ordinance, the only provision which Pittsburgh Press was found to have violated and the only provision under attack here, makes it unlawful for "any person . . . to aid . . . in doing of any act declared to be an unlawful employment practice by this ordinance." The Commission and the courts below concluded that the practice of placing want ads for non-exempt employment in sex-designated columns did indeed "aid" employers to indicate illegal sex preferences. The advertisements, as embroidered by their placement, signaled that the advertisers were likely to show an illegal sex preference in their hiring decisions. Any First Amendment interest which might be

rely when necessary. Later cases made it clear "that speech does not fall wholly outside the First Amendment simply because it is in commercial context."[115]

In 1976, the landmark case of *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*[116] overruled *Chrestensen*[117] and established first amendment protection for truthful commercial speech.[118] The court in *Virginia Pharmacy* borrowed some of the language and much of the sentiment from a decision in the previous term, *Bigelow v. Virginia.*[119]

In *Bigelow*, a Virginia newspaper ran an advertisement concerning the availability of legal abortions outside of Virginia.[120] The subject matter of the ads in *Bigelow* may have left "some fragment of hope for the continuing validity of a 'commercial speech' exception,"[121] because the substance of the advertisement was not purely commercial, in that it also dealt with a politically controversial subject, abortion. The Court in *Bigelow* said the "relationship of speech to the marketplace of products or of services does not make it valueless in the marketplace of ideas."[122] This language indicates that no clear distinction can be drawn

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served by advertising an ordinary commercial proposal and which might arguably outweigh the governmental interest supporting the regulation is altogether absent when the commercial activity itself is illegal and the restriction on advertising is incidental to a valid limitation on economic activity.

Id. at 389.

115. The Court in Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748 (1976), suggested:

> [T]hat speech does not lose its First Amendment protection because money is spent to project it, as in a paid advertisement of one form or another. . . . Speech likewise is protected even though it is carried in a form that is "sold" for profit, . . . and even though it may involve a solicitation to purchase or otherwise pay or contribute money.

Id. at 761 (citations omitted). *See also,* G. GUNTHER, *supra* note 14, at 1224.

116. 425 U.S. 748 (1976).

117. Valentine v. Chrestensen, 316 U.S. 52 (1942).

118. The Court in Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748 (1976) recognized that the analytical trick of labeling advertising as commercial activity rather than speech, and thus unprotected, was no longer necessary from either a legal or policy basis. The Court established that "where a speaker exists, . . . the [first amendment] protection afforded is to the communication, to its source and to its recipients both. . . . If there is a right to advertise, there is a reciprocal right to receive the advertising. . . . *Id.* at 756-57. The legal focus of the holder of the right to first amendment protection thus shifted from one held primarily by the communicator to one shared by both the disseminator and the receiver. This distinction helped to destroy the rule that any commercial speech lacked protection, because after *Virginia Board,* any censorship considerations required examination of the value of the speech to any hearer. The policy consideration which followed was that any information serving to increase the possibility of informed decisionmaking, in any context, was desirable. *Id.* at 765.

119. 421 U.S. 809 (1975).

120. *Id.* at 812. Virginia had a statute "that made the circulation of any publication to encourage or promote the processing of an abortion in Virginia a misdemeanor." VA. CODE § 18.1-63 (1960). *See also* G. GUNTHER, *supra* note 14, at 356 (Supp. 1979).

121. G. GUNTHER, *supra* note 14, at 356 (Supp. 1979).

122. 421 U.S. at 826.

between political and commercial speech simply because the latter is directed at economic gain. Commercial speech was found to have value to society in its role of aiding citizens in determining the course of their personal lives.[123]

Virginia Pharmacy dispelled any doubt as to the fate of *Chrestensen*.[124] The question at issue, as stated by the Court, was whether the communication "I will sell you the XX prescription at the YY price ... is wholly outside the protection of the First Amendment."[125] The Consumer group had to satisfy the requirements which would render the statement protected by the first amendment.[126] The paramount requirement was that the speech be in the pubic interest.[127] It is not difficult to suggest that speech deserves greater protection in a direct relationship to the quantum of support it delivers to the goals of democracy. The Court in *Virginia Pharmacy* articulated the part played by truthful commercial speech toward realization of this goal. Essentially, the court stressed that the more information available to the people, the healthier the democracy.[128] The opinion was careful to stress that there may be

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123. Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748 (1976).

> As to the particular consumer's interest in the free flow of commercial information, that interest may be as keen, if not keener by far, than his interest in the day's most urgent political debate. Appellees' case in this respect is a convincing one. Those whom the suppression of prescription drug price information hits the hardest are the poor, the sick, and particularly the aged. A disproportionate amount of their income tends to be spent on prescription drugs; yet they are the least able to learn, by shopping from pharmacist to pharmacist, where their scarce dollars are best spent. When drug prices vary as strikingly as they do, information as to who is charging what becomes more than a convenience. It could mean the alleviation of physical pain or the enjoyment of basic necessities.
>
> Generalizing, society also may have a strong interest in the free flow of commercial information. Even an individual advertisement, though entirely "commercial," may be of general public interest.

Id. at 763-64 (footnote omitted).

124. Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748 (1976), involved a challenge by a consumer group to a state statute forbidding the advertisement of prescription drug prices. *Id.* at 749-50. The Court held that the advertising of drug prices was not a matter subject to state regulation and struck down the statute. *Id.* at 773.

125. 425 U.S. at 761.

126. *See* notes 104 & 105 *supra*.

127. Politically oriented speech has traditionally been perceived as within the public interest in that it enables citizens to discern and discuss their best interests openly and without fear of government interference. The premise behind the theory is that individuals will therby maximize their ability to determine the course of their own lives. *See* New York Times Co. v. Sullivan, 376 U.S. 254, 270, 279 (1964). The decision in Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748 (1976), equates the public interest component of political speech to that of certain commercial speech. The Court in *Virginia Board* said: "It is a matter of public interest that those decisions, in the aggregate, be intelligent and well informed. To this end, the free flow of commercial information is indispensable." *Id.* at 765.

128. In Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748 (1976) the Court stated:

> Advertising, however tasteless and excessive it sometimes may seem, is nonetheless dissemination of information as to who is producing and selling what product, for what

times when the state interest will prevail over that of the advertiser or recipient. It was apparent that given the opportunity, the Court would be more likely to censor commercial speech than traditional political speech.[129] Nevertheless, the role of commercial speech in a democracy, while not precisely delineated for all circumstances, was established in this opinion.

Although the *Virginia Pharmacy* decision brought commercial speech within first amendment protection, it was careful to distinguish the extent of that protection in at least one important way. "Untruthful speech, commercial or otherwise, has never been protected for its own sake."[130] Normally, political speech is allowed considerable breathing space, and is presumed to be within the first amendment protection regardless of its content.[131] The Court in *Virginia Pharmacy* said that "the First Amendment as we construe it today, does not prohibit the State from insuring that the stream of commercial information flows cleanly as well as freely."[132] This statement has generally been interpreted in later cases as an indication that not all commercial speech enjoys first amendment protection.[133] Apparently, the Court anticipated that there would be occasions when the suppression of commercial

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> reason, and at what price. So long as we preserve a predominantly free enterprise economy, the allocation of our resources in large measure will be made through numerous private economic decisions, in the aggregate, be intelligent and well-informed. To this end the free flow of commercial information is indispensable. . . . And if it is indispensable to the proper allocation of resources in a free enterprise system, it is also indispensable to the formation of intelligent opinions as to how that system ought to be regulated or altered. Therefore, even if the First Amendment were thought to be primarily an instrument to enlighten public decision making in a democracy, we could not say that the free flow of information does not serve that goal.

Id. at 765 (citations omitted) (footnotes omitted).

129. The Court said: "In concluding that commercial speech . . . is protected . . . we of course do not hold that it cannot be regulated in any way. Some forms of commercial speech regulation are surely permissible." *Id.* at 770.

130. *Id.* at 771.

131. This breathing space is termed as the "overbreadth" doctrine in constitutional terminology. The first amendment is afforded considerable leeway by virtue of this doctrine which recognizes that the right to free expression is fundamental to a democracy, and must, therefore, be accorded great deference by the judiciary if it is to thrive in the constitutional scheme envisioned by the enactment of the Bill of Rights. This is so even in cases where the speech thus protected is of questionable value.*S ee* Southeastern Promotions Ltd. v. Conrad, 420 U.S. 546 (1975); Broadrick v. Oklahoma, 413 U.S. 601 (1973); New York Times Co. v. Sullivan, 376 U.S. 254 (1964). *See also,* G. GUNTHER, *supra* note 14, at 1132-42; Note, *The First Amendment Overbreadth Doctrine,* 83 HARV. L REV. 844 (1970).

132. Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 771-72 (1976).

133. *See* Friedman v. Rogers, 440 U.S. 1 (1979); Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447 (1978); Bates v. State Bar of Ariz., 433 U.S. 350 (1977). In Central Hudson Gas & Electric Co. v. Public Serv. Comm'n of N.Y., 100 S.Ct. 2343 (1980), the Court actually specified that government regulation of commercial speech was permissible in certain instances and provided therefore.

speech would be clearly beneficial to the state and would not impinge constitutionally protected rights of individuals.[134]

In *Friedman v. Rogers,*[135] the Court rejected a first amendment attack on a Texas law prohibiting the practice of optometry under a trade name. Here, the state sought to protect consumers from commercial optometrists representing themselves as professional optometrists as contemplated under the state licensing statue.[136] In the majority's view, the lower court's reliance on *Virginia Pharmacy* in striking down the law had been misplaced.[137] The *Friedman* decision furthered the distinction by saying:

> By definition commercial speech is linked inextricably to commercial activity: while the First Amendment affords such speech "a limited measure of protection" it is also true that the "state does not lose its power to regulate commercial activity deemed harmful to the public whenever speech is a component of that activity."[138]

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134. Several Supreme Court decisions built upon the *Virginia Pharmacy* opinion; *see* Central Hudson Gas & Electric Co. v. Public Service Comm'n of N.Y., 100 S.Ct. 2343 (1980); Friedman v. Rogers, 440 U.S. 1 (1979); Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447 (1978); Bates v. State Bar of Ariz., 433 U.S. 350 (1977), although they failed to sufficiently define its boundaries, especially regarding prior restraint. In Bates v. State Bar of Ariz., 433 U.S. 350 (1977), a state ban on attorney advertising was overturned. The Court in *Bates* solidified the *Virginia Pharmacy* charge that false or deceptive advertising is not protected speech. The Court said that: "Advertising that is false, deceptive or misleading . . . is subject to restraint." *Id.* at 383. It also gave further justification for protecting truthful, non-deceptive advertising. One of the primary justifications for the overruling of Valentine v. Chrestensen, 316 U.S. 52 (1942), was that any rule which seeks to benefit the public by keeping it ignorant must bow to one which seeks to guide thought and action via intelligent deliberation."[O]n close inspection it is seen that the State's protectiveness of its citizens rests in large measure on the advantages of their being kept in ignorance." Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. at 769. The corollary to this rule is that such intelligent consideration is possible only when truthful facts are being weighed. There is no public benefit in the opportunity to evaluate untruthful commercial speech. In Bates v. State Bar of Ariz., 433 U.S. 350 (1977), the Court said:

> Any concern that strict requirements for truthfulness will undesirably inhibit spontaneity seems inapplicable because commercial speech generally is calculated. Indeed, the public and private benefits from commercial speech derive from confidence in its accuracy and reliability. Thus the leeway for untruthful or misleading expression that has been allowed in other contexts has little force in the commercial arena.

Id. at 383. The *Bates* opinion served to reinforce the notion that truthful commercial speech has social value worthy of some first amendment protection. The Court remained unclear as to how rigorous that protecion would be.

135. 440 U.S. 1 (1979).

136. *Id.* at 4-6. The statute at issue was Article 4552, sections 2.01-2.04 of the Texas Revised Civil Statutes Annotated (Vernon 1976).

137. Prohibiting the practice of optometry under a trade name was found to be a constitutionally permissible state regulation to protect the public from deceptive trade practices. Friedman v. Rogers, 440 U.S. at 19.

138. *Id.* at 10 n.9. This statement is taken by some writers to signify a withdrawal of first amendment protection for commercial speech. *See* G. GUNTHER *supra* note 14, at 376-77 (Supp. 1979).

The Court's language focused on the state's power to control business activity and thereby sidestepped the constitutional issue.[139] Nevertheless, the decision appears to be another formulation for the proposition that truthful, non-deceptive commercial speech is protected.

Prior to the commercial speech limits set forth in *Friedman,* two cases decided in the lower federal courts following the *Virginia Pharmacy* decision illustrate the difficulties resulting from the newly created protection for commercial speech. *Beneficial Corp. v. FTC,*[140] and *Standard Oil Co. of California v. FTC,*[141] relied upon *Bigelow v. Virginia.*[142] That decision advocated a balancing of the first amendment rights involved with those of the state's interest in regulating business.[143] These courts then applied this balancing approach to the then apparent blanket protection for commercial speech which *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*[144] afforded.[145]

Beneficial[146] involved a Commission order requiring a personal loan company to cease and desist the use of a certain copyrighted phrase.[147] The Commission had determined the phrase was deceptive. Beneficial disagreed. The court found that the order was overly broad, in that the deception could be eliminated without requiring complete retirement of the phrase. The court said that the phrase merely needed modification.[148] The state interest in eliminating deception was balanced against the petitioner's copyrighted phrase, which was "deemed to be a

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139. Friedman v. Rogers, 440 U.S. at 13-14. The reader should at this juncture recall the original distinction between business activity and speech. *See* notes 108-14 and accompanying text *supra.* It appears that the Court's determination that the entire contested transaction in *Friedman* was a ploy to dupe the public led to the consequent limiting of the role of the questioned speech towards the goals of informing the public truthfully. Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. at 14-15. However, it would be fair to characterize the *Friedman* decsion as a reaction to the particular facts of *Friedman* rather than a retrenching of the Court's developing protection of commercial speech.

140. 542 F.2d 611 (3d Cir. 1976), *cert. denied,* 430 U.S. 983 (1977).

141. 577 F.2d 653 (9th Cir. 1978).

142. 421. U.S. 809 (1975).

143. It should be recalled that the *Bigelow* Court's analysis was grounded in the characterization of the speech involved as more akin to the political rather than the commercial variety. *See* notes 118-21 and accompanying text *supra.*

144. 425 U.S. 748 (1976).

145. *Beneficial* was overruled by implication in Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447 (1978) and Central Hudson Gas & Electric Co. v. Public Serv. Comm'n of N.Y., 100 S.Ct. 2343 (1980), because those cases dictate that commercial speech was not put on a par with political speech, as the court in *Beneficial* had presumed.

146. 542 F.2d 611 (3d Cir. 1976).

147. The phrases at issue were the terms "Instant Tax Refund Plan" or "Instant Tax Refund Loan." *Id.* at 614.

148. *Id.* at 620.

> The Commission's order proscribing use of the term instant tax refund or any other word or words of similar import or meaning, without consideration of the context in which the words appear, went further than was permitted for that purpose and was an

valuable business asset."[149] The FTC could require compliance, but only to the extent necessary to prevent deception. The court felt that full enforcement of the order would be a constitutional infringement on the petitioner's right to make a truthful commercial claim.[150]

In *Standard Oil Co. of California v. FTC,*[151] the Commission issued a blanket cease and desist order concerning representations involving gasoline that was claimed to be, and in fact was, less polluting to the atmosphere than competing products. The court agreed with the Commission's assessment that the *mode* of presenting the quality of the product was deceptive.[152] However, the claims were found to be of certifiable social value and not mere commercial exhortations.[153] Thus the court modified the FTC's order concluding that: "The agency misused its discretion in issuing the order."[154]

The *Standard Oil* court also reiterated the balancing theory[155] applied

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abuse of the Commission's remedial discretion. It cannot in that form and without such consideration be affirmed or enforced.

Id.

149. *Id.* at 619.

150. The Court said: "The Commission, like any governmental agency, must start from the premise that any prior restraint is suspect, and that a remedy, even for deceptive advertising, can go no further than is necessary for the elimination of the deception." *Id.* at 620. *Cf.* United States v. Reader's Digest Ass'n, Inc., 464 F. Supp. 1037 (D. D.C. 1978). (Where the government sued for injunctive relief based upon a prior consent agreement) where the court declined to find the presence of a valuable business asset to act as a counterweight to the state interest in suppressing deceptive advertising. As a result, the petitioner's challenge failed. This case was not brought pursuant to the appeal provisions of FTCA, 15 U.S.C. § 45(c) (1976), but was brought independently by the United States government based on the prescriptions in FTCA, 15 U.S.C. § 45(a) (1976), for alleged violation of a consent order brought following a prior Commission determination of wrong-doing, thus, the reason for its adjudication in the district court.

151. 577 F.2d 653 (9th Cir. 1978).

152. The facts in Standard Oil Co. of Cal. v. FTC, 577 F.2d 653 (9th Cir. 1978), were described by the court as follows:

> Two commercials were based on demonstrations which were designed to afford viewers a visual comparison of automobile exhaust before and after using F-310. In one [commercial] a large clear balloon was attached to the exhaust pipe of an idling automobile. The balloon was shown inflating with black, opaque vapor, while the announcer described it as "filling with dirty exhaust emissions that go into the air and waste mileage." The announcer then stated that "Standard Oil of California had accomplished the development of a remarkable gasoline additive, Formula F-310, that reduces exhaust emissions from dirty engines." He informed the viewer that the same car was run on six tankfuls of Chevron F-310 and the result was "no dirty smoke, cleaner air." To prove the point, a clear balloon was again shown being attached to the car. This time the balloon inflated with transparent vapor. In conclusion the television viewer was told: "Chevron with F-310 turns dirty smoke into good, clean mileage. There isn't a car on the road that shouldn't be using it."

Id. at 655-56.

153. *Id.* at 663.

154. *Id.* at 661.

155. *See* notes 118-21 and accompanying text *supra* for a discussion of the balancing approach. The court in *Standard Oil* said:

> The propriety of a broad order depends upon the scientific circumstances of the case. . . . Among the circumstances which should be considered in evaluating the rela-

in *Beneficial Corp. v. FTC*[156] in what appears to be the clearest formulation of that test:

> [T]hese orders go far beyond elimination of the specific representations which were made and also beyond what in fairness could be deemed necessary to deter future unlawful conduct. In the emerging law of first amendment protection for commercial speech, one of the first principles is that "such speech serves individual and societal interests in assuring informed and reliable decision making." At a minimum, administrative agencies may not pursue rigorous enforcement to the extent of discouraging advertising with no concomitant gain in assuring accuracy and truthfulness.[157]

The court only allowed the Commission to regulate the advertisers' conduct to the extent necessary to prevent deception of the public.[158]

The court in *Beneficial* felt strongly that the demise of the commercial speech exception to the first amendment would lead to a curtailment of the FTC's broad remedial powers.[159] "The Commission like any governmental agency, must start from the premise that any prior restraint is suspect, and that a remedy, even for deceptive advertising, can go no further than is necessary for the elimination of the deception."[160] The logical consequence of this holding is that protected commercial speech is not properly subject to prior restraint.

The court in *Standard Oil Co. of California v. FTC*[161] ruled similarly, in saying that broad and vague cease and desist orders where unwarranted, "*may* amount to a prior restraint on protected commercial speech."[162] The cease and desist orders issued by the Commission in this case "unquestionably burden[ed] Standard's ... advertising

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tion between the order and the unlawful practice are whether the respondents acted in blatant and utter disregard of the law, and whether they had a history of engaging in unfair trade practices.

577 F.2d at 662 (citations omitted).

156. 542 F.2d 611 (3d Cir. 1976).

157. Standard Oil Co. of Cal. v. FTC, 577 F.2d at 662 (citations omitted).

158. *Id.* The court found that the "exceptionally broad orders issued by the FTC in this case bear no 'reasonable relationship to the unlawful practices found to exist.' Both orders shall be modified so that they refer only to future advertising. . . ." *Id.* at 663.

159. Beneficial Corp. v. FTC., 542 F.2d 611 (3d Cir. 1976). The court said, in one of the first cases to question the FTC's powers following *Virginia Pharmacy,* the "doubtless the Commission's broad construction of its § 5 remedial authority cannot survive the demise of the commercial speech exception to the first amendment." *Id.* at 620. Subsequent cases have made it clear that this court's predictions regarding the FTC's powers have not been fulfilled. *See* note 144 and accompanying text *supra.*

160. Beneficial Corp. v. FTC, 542 F.2d at 620.

161. 577 F.2d 653 (9th Cir. 1978).

162. *Id.* at 662.

capacity."[163] It appears that the fear of placing a chill on truthful advertising was the focus of this determination.[164]

While the interpretation of the commercial speech doctrine as developed by these lower federal court decisions has clearly been renounced by later Supreme Court decisions,[165] the concern regarding questions of prior restraint is relevant here. The court in *Beneficial Corp. v. FTC*[166] determined the new protection for commercial speech to be equivalent to that accorded to political speech.[167] It then applied prior restraint analysis to the questioned speech as in any speech determination. The court in *Standard Oil Co. of California v. FTC*[168] was more sensitive to the commercial speech-political speech dichotomy when it came to the question of prior restraint, in that it merely posited the problem while leaving its resolution to a future tribunal.[169]

The Supreme Court was able to further define the distinction between political in commercial settings and purely commercial speech. This distinction reinforced the implication that different levels of first amendment protection would follow the factual determination as to the nature of the questioned speech. The decisions in *Ohralik v. Ohio State Bar Ass'n*[170] and *In re Primus*[171] dealt with an attorney's right to solicit clients.[172] In *Primus*, an American Civil Liberties Union (ACLU) attorney sought to include a woman who had been sterilized in a class action suit challenging the propriety of the statute authorizing the surgery.

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163. *Id.*

164. The basis of this fear is not clear. It is generally accepted that commercial speech is hardy and will usually withstand attempts to subordinate or censor it. It is plausible that the court proscribed the possibility of prior restraint here based on the precept that our system generally awaits the occurrence of wrongful conduct before imposing sanctions. *See, e.g.*, Near v. Minnesota, 283 U.S. 697 (1931) where the Court quoted a classic formulation for the protection due to speech in a democracy:

> The liberty of the press is indeed essential to the nature of a free state; but this consists in laying no previous restraints upon publications, and not in freedom for criminal matter when published. Every freeman has an undoubted right to lay what sentiments he pleases before the public; to forbid this, is to destroy the freedom of the press; but if he publishes what is improper, mischievous or illegal, he must take the consequences of his own temerity.

Id. 713-14, *quoting* W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 151-52 (1771) (emphasis deleted).

165. *See* note 144 *supra.*

166. 542 F.2d 611 (3d Cir. 1976).

167. *Id.* at 620.

168. 577 F.2d 653 (9th Cir. 1978).

169. *Id.* at 662.

170. 436 U.S. 447 (1978).

171. 436 U.S. 412 (1978).

172. In *In re* Primus, 436 U.S. 412 (1978), a woman who had been sterilized by a doctor who stood to lose further Medicaid reimbursements unless she consented to such procedures, had been asked by an American Civil Liberties Union attorney if she would like to be included as a plaintiff in a lawsuit. *Id.* at 416. The attorney stood to gain financially by the suit, but she was a staff attorney on salary whose compensation was to be determined by the court. *Id.* at 427-28. There was

The Court was solicitous of the potential state interest by maintaining the possibility of regulation of attorney advertising in the proper context.[173] It went on to say that the statute in question fell within the first amendment proscription of undue state interference.[174] The Court was also strongly influenced by the association clause in the first amendment.[175] The Court did not want to inhibit attorneys' conduct which was primarily motivated by a desire for justice rather than financial gain.[176]

In *Ohralik* the attorney sought to induce car accident victims to employ his services.[177] The Court stated that "in person solicitation by a lawyer of remunerative employment is a business transaction in which speech is an essential but subordinate component. While this does not remove the speech from the protection of the First Amendment . . . it lowers the level of appropriate judicial scrutiny."[178] The Court found the aspect of undue pressure in a face to face confrontation a most disturbing aspect of this commercial speech which served to lower its constitutional protection.[179] The potentially misleading character of the speech, in this confrontation, voided protection for that speech.[180]

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no fee contingency aspect here. *Cf.* Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447 (1978) (where an attorney attempted to solicit a contingent fee arrangment from two motor vehicle accident victims).

173. In *In re* Primus, 436 U.S. 412 (1978), the Court said:

> The State's special interest in regulating members of a profession it licenses, and who serve as officers of its courts, amply justifies the application of narrowly drawn rules to proscribe solicitation that in fact is misleading, overbearing, or involves other features of deception or improper influence. . . . Accordingly, nothing in this opinion should be read to foreclose carefully tailored regulation that does not abridge unnecessarily the associational freedom of nonprofit organizations, or their members, having characteristics like those of the ACLU.

Id. at 438.

174. *Id.* at 439.

175. "Congress shall make no law . . . abridging . . . the right of the people peaceably to assemble. . . ." U.S. CONST. amend. I.

176. *In re* Primus, 436 U.S. at 422.

177. Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447 (1978). This case involved what one of the Justices called " 'a classic case of ambulance chasing.' " G. GUNTHER, *supra* note 14, at 371 (Supp. 1979). The petitioner, an enterprising attorney, pressed himself upon two potential plaintiffs in an attempt to have his services retained. The Court found this behavior both unbecoming of a member of the bar, and its speech component unprotected by the decisions in Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748 (1976) and Bates v. State Bar of Ariz., 433 U.S. 350 (1977). 436 U.S. at 457.

178. Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 457 (1978).

179. *Id.* The Court said:

> Unlike a public advertisement, which simply provides information and leaves the recipient free to act upon it or not, in-person solicitation may exert pressure and often demands an immediate response, without providing an opportunity for comparison or reflection. The aim and effect of in-person solicitation may be to provide a one-sided presentation and to encourage speedy and perhaps uninformed decisionmaking; there is no opportunity for intervention or counter-education by agencies of the Bar, supervisory authorities, or persons close to the solicited individual.

Id. at 457-58 (footnote omitted).

180. *Id.* The petitioner's first amendment claims were not recognized in this instance. "A

The right to freedom of association was a powerful influence in *Primus*, which, in concert with the factual situation regarding the ACLU attorney's means of renumeration,[181] led the Court to find that the speech in *Primus* should be protected. The speech in *Primus* was free of the strictly commercial concerns which prevailed in *Ohralik* and which the Court obviously thought were both indiscrete and sufficiently hardy to withstand the withholding of first amendment protection for the speech.[182]

It is easier to understand the effect of the *Friedman*[183] decision on the commercial speech doctrine as a whole, by noting that it is largely governed by the *Ohralik* opinion. This can be explained by the fact that in each of these cases, the potential for deception entailed in the advertising was at the heart of the dispute.[184] The common aspect of these cases is that the petitioner, with purely commercial motives, is using potentially deceptive speech as an arm of his business solicitation. He then attempts to continue this activity under the auspices of a broad first amendment protection. The Court was quick to perceive the ploy and arrest the practice. With this distinction in mind *Friedman* does not expressly point to a withdrawal of first amendment protection for commercial speech. It only helps to define the parameters of the doctrine. It is a concrete example of the Court's earlier suggested withholding of first amendment protection for false or deceptive commercial speech.[185]

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lawyer's procurement of remunerative employment is a subject only marginally affected with first amendment concerns. It falls within the state's proper sphere of economic and professional regulation." *Id.* at 459.

181. *See* note 171 *supra.*

182. The opinion in *Primus,* although clearly involving a question of commercial speech regarding client solicitation by an attorney, was supported by reasons best stated in NAACP v. Button, 371 U.S. 415 (1963). *Primus* concerned associational rights as well as those of free speech. As such, much of the balancing employed by the Court in *Virginia Pharmacy* was absent in the *Primus* opinion. *Primus* did not analyze the value to the consumer of the disputed commercial speech in opposition to the state's interest in controlling this speech. Rather it depended on traditional analysis requiring a compelling state need to justify limitation of the advertisers' right. *See In re* Primus, 436 U.S. at 439.

The opinion in Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447 (1978) exemplifies the full potential of the Court's reservation of some regulatory power over commercial speech to the state. Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748 (1976). The Court in *Ohralik* said that as a proportionally greater quantum of the speech tends to lack the merits of traditionally protected political speech, the greater the regulation that will be permissible. 436 U.S. at 455-56.

"In-person solicitation by a lawyer of remunerative employment is a business transaction in which speech is an essential but subordinate component. While this does not remove the speech from the protection of the First Amendment ... it lowers the level of appropriate judicial scrutiny." *Id.* at 457. The negative aspects of in-person solicitation removed nearly all constitutional protection for that speech in *Ohralik.*

183. Friedman v. Rogers, 440 U.S. 1 (1979).

184. *See* notes 171 & 176 and accompanying text, *supra.*

185. The language is especially harsh in *Ohralik* undoubtedly due to the hoped for chastising effect on the opprobrious behavior of a fellow member of the bar. Such language is not entirely necessary in *Friedman,* yet *Ohralik* is the case among the small collection of commercial speech

In 1980, the Court finally abandoned the vagueness of its earlier decisions and attempted to enunciate a clear standard of review for commercial speech cases.[186] The Court in *Central Hudson Gas & Electric Co. v. Public Service Comm'n of New York,* determined that "if the communication is neither misleading nor related to unlawful activity, the government's power to regulate is more circumscribed. The States must assert a substantial interest to be achieved by restrictions on commercial speech."[187] Thus, the Court has attempted to fit commercial speech within established constitutional modes of analysis.[188] By this decision, the Court has made it clear that there is a difference between commercial speech and other forms of speech and that this difference should be reflected in the analysis used in questions regarding their regulation.[189]

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cases which most closely reflects the *Friedman* fact pattern. It is the proper source of authority for the *Friedman* opinion.

186. *See* Central Hudson Gas & Electric Co. v. Public Serv. Comm'n of N.Y., 100 S. Ct. 2343 (1980). In this case a utility company questioned the constitutionality of a state statute which banned advertising by utilities. *Id.* at 2348. The Court held that such advertising constituted protected first amendment speech, and that the statute was invalid. *Id.* at 2355.

187. *Id.* at 2350. Note that this proposed mode of analysis implies the use of a rational basis test in situations where speech is untruthful.

188. The important words used by the Court are "substantial state interest" and the need to know if "the governmental interest could be served as well by a more limited restriction on commercial speech." Both inquiries must be fulfilled, or the regulations will be deemed "excessive." *Id.* at 2350. This can be characterized as the middle tier of judicial review as is used in equal protection analysis, notably in sex discrimination cases. *See* note 192 and accompanying text *infra.* Although by no means the focus of this paper, it is interesting to note that a constitutional question traditionally dealt with via the two tiered due process approach, that being first amendment freedom, *see* G. GUNTHER, *supra* note 14, at 584 & 595, has had the three tiered approach of equal protection analysis, *id.* at 875 & 880, applied to it in this instance.

189. As noted above, *see* note 187 *supra,* the Court has apparently chosen to utilize a three-tiered approach to analyze commercial speech questions, despite the generally accepted use of two-tiered due process analysis with traditional first amendment considerations. *See* G. GUNTHER, *supra* note 14 at 584. Nevertheless, it is not difficult to conceptualize the differing quality of judicial scrutiny that will be applied after *Central Hudson* in commercial speech cases as compared to traditional first amendment speech cases. As stated in *Central Hudson,* the state must show a substantial need for its regulation while also proving that no less restrictive method for satisfying the state goal exists. Central Hudson Gas & Electric Co. v. Public Serv. Comm'n of N.Y., 100 S.Ct. at 2350.

Compare this language with that commonly associated with the strict scrutiny normally given to first amendment regulation. Generally, the state must show compelling need for the regulation and necessary means of application. The words on their face evoke the notion that a marked contrast in the quantum of scrutiny will be applied, but the practical results of the use of the two standards is far more indicative of the difference. Very few state regulations have ever cleared the strict scrutiny threshold. *See* Korematsu v. United States, 323 U.S. 214 (1944). *"Korematsu* is one of the very rare cases in which a classification based on race or ancestry survived Court scrutiny." G. GUNTHER, *supra* note 14, at 698. Strict scrutiny under due process analysis has also rarely yielded to the conflicting state regulation. *See* New York Times Co. v. United States, 403 U.S. 713 (1971); United States v. Progressive, Inc., 467 F. Supp. 990 (W.D. Wis. 1979).

As a group, the commercial speech cases[190] point to use of the substantial scrutiny standard of judicial review[191] concerning questions as to whether a given advertisement should be protected under the first amendment.[192] This mode of analysis is similar to the middle tier level of review which has been applied in certain equal protection areas.[193] With traditional first amendment consideration, only compelling state needs will allow regulation of speech.[194] Prior restraint of that speech entails an even greater showing of compelling state need.[195] Under pres-

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190. *See* notes 104-88 and accompanying text *supra.*

191. *See* notes 186-88 and accompanying text *supra.*

192. In summary, it appears that the attempt to regulate truthful commercial speech will nearly always meet with judicial disapproval, in that it triggers the use of the substantial scrutiny test. *See* Central Hudson Gas & Electric Co. v. Public Serv. Comm'n of N.Y., 100 S.Ct. at 2350 and notes 187 & 188 *supra. See also* Comment, *First Amendment Protection for Commercial Advertising: The New Constitutional Doctrine,* 44 U. CHI. L. REV. 205, 244-45 (1977). Commission orders will only be allowed to conform commercial speech to state or agency standards to the extent that the deception is remedied, and not at the unnecessary expense of the advertiser. *See* notes 145 & 150 *supra.* In addition, it does not appear that an advertiser without a bad past record of deceptive promotion will be held to have forfeited his future first amendment rights. The question lurking in the background in these cases is whether commercial speech which is susceptible of first amendment protection is free from prior restraint. In Friedman v. Rogers, 440 U.S. 1, 10 n.9 (1979); Bates v. State Bar of Ariz., 433 U.S. 350, 383 (1977); and Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 763 (1976), the Court essentially said that commercial speech may not be immune from prior restraint.

193. *See* Craig v. Boren, 429 U.S. 190 (1976), which established the intermediate standard of equal protection analysis. In *Craig,* a state statute was declared invalid which allowed females to buy certain alcoholic beverages at the age of 18, but precluded males from doing so until they were 21. The Court refused to accord this gender-based classification strict scrutiny but made clear that much more than a showing of a reasonable relationship would be necessary to satisfy the Court that the classification was justified. *Id.* at 198-99. *See also* Gunther, *Foreward: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection,* 86 HARV. L. REV. 1 (1972). Generally, this standard of review is not well suited to the issue of prior restraint. The first amendment right to free speech is arguably of a more absolute nature than the right to equal protection of the laws, the analysis of which entails a relative determination as to the propriety of legislative classifications. In an equal protection analysis, political speech would be protected by the strict scrutiny directed by Chief Justice Stone in United States v. Carolene Products, 304 U.S. 144 (1937), where the Court said: "There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments which are deemed equally specific when held to be embraced within the Fourteenth." *Id.* at 154 n.4. This language established the upper tier of due process analysis which essentially required that the literal instructions of the Constitution be breached only after the most rigorous judicial review has been applied to the classification in question. As an element of constitutional protection which may even surpass the level of protection accorded to racial classifications, *see* W. BERNS, *supra* note 14, at 76-80, the application of prior restraint is difficult to conceptualize in the context of a general scheme which revolves around a much lower level of scrutiny. *See generally* Central Hudson Gas & Electric Co. v. Public Serv. Comm'n of N.Y., 100 S.Ct. 2343 (1980).

194. *See* note 192 *supra.*

195. The difference in the manner in which the Court considers cases involving previous restraint may be . . . a subtle one, but the difference is nonetheless real and manages to play its part in decisions. . . . The freedoms of the first amendment stand in a preferred position; anything that stands in their way must be presumed to be invalid. W. BERNS, *supra* note 14, at 83, 85.

ent commercial speech analysis, regulation is permitted in the showing of a *substantial* state interest.[196] None of the cases admit to suggesting how this affects the status of prior restraint in such a situation. It is not likely that a logical argument could be made to apply prior restraint considerations to the intermediate standard of review, in that the standard was developed without considering prior restraint, and because the notion of prior restraint is so integrated with traditional first amendment considerations.[197] Therefore, policy considerations would appear to be the next best means of determining the appropriate level of scrutiny to be accorded to prior restraint of commercial speech.

V. POLICY CONSIDERATIONS

Policy arguments may be made for and against the application of prior restraint of the commercial speech setting. Consider first the argument against its use. The Supreme Court established the value of truthful commercial speech in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*[198] by analogizing it with traditionally protected political speech.[199] The most important distinction drawn in this opinion, is that, since we choose to utilize a free enterprise system which depends on the informed preferences of the populace, it is necessary that as much true information as possible be available to facilitate these decisions.[200]

The protection of the right to communicate and receive ideas is essential to the concept of a democracy.[201] The efficient operation of an economic model is a further consideration which, while secondary to political requirements, nonetheless requires a free flow of information as long as the flow is truthful. Some pragmatism must be employed in

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196. *See* Central Hudson Gas & Electric Co. v. Public Serv. Comm'n of N.Y., 100 S.Ct. 2343 (1980).

197. Under the present scheme, prior restraint analysis is twice removed from commercial speech. It could be argued that just as prior restraint merits one quantum of additional constitutional protection above the strict scrutiny accorded to politically-based speech, so also should the level of scrutiny be raised in questions of prior restraint for commercial speech. This treatment would entitle censorship of commercial speech to strict judicial scrutiny. This approach seems simplistic, and possibly untenable in light of the analytical basis for acording commercial first amendment protection. *See* Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748 (1976); Baker, *A Problem in the Theory of Freedom,* 62 IOWA L. REV. 1 (1976-1977).

198. 425 U.S. 748 (1976).

199. *See* notes 116-33 and accompanying text *supra.*

200. Bates v. State Bar of Ariz., 433 U.S. 350 (1977); Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748 (1976).

201. Jackson & Jeffries, *Commercial Speech: Economic Due Process and the First Amendment,* 65 VA. L. REV. 1, 9-10 (1979).

an effort to reconcile this conflict. Truthful commercial speech aids in the functioning of a democratic society by serving the interests of its constituents through the provision of commercial information. Such information is a necessity where the economic system chosen by the people is one which operates at its best when potential buyers and sellers act with sufficiently complete information as to what they are buying and selling and for what price. If prior restraints are employed by the FTC to a situation involving commercial speech, the truth of which is later established in court, the public interest in receiving such information will have been defeated.[202]

Censorship would also constitute a chill upon commercial speech. Consumers would be deprived of information necessary to make intelligent economic determinations. This deprivation could reflect directly on the welfare of the population, or certain segments of the population as discussed in *Virginia Pharmacy*.[203] Several negative consequences could result by allowing prior restraint. More efficient or better products and services may be foreclosed from ever having a chance in the market. It is an unfortunate fact that even quality products and services require commercial promotion to assure their success in the marketplace.[204]

A more tangential but possibly more insidious problem could result from the allowance of prior restraint on commercial speech. It is at least arguable that the incentive to develop and create new or better products and services lies in the hope of a reward, pecuniary or congratulatory. The spectre of prior restraint serving as a damper on the promotion of a new product or service development might preclude a would-be creator from attempting a new creation.[205] This scenario becomes plausible when transposed onto the research and development branch of a large technically-oriented company. The paramount consideration for the director of the research and development department concerning a particular develoment will not be how good it is, but whether the company

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202. *See* notes 123-33 and accompanying text *supra*.

203. 425 U.S. 748, 763 (1976). *See also* note 122 *supra*.

204. Advertising expenditures usually are significantly greater when a new product is launched than for an established product. Companies must inform potential customers about new products to build up the market for them. Through advertising and related selling efforts, producers seek to increase the willingness of consumers to use part of their expanding incomes to buy these new and improved products.

As compared with existing products, advertising costs for a new product tend to be a very high proportion of total sales during the first one or two years it is on the market. Studies by A.C. Nielson & Co. have shown that for a new toilet-good product to be successful it must "over a twenty-four month period . . . produce a share of advertising about one and one-half times that of the share of sales" sought.

J. BACKMAN, *supra* note 109 at 24-25.

205. J. BACKMAN, *supra* note 109 at 37.

will be able to sell it.[206] It would be unfortunate if a desirable invention were foreclosed from development due to a company's fears of not being able to promote the item and market it successfully.

The overbreadth doctrine also deserves consideration in determining the propriety of prior restraint for commercial speech.[207] By creating the FTC, Congress has established a process whereby deceptive and unfair acts will be immediately discerned and arrested. The FTC purports to advance a compelling societal need; public protection from deceptive advertisement. The FTC's plenary power leaves room for abuse of the discretion granted it by its enabling statute.[208] "[O]verbreadth claims have . . . been entertained where statutes, by their terms, purport to regulate the . . . manner of expressive or communicative conduct . . . and where such conduct has required official approval under laws that delegated standardless discretionary power to local functionaries, resulting in virtually unreviewable prior restraints on First Amendment rights."[209] Elevation of commercial speech to First Amendment protection should include the breathing room made available by the assurance of no prior restraint. This protection should extend to all but the most egregious multiple offenders employing deceptive commercial speech, if the protection for commercial speech is to be successful. It is permissible for the FTC to act as a watch dog for unlawful conduct, but its methods must be constitutionally sound. It is clear that when the exercise of first amendment rights is affected, the methods must be carefully examined for excess. Aiding the democratic system by enhancing free enterprise and observance of the overbreadth doctrine tends to support the idea that prior restraint of commercial speech is unacceptable in all but exceptional circumstances.[210]

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206. This proposition requires no formal substantiation. It is merely a reflection of a typical business-oriented managerial decision.

207. It has long been recognized that the First Amendment needs breathing space and that statutes attempting to restrict or burden the exercise of First Amendment rights must be narrowly drawn and represent a considered legislative judgement that a particular mode of expression has to give way to other compelling needs of society. Broadrick v. Oklahoma, 413 U.S. 601, 611-12 (1973).

In Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447 (1978), the Court addressed the usefulness of the overbreadth doctrine, and found it lacking in a commercial speech capacity: "appellant [could not] make a successful overbreadth argument in view of the Court's observation in *Bates* that 'the justification for the application of overbreadth analysis applies, weakly, if at all, in the ordinary commercial context.' Commercial speech is not as likely to be deterred as noncommercial speech, and therefore does not require the added protection afforded by the overbreadth approach." *Id.* at 462 n.20 (citation omitted).

The Court's dismissal of the overbreadth doctrine based on the facts of *Ohralik* and the demurring attitude of the *Bates* Court may be ill-conceived. The effects which the overbreadth doctrine attempts to cure are still present despite the hardiness of commercial speech, and the ramifications could extend beyond the injury to commercial interests.

208. *See* notes 2 & 7 *supra.*

209. Broadrick v. Oklahoma, 413 U.S. 601, 612 (1973).

210. *See, e.g.,* Jay Norris, Inc v. FTC, 598 F.2d 1244 (2nd Cir. 1979). *See* notes 82-86 and ac-

The argument for prior restraint rests on the view that permitting construction of the commercial speech cases to withdraw the FTC's remedial powers would act as a serious blow to the FTCA. The bottom line regarding how businesses will react to FTC directions will in a large part be reflected in businesses' perception of what the FTC can do to remedy violations of the Act. A special problem is present, as noted above,[211] in that the effects of unlawful advertising are of immediate danger to the public, and cannot be adequately remedied by traditional methods of after-the-fact adjudication. It is of paramount importance that the FTC be able to wield such power to stop "unfair or deceptive acts or practices in . . . commerce."[212]

Outright prior restraint would not impose such a heavy burden on business and the public. The federal courts have condoned what is essentially a form of prior restraint, in upholding affirmative disclosures.[213] The step from allowing affirmative disclosure to censorship is a matter of slight degree. "Prior restraints are not unconstitutional per se."[214] It is just that the public interest in censoring deceptive commercial speech must be accorded more weight than the constitutional interest in protecting truthful commercial speech.[215] Employed properly, with no chance for the abuse of discretion, a system of prior restraint is possible and desirable. The Supreme Court was unclear as to whether it would direct proscription of prior restraint when it found commercial speech to have first amendment protection.[216] This express reservation should lead one to believe that such a prohibition was not part of the overall reservation of protection that the Court specified regarding commercial speech in general.[217]

As a practical matter it is unlikely that the FTC would ever censor an advertiser unless that advertiser had shown a decided propensity to dupe the public. Where an advertiser has been caught before he sacrifices some of his rights due to his prior conduct.[218] It is also difficult to contemplate when a state or agency would ever have the necessary justification that would allow a ban on advertising such as was involved in *Virginia State Board of Pharmacy v. Virginia Citizens*

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companying text *supra*. *See also* Comment, *First Amendment Protection for Commercial Advertising: The New Constitutional Doctrine*, 44 U. CHI. L. REV. 205, 244-45 (1976).

211. *See* notes 59-73 and accompanying text *supra*.

212. 15 U.S.C. § 45(a) (1976).

213. *See* notes 53-81 and accompanying text *supra*.

214. Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 558 (1975).

215. *See* Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 771-72 n.24 (1976).

216. *See* note 24 *supra*.

217. *See* Jackson & Jeffries, *supra* note 201, at 1; Baker, *Commercial Speech: A Problem in the Theory of Freedom*, 62 IOWA L. REV. 1 (1976-1977).

218. *See* Jay Norris, Inc. v. FTC, 598 F.2d 1244 (2d Cir. 1979). *See also* notes 82-86 and accompanying text *supra*.

Consumer Council, Inc.[219] Censorship should be allowed in the scheme of modified first amendment protection for commercial speech. It would enhance the FTC's powers over unlawful advertisers while leaving truthful advertisers with nothing to fear.

The practical aspects of the argument for censorship are compelling at first.[220] However, they leave much room for uncontrolled agency indiscretion and they are not constitutionally sound. The first amendment requires breathing room.[221] Commercial speech is only partially protected if it remains subject to prior restraint. Our system is content to allow speakers to say what they will and then suffer the consequences.[222] There is no need to exclude commercial speech from this protection. The public is protected from unlawful advertising by traditional remedies and the FTC power to require affirmative disclosure. To permit prior restraint would not only be an abrogation of advertisers' constitutional rights, but it would serve to chill future advertisers and creators in their lawful attempts to promote their products and the public's right to know of them.[223] In addition, the natural propensity of the FTC to be skeptical of advertisers could easily lead to an abuse of the agency's power. Prior restraint has the potential of becoming a standard practice, rather than a rarely used stopper. Its use is too easily facilitated and it requires little attention to the detail of fashioning an appropriate remedy as is done in most FTC matters. Abuse of discretion is a very real possibility which, in concert with the constitutional arguments,[224] gives sufficient weight to the proposition that prior restraint is an inappropriate remedy for the regulation of commercial speech. The Court in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*[225] said that "[t]he First Amendment, as we construe it today, does not prohibit the State from insuring that the stream of commercial information flow cleanly . . .,"[226] but it does not permit the state to stop the flow entirely.

CONCLUSION

Persuasive policy arguments can be made both for and against allowing prior restraint of commercial speech. As a matter of constitutional

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219. 425 U.S. 748 (1976).
220. *See* notes 211-18 accompanying text *supra.*
221. *See* Broadrick v. Oklahoma, 413 U.S. 601 (1973); NAACP v. Button, 371 U.S. 415 (1963).
222. Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546 (1975).
223. J. BACKMAN, *supra* note 109 at 37.
224. *See* notes 202-06 *supra.*
225. 425 U.S. 748 (1976).
226. *Id.* at 771-72.
227. *See* notes 139-67 and accompanying text *supra.*

law, the scales should clearly tip in favor of proscribing this type of FTC remedy. The status of the law, however, is not clear at the present time. The Supreme Court's decisions have resulted in the recognition of first amendment protection for commercial speech but have left open the possibility of censorship. Until the Court adopts a clearer position, similar to that of some of the lower federal courts,[227] the constitutionality of prior restraint of commercial speech remains unresolved.

JOHN GEISMAR

The Revitalization of Section 1905 of the Trade Secrets Act in Reverse Freedom of Information Act Suits

The expansion of federal regulatory activity, along with growth in the government sector of the economy, has resulted in a sharp increase in agency demands for information concerning the activities of private individuals and corporations.[1] Paralleling these developments has been a growing concern about governmental secrecy and abuse of power.[2] In an effort to strike a balance between society's interest in a free and open government,[3] and the need for workable confidentiality in the government decision-making process, Congress enacted the Freedom of Infor-

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1. Chrysler Corp. v. Brown, 441 U.S. 281, 285 (1979). Two common examples of agency requirements are Executive Orders 11246 and 11375. Executive Order 11246, 3 C.F.R. 339 (1964-1965 Comp.) is a regulatory statute prohibiting discrimination on the basis of "race, creed, color or national origin" in federal employment or by government contractors. Under the Johnson Administration, Executive Order 11375, 3 C.F.R. 684 (1966-1970 Comp.) was promulgated to extend the reach of Executive Order 11246 to prohibit such discrimination on the basis of sex. Quite often, compliance with such regulations requires that the contractors or corporation file statistical data indicating the breakdown of the work force in terms of minority hiring, along with pay scales, benefits and promotion rates. 441 U.S. at 286 n.1. Business concern over the disclosure of information becomes more acute when the nature of the data involves profit rates, actual loss data, general and administrative expense rates, projected scrap rates and learning curve data. *See* Gulf & Western Industries, Inc. v. U.S., 615 F.2d 527 (D.C. Cir. 1979). For reasons which should be obvious, such data may prove invaluable to a company's competitors.

2. 441 U.S. at 285.

3. It is vital to our way of life to reach a workable balance between the right of the public to know and the need of the Government to keep information in confidence to the extent necessary without permitting indiscriminate secrecy. The right of an individual to be able to find out how his Government is operating can be just as important to him as his right to privacy and his right to confide in his Government. This bill strikes a balance considering all these interests.

H. R. REP. NO. 1497, 89th Cong., 2d Sess. 6, *reprinted in* [1966] U.S. CODE CONG. & AD. NEWS 2418, 2423 [hereinafter cited as 1966 HOUSE REPORT].

mation Act[4] (FOIA or Act). Fully aware that the task of accommodating the competing interests would be difficult, it was Congress's belief that success would lie "in providing a workable formula which encompasses, balances, and protects all interests, yet places emphasis on the fullest responsible disclosure."[5]

Two controversial aspects of the FOIA's operation merit attention: first, the identity of those requesters who have taken advantage of the Act's provisions; and second, the nature and content of the information frequently sought under the Act.[6] The majority of the requests under the FOIA have come from businesses seeking valuable and confidential information submitted to the government by their competitors.[7] Thus, despite Congress's laudable objectives, the corporation or business submitting (submitters) information is faced with a dilemma. Refusal to

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4. 5 U.S.C. § 552 (1976) (originally enacted as Pub. L. No. 89-554, Sept. 6, 1966, 80 Stat. 383).

5. Chrysler Corp. v. Brown, 441 U.S. 281, 292 n.12 (1979), *quoting* S. REP. NO. 813, 89th Cong., 1st Sess., 3 (1965). It is the procedural aspects of the FOIA that makes information readily and speedily available. Three categories of information, each with distinctive disclosure requirements, are created by the Act. The first category involves information that must be published in the Federal Register. This information is limited to procedural and substantive rules and other information about the agency's administrative procedure. 5 U.S.C. § 552(a)(1) (1976). The second category of information requires the agency to publish or index and make available for public inspection and copying: final opinions and orders made in the adjudication of cases; agency policy statements and interpretations not published in the Federal Register; and staff manuals and instructions that affect a member of the public. *Id.* § 552(a)(2). The third category of information, and the one with which this article deals, involves information that must be disclosed upon request. Except for those covered by the Act's exemptions, all such records must be released to any person who requests them in accordance with the procedure prescribed by the FOIA and by the agency's own rules. *Id.* § 552(a)(3). A reply from the agency to a FOIA request must be within 10 business days, *id.* § 552(a)(6)(A)(i), unless there are "unusual circumstances" as defined by the Act. *Id.* § 552(a)(6)(B).

Should a request for information be denied, injunctive relief is available from the federal district court. *Id.* § 552(a)(4)(B). The court is instructed to make a de novo determination about the availability of information and may examine documents *in camera* to assess the agency's claim that the information is exempt from disclosure. *Id.* The agency has the burden of showing that the information is exempt. *Id.* The agency must respond to FOIA complaints within 30 days, *id.* § 552(a)(4)(C), and courts are required to give FOIA suits expedited treatment. *Id.* § 552(a)(4)(D).

Attorney's fees and other litigation costs may be recovered from the withholding agency if the plaintiff has "substantially prevailed." *Id.* § 552(a)(4)(F). In addition, a court may punish for contempt any responsible employee who does not comply with the court's order. *Id.* § 552(a)(4)(G). Lastly, even if a document is exempt from disclosure under the Act, nonexempt portions that are "reasonably segregable" must be disclosed. *Id.* § 552(b).

6. The department of Justice reports that approximately 76 cases were filed in 1976, 63 in 1977, and 76 through May, 1978. At that time, there were 104 pending cases, including 34 involving equal employment opportunity information, 33 involving commercial information, and 20 cases about Medicare cost reports. However, the overwhelming majority of reverse FOIA cases involve business records. FREEDOM OF INFORMATION ACT REQUESTS FOR BUSINESS DATA AND REVERSE FOIA LAWSUITS, 25TH REPORT BY THE COMMITTEE ON GOVERNMENT OPERATIONS, H. R. REP. NO. 1382, 95th Cong., 2d Sess. 54 (1978).

7. *See Business Record Exemption of the Freedom of Information Act: Hearings Before a Subcommittee of the House Committee on Government Operations,* 95th Cong., 1st Sess. 111 (1977) (statements of Burt Braverman). Mr. Braverman remarked:

comply with agency requirements may result in the forfeiture of lucrative government business; compliance with the requirements may result in substantial competitive harm.[8]

Consequently, there has been a great deal of concern about the plight of submitters.[9] In order to counter the growing requests for such information, businesses affected have recently resorted to the courts to block agency disclosure.[10] The result has been confusion within the circuits.[11] Although there is a specific provision for direct FOIA suits when one is seeking to compel disclosure, the confusion exists because the Act lacks a similar provision for those seeking to block disclosure.[12]

Absent a statutory basis for bringing such a suit, businesses seeking confidentiality have tried to turn the FOIA back on itself. These "reverse FOIA" suits have become the submitter's last hope of preventing the disclosure of information provided to a government agency.[13] Businesses contend that their need for confidentiality will not be protected unless the agencies are required to withhold information covered by one of the Act's exemptions.[14] The reverse FOIA suit is instituted following an agency determination that the records had to be disclosed,

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> Today, the FOIA is being utilized by an extremely diverse group as a means of obtaining ... private data. The Act has been employed by competitors, analysts, investors, disgruntled employees, potential and existing adverse litigants, self-styled "public interest" groups, foreign businesses and governments and a wide variety of others to obtain information concerning private businesses which, but for the FOIA, would not be available to them. Yet now, for the price of a postage stamp, such persons can generally obtain such data from federal agencies. The use of the FOIA for such surveillance of private affairs was not intended by Congress and needs to be remedied.

See also Clement, *The Rights of Submitters to Prevent Agency Disclosure of Confidential Business Information: The Reverse Freedom of Information Act Lawsuit,* 55 TEX. L. REV. 587, 588-89 (1977).

8. *See* Note, *The Corporate Dilemma in "Reverse" FOIA Suits: Chrysler Corp. v. Schlesinger,* 40 PITT. L. REV. 93, 96 (1978). *See also* Note, *Reverse FOIA Suits After* Chrysler: *A New Direction,* 48 FORDHAM L. REV. 185, 186-87 (1979) [hereinafter cited as *A New Direction*].

9. "Understandably, firms that submit confidential documents to Federal agencies have expressed concern about their release. While competitively harmful business information may be withheld under the Freedom of Information Act, other data may legitimately be sought and publicly released. Business's concern is not merely theoretical — numerous disputes and court cases have arisen over the release of such information." *See A New Direction, supra* note 8, at 187 n.17, *quoting* H. R. REP. NO. 1382, 95th Cong., 2d Sess. 1-2 (1978).

10. These suits have commonly been referred to as "Reverse FOIA" actions. The first suit of this type was Charles River Park "A," Inc. v. HUD, 360 F. Supp. 212 (D.D.C. 1972), *rev'd and remanded,* 519 F.2d 935 (D.C. Cir. 1975). As a result of *Charles,* business use of the reverse FOIA has increased dramatically. *See* note 6 *supra.*

11. *See* Chrysler Corp. v. Brown, 441 U.S. 281, 289 (1979). *See also* Comment, *Reverse — Freedom of Information Act Suits. Confidential Information in Search of Protection,* 70 NW. L. REV. 995, 996 (1976). For a discussion of the problems courts encountered before *Chrysler, see* Section II *infra.*

12. 5 U.S.C. § 552(a)(4)(B) (1976). *See* note 5 *supra.*

13. *See* S. ROSENFELD, THE FREEDOM OF INFORMATION ACT: BUSINESS USES A-29 (BNA ed. 1979).

14. *Id.* at A-30.

either because they did not fall within one of the FOIA exemptions, or that disclosure was otherwise necessary or desirable.[15]

The absence of a firm statutory base upon which to bring a reverse FOIA suit, coupled with the confusion created by such suits in the lower courts, made it essential that the Supreme Court address the problem. In *Chrysler Corp. v. Brown*,[16] a unanimous Supreme Court held that Congress did not design the FOIA exemptions to be mandatory bars to disclosure of records.[17] The Court rejected the theory of a reverse FOIA suit, finding that neither the Act nor its legislative history provided grounds to infer the existence of a private right of action to enjoin agency compliance.[18] Alternatively, the Court decided that a submitter of information could seek judicial review of an agency's disclosure under the Administrative Procedure Act[19] (APA).

This Note will trace the development of the reverse FOIA suit as a response to unchecked requests for business information. The Note will review the FOIA's policy objectives and the various reverse FOIA theories that were formulated prior to the *Chrysler* decision. A focus on the *Chrysler* decision and its impact on the reverse FOIA theories will be followed by an analysis of the Supreme Court's use of section 1905 of the Trade Secrets Act[20] (section 1905). The objective of this Note is to assess whether the Supreme Court's decision in *Chrysler Corp. v. Brown*[21] comports with the Congressional intent behind both the FOIA and section 1905 of the Trade Secrets Act.[22]

I. THE FREEDOM OF INFORMATION ACT: CONGRESS OPENS THE DOORS

Congress enacted the FOIA in order to permit access to information long-shielded unnecessarily from public view. Prior to the FOIA's enactment, agency disclosure of information was governed by section 3 of the Administrative Procedure Act.[23] Congress had become disen-

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15. *Id.* at A-29.

16. 441 U.S. 281 (1979).

17. *Id.* at 291-93.

18. *Id.* at 291-92.

19. *Id.* at 317-18. *See* 5 U.S.C. §§ 702, 706 (1976). For an analysis of the Administrative Procedure Act, *see* Section II.B. *infra.*

20. 18 U.S.C. § 1905 (1976). For the full text of section 1905, *see* note 43 *infra.* Specifically, the prospective analysis will focus on two critical issues: the scope of section 1905 of the Trade Secrets Act in relation to the fourth exemption of the FOIA; and the determination of what constitutes the "authorization by law" needed to disclose the requested information. Though the former was left untouched by the *Chrysler* Court, its determination will prove critical both to businesses seeking to block disclosure, as well as agencies seeking to disclose. The latter issue was discussed at length in *Chrysler,* but its propriety in light of Congress's original intentions in passing the FOIA may be suspect.

21. 441 U.S. 281 (1979).

22. 18 U.S.C. § 1905 (1976).

23. 5 U.S.C. § 1002 (1964) (originally enacted as Act of June 11, 1946, ch. 324, 60 Stat. 238) (repealed by Pub. L. No. 89-554) (current version at 5 U.S.C. § 552 (1976)). Section 3 was the

chanted with section 3 for several reasons: the section suffered from vague drafting; no remedy was provided for the wrongful withholding of information; and finally, even matters of official record were only to be made available to "persons properly and directly concerned" with the information.[24] Instead of providing agencies with the guidance needed to disclose information, the section had become the government's main vehicle for withholding information.[25]

As a result, the FOIA "was enacted in order to impose objective and easily applicable statutory disclosure standards in place of relatively amorphous standards such as the 'public interest,' behind which the most self-serving motives for nondisclosure of information could be

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"public information" section of the Act. It was based "upon the theory that administrative operations and procedures are public property which the general public, rather than a few specialists or lobbyists, is entitled to know or have ready means of knowing with definiteness and assurance." *See* 1966 HOUSE REPORT, *supra* note 3, at 2420. Section 3 of the Administrative Procedure Act provided:

> Except to the extent that there is involved (1) any function of the United States requiring secrecy in the public interest or (2) any matter relating solely to the internal management of an agency —
>
> (a) RULES. Every agency shall separately state and currently publish in the Federal Register (1) descriptions of its central and field organization including delegations by the agency of final authority and the established places at which, and methods whereby, the public may secure information or make submittals or requests; (2) statements of the general course and method by which its functions are channeled and determined, including the nature and requirements of all formal or informal procedures available as well as forms and instructions as to the scope and contents of all papers, reports, or examinations; and (3) substantive rules adopted as authorized by law and statements of general policy or interpretations formulated and adopted by the agency for the guidance of the public, but not rules addressed to and served upon named persons in accordance with law. No person shall in any manner be required to resort to organization or procedure not so published.
>
> (b) OPINIONS AND ORDERS. Every agency shall publish or, in accordance with published rule, make available to public inspection all final opinions or orders in the adjudication of cases (except those required for good cause to be held confidential and not cited as precedents) and all rules.
>
> (c) PUBLIC RECORDS. Save as otherwise required by statute, matters of official record shall in accordance with published rule be made available to persons properly and directly concerned except information held confidential for good cause found.

5 U.S.C. §§ 1002(a)-(c) (1964).

24. EPA v. Mink, 410 U.S. 73, 79 (1973). *See* Chrysler Corp. v. Brown, 441 U.S. 281, 293 (1979), wherein the Court stated: "The FOIA was enacted out of dissatisfaction with [section] 3 of the Administrative Procedure Act, which had not resulted in as much disclosure by the agencies as Congress later thought desirable." *See also* Campbell, *Reverse Freedom of Information Act Litigation: The Need for Congressional Action*, 67 GEO. L. J. 103, 104 (1978).

25. *See* EPA v. Mink, 410 U.S. 73, 79 (1973), wherein the Court stated: "Section 3 was generally recognized as falling far short of its disclosure goals and came to be looked upon more as a withholding statute than a disclosure statute." As the congressional history indicates, the problem was that

> the section permit[ted] withholding of Federal agency records if secrecy [was] required "in the public interest" or if the records relat[ed] "solely to the internal management of an agency. . . ." Even if no good cause [could] be found for secrecy, the records [would] be made available only to "persons properly and directly concerned." ... [N]or [was] there a recognition of the basic right of any person — not just those special classes "properly and directly concerned" — to gain access to the records of official Government actions. Above all, there [was] no remedy available to a citizen who has been wrongfully denied access to the Government's public records.

concealed."[26] The FOIA stood in sharp contrast with the section 3 requirements of the APA.[27] By eliminating the "properly and directly concerned" test of accessability, the Act made it clear that the vast majority of records would be made available to anyone. Furthermore, the Act eliminated the "good cause found" and "public interest" standards, which had existed under the APA, by delineating specific categories of information which could be withheld.[28] Finally, the FOIA provided an aggrieved citizen the right to appeal to the courts when requests for information were denied.[29]

Congress wanted to establish a general philosophy of full agency disclosure,[30] while simultaneously protecting the privacy concerns of

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See 1966 HOUSE REPORT, *supra* note 3, at 2422; S. REP. NO. 813, 89th Cong., 1st Sess., 5 (1965).

26. FAA v. Robertson, 422 U.S. 255, 268 (1975) (Stewart, J., concurring).

27. *See* EPA v. Mink, 410 U.S. 73, 79 (1973).

28. The FOIA includes the following exemptions:

(b) This section does not apply to matters that are —

(1) (A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order;

(2) related solely to the internal personnel rules and practices of an agency;

(3) specifically exempted from disclosure by statute (other than section 552b of this title), provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld;

(4) trade secrets and commercial or financial information obtained from a person and privileged or confidential;

(5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency;

(6) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;

(7) investigatory records compiled for law enforcement purposes, but only to the extent that the production of such records would (A) interfere with enforcement proceedings, (B) deprive a person of a right to a fair trial or an impartial adjudication, (C) constitute an unwarranted invasion of personal privacy, (D) disclose the identity of a confidential source and, in the case of a record compiled by a criminal law enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation, confidential information furnished only by the confidential source, (E) disclose investigative techniques and procedures, or (F) endanger the life or physical safety of law enforcement personnel;

(8) contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions; or

(9) geological and geophysical information and data, including maps, concerning wells.

Any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection.

5 U.S.C. § 552(b) (1976).

29. If the aggrieved individual did appeal, the court was to determine the matter de novo and the burden was placed upon the agency to sustain its action. 5 U.S.C. § 552(a)(4)(B) (1976). Noncompliance with the court orders may be punished by contempt. *Id.* § 552(G). *See* 1966 HOUSE REPORT, *supra* note 3, at 2418-20. *See also* note 5 *supra*.

30. 410 U.S. at 80 n.6. *See* Department of Air Force v. Rose, 425 U.S. 352, 361 (1976) ("[T]hese limited exemptions do not obscure the basic policy that disclosure, not secrecy, is the dominant objective of the Act."); Chrysler Corp. v. Brown, 441 U.S. 281, 290 (1979) ("We have ... consistently recognized that the basic objective of the Act is disclosure."). *See also* 1966

agencies, businesses, and individuals.[31] By creating the nine exemptions under the FOIA, Congress set up concrete, workable standards for determining whether particular material *may* be withheld or *must* be disclosed.[32] The exemptions were not to be used either to prohibit disclosure of information or to justify automatic withholding of information.[33] Instead, the exemptions "merely mark the outer limits of information that may be withheld where the agency makes a specific affirmative determination that the public interest and the specific circumstances presented dictate ... that the information should be withheld."[34] In the final analysis, the exemptions were not to obscure the basic policy reasons underlying the Act.[35] Congress believed that the FOIA provided a workable formula which balanced the confidentiality interests of those who submitted information to the government, with the general public's interest in the fullest responsible disclosure.[36] Several amendments to the original bill regarding time limits and penalties for failure to release have invariably served to strengthen congressional intent.[37] Finally, whenever it has appeared that a court has

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HOUSE REPORT, *supra* note 3, at 2429 ("A democratic society requires an informed, intelligent electorate, and the intelligence of the electorate varies as the quantity and quality of its information varies. . . . [The FOIA] provides the necessary machinery to assure the availability of Government information necessary to an informed electorate.").

31. By creating nine explicitly exclusive exemptions, Congress intended "to provide a more workable and balanced formula that would make available information that ought to be public and, at the same time, protect certain information where confidentiality was necessary to protect legitimate governmental functions that would be impaired by disclosure." FAA v. Robertson, 422 U.S. 255, 262 (1975). *See also* 1966 HOUSE REPORT, *supra* note 3, at 2425 ("Subsection (b) solves the conflict between the requirement for public access to records of agency actions and the need to protect individual privacy. It permits an agency to delete personal identifications from its public records 'to prevent a clearly unwarranted invasion of personal privacy.' ").

32. *See* 1966 HOUSE REPORT, *supra* note 3, at 2424-25. *See also* EPA v. Mink, 410 U.S. 73, 79 (1973).

33. "[T]he Act contains no provision for forbidding disclosure. . . . The exemptions protect against required disclosure, not against disclosure." K. DAVIS, ADMINISTRATIVE LAW TREATISE § 3A.5 (Supp. 1978). *See also* Charles River Park "A," Inc. v. HUD, 519 F.2d 935, 942 (D.C. Cir. 1975) (acceptance of the theory that the FOIA prohibits agency disclosure of information that falls within one of the Act's exemptions would tend to subvert those very purposes underlying the Act).

34. *See* S. REP. NO. 854, 93d Cong., 2d Sess. 6 (1974).

35. *See* note 30 *supra*.

36. The Senate Judiciary Committee recognized:

> "It is not an easy task to balance the opposing interests, but it is not an impossible one either. It is not necessary to conclude that to protect one of the interests, the other must, of necessity, either be abrogated or substantially subordinated. Success lies in providing a workable formula which encompasses, balances, and protects all interests, yet places emphasis on the fullest responsible disclosure."

EPA v. Mink, 410 U.S. 73, 80 n.6 (1973), *quoting* S. REP. NO. 813, 89th Cong., 1st Sess. 3 (1965).

37. *See, e.g.*, H. R. REP. NO. 876, 93d Cong., 2d Sess., *reprinted in* [1974] U.S. CODE CONG. & AD. NEWS 6267, regarding H.R. 12471 to amend 5 U.S.C. § 552. The bill sought to reach the goal of more efficient, prompt, and full disclosure of information by effecting changes in several major areas (indexes, identifiable records, time limits, attorney fees, court costs, court review, etc.). *Id.* at 6271. In particular, one section of the bill "set definite time limits for agency action on original requests and on appeals. A limit of 10 working days [was] set for a determination on

misapplied the FOIA, Congress has been quick to overrule the decision.[38] The message was clear to those businesses and corporations submitting confidential data in compliance with government regulations: agency protection of crucial records could no longer be guaranteed.

II. THE REVERSE FOIA: A SEARCH FOR PROTECTION

A great deal of concern has been voiced by those, who in order to comply with agency regulations, have submitted confidential information but feel a strong need not to have that information disclosed to the general public.[39] The plight of submitters is sharpened because the FOIA contains no provisions dealing with the rights of those seeking to block disclosure.[40] Lacking a statutory basis under the FOIA to halt disclosure, adversely affected submitters resorted to various creative and implied causes of action to bring the reverse FOIA suit.[41] Submit-

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original requests. . . . In the case of a determination to deny an original request, the denial [had] to include the reasons therefor and notice of the right of appeal." *Id.* at 6276. It is difficult to imagine a more stringent time schedule, considering the size of most federal agencies.

38. In FAA v. Robertson, 422 U.S. 255 (1975), the Supreme Court held that a statute giving the Federal Aviation Administrator discretion to withhold certain kinds of information was sufficient to render that information specifically exempted from disclosure by statute within the meaning of exemption three of the FOIA. *Id.* at 267. The Court rejected the notion that Congress meant to repeal by implication those statutes that made disclosure a matter of agency discretion. *Id.* at 269 (Stewart, J., concurring). At that time, such statutes numbered well over a hundred. Less than a year later, Congress amended the third exemption of the FOIA. The report stated:

> Section 5(b) of the conference substitute amends the third exemption in 5 U.S.C. 552(b) to include information specifically exempted from disclosure by statute (other than new section 552(b)), if the statute either (A) requires that the information be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of information to be withheld. The conferees intend this language to overrule the decision of the Supreme Court in *Administrator,* FAA v. Robertson, 422 U.S. 255 (1975), which dealt with section 1104 of the Federal Aviation Act of 1958 (49 U.S.C. 1504).

HOUSE CONFERENCE REPORT NO. 1441, 94th Cong., 2d Sess., 25, *reprinted in* [1976] U.S. CODE CONG. & AD. NEWS 2244, 2260. *See* Campbell, *supra* note 24, at 107 (congressional action in the *Robertson* case "indicates again that Congress was quite willing to step in not only to redress any improper balancing of interests under the Act, but also to avert frustration of the purposes of the Act, whether by bureaucratic recalcitrance . . . or by improper court interpretation. . . .")

39. This is particularly true when it involves trade secrets or other data that might injure their competitive position. *See, e.g.,* Sears, Roebuck & Co. v. Eckerd, 575 F.2d 1197, 1198 (7th Cir. 1978), *vacated,* 441 U.S. 919 (1979) (Sears sought to prevent disclosure of affirmative action plans to priest); General Dynamics Corp. v. Dunlop, 427 F. Supp. 578, 579 (E.D. Mo. 1976), *vacated sub nom.* General Dynamics Corp. v. Marshall, 572 F.2d 1211 (8th Cir. 1978) (General Dynamics sought permanent injunction against disclosure of affirmative action plans relating to government contract); Metropolitan Life Ins. Co. v. Usery, 426 F. Supp. 150, 159 (D.D.C. 1976) (insurance company challenged release of affirmative action plans).

40. "Because the Act focuses on disclosure, it is silent on the rights of persons other than requesters of information to enforce its provisions." *See* Campbell, *supra* note 24, at 107.

41. The *Chrysler* suit provides an excellent illustration of the numerous theories for such actions. When the suit was initially brought, the challenges were raised under the FOIA, the Trade Secrets Act, 18 U.S.C. § 1905 (1976); the Administrative Procedure Act, 5 U.S.C. § 702 (1976); the

ters have relied on three main theories: first, that disclosure was barred by the FOIA itself;[42] second, that disclosure was inconsistent with section 1905 of the Trade Secrets Act;[43] and third, that disclosure was an abuse of agency discretion in violation of the provisions of the APA.[44] Each of these theories had encountered mixed success within the federal courts prior to the *Chrysler* decision.

A. Implying A Cause of Action Under the FOIA

Parties seeking to bar disclosure have frequently contended that such causes of action were implied in the FOIA itself.[45] Under this theory, the submitter would assert that the exemptions contained within the FOIA were mandatory, not permissive. Therefore, if an agency were to release information falling within one of the exemptions, it would constitute a violation of the FOIA.[46] The right to prevent such violations was thought to be implied in that statute.[47]

In addition, a crucial aspect of this theory was that the submitters would be entitled to a trial de novo.[48] A de novo review would be highly

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Civil Rights Act, 42 U.S.C. § 2000(e)-8(e) (1976) and the Federal Reports Act of 1942, 44 U.S.C. § 3508 (1976). *See* Chrysler Corp. v. Brown, 441 U.S. 281, 288 (1979).

42. 5 U.S.C. § 552 (1976).

43. Section 1905 provides:

> Whoever, being an officer or employee of the United States or of any department or agency thereof, publishes, divulges, discloses, or makes known in any manner or to any extent *not authorized by law* any information coming to him in the course of his employment or official duties or by reason of any examination or investigation made by, or return, report or record made to or filed with, such department or agency or officer or employee thereof, which information concerns or relates to the trade secrets, processes, operations, style of work, or apparatus, or to the identity, confidential statistical data, amount or source of any income, profits, losses, or expenditures of any person, firm, partnership, corporation, or association; or permits any income return or copy thereof or any book containing any abstract or particulars thereof to be seen or examined by any person except as provided by law; shall be fined not more than $1000, or imprisoned not more than one year, or both; and shall be removed from office or employment.

18 U.S.C. § 1905 (1976) (emphasis added).

44. 5 U.S.C. § 702 (1976).

45. *See* Union Oil Co. of Cal. v. Federal Power Comm'n, 542 F.2d 1036, 1045 (9th Cir. 1976); Westinghouse Elec. Corp. v. Schlesinger, 392 F. Supp. 1246, 1250 (E.D. Va. 1974), *aff'd*, 542 F.2d 1190 (4th Cir. 1976), *cert. denied sub nom.* Brown v. Westinghouse Elec. Corp., 431 U.S. 924 (1977). *But see* General Dynamics Corp. v. Marshall, 572 F.2d 1211 (8th Cir. 1978), *vacated*, 441 U.S. 919 (1979).

46. *See* Note, Chrysler Corporation v. Brown: *Seeking A Formula For Responsible Disclosure Under The FOIA*, 29 CATH. UNIV. L. REV. 159, 167 (1979). *See also A New Direction*, *supra* note 8, at 188.

47. *Compare* Westinghouse Elec. Corp. v. Schlesinger, 542 F.2d 1190 (4th Cir. 1976), *cert. denied sub nom.* Brown v. Westinghouse Elec. Corp., 431 U.S. 924 (1977) (the FOIA itself conferred an implied right to invoke equity jurisdiction to enjoin disclosure) *with* Sears, Roebuck & Co. v. Eckerd, 575 F.2d 1197 (7th Cir. 1978), *vacated*, 441 U.S. 919 (1979) (no private cause of action can be implied under either the FOIA or the Trade Secrets Act). *See also* Note, *supra* note 46, at 169.

48. Westinghouse Elec. Corp. v. Schlesinger, 542 F.2d 1190, 1215 (4th Cir. 1976), wherein the court stated: "The supplier [of information]. . . is entitled to a fair and adequate hearing, on

advantageous to those seeking to block disclosure, since the reviewing court would not be limited to the agency record.[49] If, after conducting its own factfinding analysis, the court determined that the agency had erred, it could substitute its judgment for that of the agency.

The attempt to imply a cause of action under the FOIA received varied treatment within the circuits. The theory was first accepted by the United States Court of Appeals for the Fourth Circuit in *Westinghouse Electric Corp. v. Schlesinger.*[50] In an effort to enjoin agency disclosure of its affirmative action compliance reports, Westinghouse argued that the FOIA itself implied the right to invoke equity jurisdiction to protect information falling within the FOIA exemption.[51] The court agreed, theorizing that a statute granting a private party protection from disclosure, though phrased in terms of an exemption, carried with it an implied right to invoke a court's equity jurisdiction to assure that protection.[52] Hence, the Fourth Circuit held that the FOIA exemptions constituted mandatory bars to disclosure.[53]

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proper evidence, in the courts, a hearing that is no less broad and adequate than that given the merely curious who may seek disclosure."

49. If a de novo review were allowed, subsequent judicial scrutiny would reach beyond the existing agency record and invite submission of only relevant information not found in the record. This could obviously benefit those seeking to block disclosure, since they would, in effect, have another chance to present their case. Since their initial attempts were thwarted, it is highly unlikely that the original agency record would support their views. Thus, contesters would have an opportunity to remake the record. For a more extensive treatment of the de novo issue, *see* notes 75-81 and accompanying text *infra.*

50. 542 F.2d 1190 (4th Cir. 1976), *cert. denied sub nom.* Brown v. Westinghouse Elec. Corp., 431 U.S. 924 (1977).

51. *Id.* at 1210.

52. *Id.* The court took a broad view of its equity power under the FOIA, relying upon the Supreme Court decision in Renegotiation Bd. v. Bannercraft Clothing Co., 415 U.S.1 (1974). *Id.* In *Bannercraft,* the plaintiff, in the process of renegotiating his contract with the government, sought to enjoin further proceedings pending his receipt of information requested under the FOIA. The Supreme Court refused to allow the assertion of jurisdiction for such an injunctive suit, but declared, in dicta:

> The broad language of the FOIA, with its obvious emphasis on disclosure and with its exemptions carefully delineated as exceptions; the truism that Congress knows how to deprive a court of broad equitable power when it chooses so to do . . . and the fact that the Act, to a definite degree, makes the district courts the enforcement arm of the statute, . . . persuade us that the . . . principle of a statutorily prescribed special and exclusive remedy is not applicable to FOIA cases. . . . [T]here is little to suggest, despite the Act's primary purpose, that Congress sought to limit the inherent powers of an equity court.

Id. at 19-20 (citations omitted). A subsequent interpretation of *Bannercraft,* however, stated that the broad equity power discussed by the Supreme Court was intended only to carry out the purposes of disclosure. Seafarers Int'l Union v. Baldovin, 508 F.2d 125, 128 (5th Cir. 1975).

53. In addition, the court discussed the relationships between a statute prohibiting disclosure of specified information such as section 1905 of the Trade Secrets Act and the FOIA exemptions. The court noted that Congress had acted to protect the confidentiality of private information by including exemption four to avoid such competitive harm that could undermine basic free enterprise principles. 542 F.2d at 1210-12.

The Seventh Circuit's decision in *Sears, Roebuck and Co. v. Eckerd*[54] conflicted with that of the Fourth Circuit. Sears had sought to prevent disclosure of allegedly confidential statistical information which it had provided to the government in its equal employment opportunity and affirmative action reports.[55] Sears argued that the third FOIA exemption, as well as section 1905 of the Trade Secrets Act, prohibited the release of such data.[56] The Seventh Circuit rejected these arguments[57] on three bases. First, the court pointed out that affected persons could obtain review under the APA.[58] Second, through the use of legislative history, the court limited section 1905's scope to "unwarranted and uncontrollable action by 'poorly paid revenue agents.' "[59] Finally, the court reasoned that the requirement of independent statutory authorizations in all cases was unreasonable "because of the tedious and difficult job that such a requirement would force Congress to undertake."[60] Accordingly, the court vacated the preliminary injunction and remanded the case to the district court with directions to dismiss the complaint.[61]

In *General Dynamics Corp. v. Marshall,*[62] under factual circumstances virtually identical to those in *Sears,* the Eighth Circuit also

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54. 575 F.2d 1197 (7th Cir. 1978), *vacated,* 441 U.S. 919 (1979).

55. 575 F.2d at 1198.

56. *Id.* at 1199. In *Sears,* the government contended that disclosure was clearly authorized by 5 U.S.C. § 301 (1976), a "housekeeping" type statute that allows agencies to formulate their own rules concerning the disposition of agency records. The government argued that this statute provided proper "authorization of law" needed to neutralize section 1905. *Id.* at 1200. Sears countered by arguing that section 301 could not provide the proper authorization, for to do so would give government officials unlimited freedom to redefine their own illegal conduct under section 1905. *Id.* at 1202. Instead, Sears argued that an independent statutory authorization was needed. *Id.*

57. In refusing to imply a private right of action, the Seventh Circuit relied on the test established in Cort v. Ash, 422 U.S. 66 (1975), to determine whether private causes of action could be implied under the two statutes. The test consists of four inquiries:

> First, is the plaintiff "one of the class for whose *especial* benefit the statute was enacted?" ... Second, is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one? Third, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff? [Fourth] is the cause of action one traditionally relegated to state law, . . . so that it would be inappropriate to infer a cause of action based solely on federal law?

Id. at 78 (citations omitted). After close scrutiny of the tests in light of the facts, the court held that neither of the statutory provisions provided an implied basis of relief. 575 F.2d at 1202-03.

58. 575 F.2d at 1201. *Accord,* Chrysler Corp. v. Schlesinger, 565 F.2d 1172, 1190-91 (3d Cir. 1977), *vacated and remanded sub nom.* Chrysler Corp. v. Brown, 441 U.S. 281 (1979).

59. 575 F.2d at 1201, *quoting* 26 Cong. Rec. 6893 (1894) (remarks of Sen. Aldrich).

60. 575 F.2d at 1202. The Seventh Circuit noted that section 1905, if read literally, could probably encompass virtually every category of business information contained in the federal agencies. If the scope of the statute was read in this manner, and if an independent statutory authorization was needed, then the basic policy of full disclosure would have been severely curtailed. The court was unwilling to go so far. *Id.*

61. *Id.* at 1204.

62. 572 F.2d 1211 (8th Cir. 1978), *vacated,* 441 U.S. 919 (1979).

rejected the implied cause of action theory for a submitter.[63] The court held the exemptions to be permissive rather than mandatory and flatly rejected the theory of a reverse FOIA action.[64] Rejecting General Dynamics' section 1905 argument for injunctive relief,[65] the court alternatively held that there was a right to seek judicial review of the agency decision under the APA.[66]

In sum, prior to the *Chrysler* decision, the majority of courts refused to accept the theory that a cause of action was implied in the FOIA to bar agency disclosure.[67] The feeling was that when information falls within an exemption, that information is simply outside the full disclosure mandate of the FOIA. The permissive nature of the exemptions allowed government agencies to then decide whether disclosure was in the public interest.[68] Hence, despite repeated recognition of past agency abuses under section 3 of the APA, and despite repeated emphasis on the fullest possible disclosure, agencies were still left with a degree of discretion as to the propriety of releasing certain records.

B. Implied Actions Under the APA

In addition to implying a cause of action under the FOIA itself, the submitter also argued that an agency decision to disclose was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. . . ."[69] The submitter, as a person "aggrieved by agency action," was then entitled to judicial review according to the provisions of the APA.[70] During the review, an agency's decision to disclose could be challenged even if the FOIA's exemptions were considered per-

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63. General Dynamics has argued the existence of implied causes of action under both the third and fourth exemptions, as well as under section 1905. *Id.* at 1213-17.

64. *Id.* at 1215.

65. The Eighth Circuit's conclusion, however, was based on the fact that the subject regulations provided the necessary authorization by law needed for disclosure as required by section 1905. *Id.* at 1217.

66. *Id.*

67. *See* Sears, Roebuck & Co. v. Eckerd, 575 F.2d 1197, 1203 (7th Cir. 1978), *vacated,* 441 U.S. 919 (1979); General Dynamics Corp. v. Marshall, 575 F.2d 1211, 1216 (8th Cir. 1978), *vacated on other grounds and remanded,* 441 U.S. 919 (1979); Chrysler Corp. v. Schlesinger, 565 F.2d 1172, 1185 (3d Cir. 1977), *vacated on other grounds and remanded sub nom.* Chrysler Corp. v. Brown, 441 U.S. 281 (1979); Charles River Park "A," Inc. v. HUD, 519 F.2d 935, 941 (D.C. Cir. 1975); St. Mary's Hosp., Inc. v. Califano, 462 F. Supp. 315, 317 (S.D. Fla. 1978).

68. *See, e.g.,* H. R. REP. NO. 94-880, 94th Cong., 2d Sess., Part I, 23, *reprinted in* [1976] U.S. CODE CONG. & AD. NEWS 2183 ("[I]f material is within the trade secrets exemption of the Freedom of Information Act . . . [it may] therefore [be] subject to disclosure if the agency determines that disclosure is in the public interest. . . ."). *See also* notes 33-35 and accompanying text *supra.*

69. 5 U.S.C. § 706(2)(A) (1976). *See* Citizens To Preserve Overton Park v. Volpe, 401 U.S. 402, 413 (1971). *See also* Campbell, *supra* note 24, at 135.

70. 401 U.S. at 413. The Court in *Volpe* noted that a person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review. *Id.*

missive,[71] and the reviewing court was authorized to set aside such action when proper.[72]

The critical determination to be made under this second theory is what the proper scope of review should be. Courts had difficulty with this determination since it was not clear if the de novo review required by the FOIA[73] could also be applied to reverse FOIA actions. When one considers that without de novo review scrutiny of the agency decision is limited to the agency record itself,[74] the importance of the determination to the submitters becomes obvious.[75] Although the APA provides for de novo review in two circumstances, neither have been held ap-

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71. *See* General Dynamics Corp. v. Marshall, 572 F.2d 1211, 1217-18 (8th Cir. 1978), *vacated and remanded,* 441 U.S. 919 (1979); Chrysler Corp. v. Schlesinger, 565 F.2d 1172, 1190-92 (3d Cir. 1977), *vacated on other grounds and remanded sub nom.* Chrysler Corp. v. Brown, 441 U.S. 281 (1979).

72. *See* 5 U.S.C. § 706(2) (1976).

73. 5 U.S.C. § 552(a)(4)(B) (1976). The statute provides that in cases "to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld," the court "shall determine the matter de novo. . . ." *Id.*

74. *See* Camp v. Pitts, 411 U.S. 138 (1973) wherein the court stated:

> [T]he focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court. . . .
> [If the record was incomplete,] the remedy was not to hold a de novo hearing but, [rather] . . . to obtain from the agency, either through affidavits or testimony, such additional explanation of the reasons for the agency decision as may prove necessary.

Id. at 142-43.

It is important to note, however, that extensive inquiries should be avoided in order to maintain the integrity of the administrative process. *See* United States v. Morgan, 313 U.S. 409, 422 (1941); National Nutritional Foods Ass'n v. FDA, 491 F.2d 1141, 1145 (2d Cir. 1974), *cert. denied,* 419 U.S. 874 (1974).

75. In Citizens To Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402 (1971), the Supreme Court addressed the issue as to the proper scope of review to be followed when reviewing an agency decision. The Court stated that de novo review of whether the Secretary decision was proper was authorized by § 706(2)(F) in only two circumstances:

> First, such *de novo* review is authorized when the action is adjudicatory in nature and the agency factfinding procedures are inadequate. And, [second], there may be independent judicial factfinding when issues that were not before the agency are raised in a proceeding to enforce nonadjudicatory agency action.

Id. at 415 (citation omitted).

The Court went on to state that "the Secretary's decision [was] entitled to a presumption of regularity. But that presumption [was] not to shield his action from a thorough, probing, in-depth review." *Id.* (citations omitted). The Court then outlined the proper review in non de novo cases:

> The court is first required to decide whether the Secretary acted within the scope of his authority. This determination naturally begins with a delineation of the scope of the Secretary's authority and discretion. Also involved in this initial inquiry is a determination of whether on the facts the Secretary's decision can reasonably be said to be within that range.

Id. at 415-16 (citations omitted). If it is found that the Secretary acted within the scope of his statutory authority, the second part of the inquiry was whether "the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment. Although this inquiry into the facts is to be searching and careful, the ultimate standard of review is a narrow one. The court is not empowered to substitute its judgment for that of the agency." *Id.* at 416 (citations omitted). Finally, the court must look to see whether the Secretary's action followed the necessary procedural requirements. *Id.* at 417.

plicable to reverse FOIA actions.[76] Rather, the proper procedure under section 706(2)(A) of the APA is for the district court to determine on the basis of the agency's record whether an abuse of discretion has occurred. If the record is inadequate, APA review is limited to an agency remand, not the preparation of a new record in the district court.[77] While this perceived drawback has made the APA approach unattractive,[78] submitters have sought APA review by the courts.[79]

The key decision supporting a de novo review for reverse FOIA decisions was *Charles River Park "A," Inc. v. HUD.*[80] The decision, which led to much confusion, began its analysis of the agency holding by stating that a de novo evidentiary hearing would be inappropriate[81] in light of *Camp v. Pitts.*[82] The court proceeded, however, to avoid the narrow standard of review by reasoning that if the materials did not fall within a FOIA exemption, they would be subject to mandatory disclosure and thus the submitters would have no right to challenge their release.[83] The appellate court instructed the district court to "hold a hearing to determine whether the information here involved would have been exempt just as it would if a suit had been brought under the FOIA to compel disclosure."[84] In effect, the district court was to hold a de novo hearing instead of limiting itself to the agency record. The "abuse of discretion" standard was inapplicable, the court continued, because "the district court is not reviewing agency action; it is making a threshold determination whether the plaintiff has any cause of action at all."[85] This decision has been widely criticized,[86] since even this threshold determination amounted to a review of agency discretion.

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76. *See* note 75 *supra.*

77. *See* note 74 *supra.*

78. *See* Note, *"Reversing" The Freedom of Information Act: Congressional Intention or Judicial Invention?,* 51 ST. JOHNS L. REV. 734, 737 (1977).

79. *See, e.g.,* General Dynamics Corp. v. Marshall, 572 F.2d 1211, 1217-18 (8th Cir. 1978); Charles River Park "A," Inc. v. HUD, 519 F.2d 935, 940 n.4, 941 (D.C. Cir. 1975); GTE Sylvania, Inc. v. Consumer Prod. Safety Comm'n, 404 F. Supp. 1152 (D. Del. 1977).

80. 519 F.2d 935 (D.C. Cir. 1975). In *Charles,* operators of multifamily housing projects whose mortgages were insured by the Federal Housing Administration sought to enjoin HUD from disclosing financial reports revealing the projects' gross income to Boston's Commissioner of Assessing. *Id.* at 938-39.

81. *Id.* at 940-41 n.4.

82. 411 U.S. 138 (1973). *See* note 74 *supra.*

83. 519 F.2d at 940-41 n.4.

84. *Id.*

85. *Id.* In *Charles,* the court pointed out that if the exemption applied and if the information also fell within section 1905, then it would be an abuse of discretion under the APA or HUD to release the information. *Id.* at 940-41. The court noted that the analysis was a balancing process between the public's interest in accurate tax assessments and the housing project owner's interest in keeping their income private. *Id.* at 943. If the public interest in this case supported disclosure, the fact that it was submitted in confidence would still not bar the release. *Id.*

86. *See* Campbell, *supra* note 24, at 140; Clement, *supra* note 7, at 631 n.206; *A New Direction, supra* note 8, at 191.

Nevertheless, the decision has been followed by a number of courts.[87]

The *Charles* decision conflicted with the Third Circuit Court of Appeals holding in *Chrysler Corp. v. Schlesinger.*[88] The district court of Delaware in *Schlesinger* had determined after a trial de novo that the material in question should not be disclosed.[89] The Third Circuit reversed and held that the trial de novo conducted by the district court was inappropriate.[90] The court stated that if the agency's record "does not establish, or insufficiently explains, the basis for the agency's decision, so as not to permit the reviewing court effectively to perform the [proper] analysis, the remedy is not a trial de novo, but a remand to the agency for an additional record or explanation for its decision."[91]

This compendium of cases indicates that efforts to challenge proposed disclosures by using the APA "abuse of discretion" standard were widely accepted.[92] Failure to gain de novo review for such challenges, however, substantially diminished the value of this second procedure. It did not seem likely that an agency would easily reverse itself. Therefore, most businesses or corporations preferred to adopt the third method of challenge.

C. Implied Actions Under the Trade Secrets Act

In addition to the implied causes of action under both the FOIA and the APA, submitters often resorted to a third theory to block disclosure. They argued that even if the FOIA exemptions were considered

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87. Westinghouse Elec. Corp. v. Schlesinger, 392 F. Supp. 1246, 1250 (E.D. Va. 1974), *aff'd,* 542 F.2d 1190 (4th Cir. 1976), *cert. denied sub nom.* Brown v. Westinghouse Elec. Corp., 431 U.S. 924 (1977); Sondregger v. United States Dep't of Interior, 424 F. Supp. 847, 848 (D. Idaho 1976).

88. 565 F.2d 1172 (3d Cir. 1977), *vacated on other grounds and remanded,* 441 U.S. 281 (1979). *Accord,* General Dynamics Corp. v. Marshall, 572 F.2d 1211 (8th Cir. 1978), *vacated on other grounds and remanded,* 441 U.S. 919 (1979). In *General Dynamics,* the Eighth Circuit conducted an APA review to determine from the administrative record whether the agency decision to disclose was an abuse of discretion. The court held that General Dynamics was not entitled to a de novo review under the APA. 572 F.2d at 1214.

89. 412 F. Supp. 171, 175-78 (D. Del. 1976), *vacated,* 565 F.2d 1172 (3d Cir. 1977).

90. 565 F.2d at 1190-93.

91. *Id.* at 1192. As part of its analysis, the court provided what it perceived the proper analysis in reverse FOIA cases to be. Analysis would begin with an inquiry of whether any nondisclosure statute or nondisclosure regulation is applicable. If so, "the court must conclude that the agency has acted outside the scope of its statutory authority and should enjoin disclosure." *Id.* If, however, the agency had determined that the material is exempt but that disclosure is both desirable and permissible, "the court must undertake a two step analysis." *Id.* It must first determine "whether the agency applied the proper legal standards for the applicability of the FOIA exemptions. . . ." If it did, the court must then determine whether the agency "considered the proper factors in determining that disclosure was permitted under its own disclosure regulations." *Id.* It appears from the analysis that the district court was not prepared to substitute its judgment for that of the agency. Its task seems limited to the ascertainment of whether the agency had applied the proper legal standards and factors.

92. *See* notes 69-90 and accompanying text *supra.*

permissive by the courts, disclosure might still be prohibited pursuant to other nondisclosure statutes.[93] That is, though agencies were possessed with a great deal of discretion, that power did not extend so far as to disregard previously enacted nondisclosure statutes.[94] In particular, submitters resorted to section 1905 of the Trade Secrets Act[95] to block disclosure.[96] Section 1905 makes it illegal for a government employee to disclose "to any extent not authorized by law any information coming to him in the course of his employment ... which ... concerns or relates to the trade secrets ... or to the ... amount of any income, profits, losses, or expenditures of any person."[97] Procedural problems, along with questions regarding the section's applicability, made the relationship between section 1905 and the FOIA a controversial subject.

Prior to the *Chrysler* decision, a section 1905 argument was usually approached in three ways.[98] First, it was argued that section 1905 prohibited disclosure of all information within its coverage.[99] In order to bar disclosure, an implied right of action was said to exist. Some early district court decisions gave support to this theory.[100] Second, it was argued that information included within the scope of section 1905 was exempt from mandatory disclosure because section 1905 was a nondisclosure statute falling within the third exemption of the FOIA.[101] Therefore, by the very terms of the FOIA itself, disclosure was prohibited. Third, that information within section 1905 could not be disclosed since it fell within the FOIA's fourth exemption.[102] Under this third avenue, if section 1905 was violated, it would constitute an abuse of discretion under the provisions of the APA since it was a disclosure "not in accordance with law."[103]

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93. *See* Trade Secrets Act, 18 U.S.C. § 1905 (1976); Civil Rights Act of 1964, Title VII, 42 U.S.C. § 2000(e)-8(e) (1976); Federal Reports Act, 44 U.S.C. § 3508 (1976).

94. *See* Clement, *supra* note 7, at 602.

95. 18 U.S.C. § 1905 (1976). For the full text of section 1905, *see* note 45 *supra*.

96. *See, e.g.*, Charles River Park "A," Inc. v. HUD, 360 F. Supp. 212 (D.D.C. 1973), *rev'd and remanded* 519 F.2d 935 (D.C. Cir. 1975), *vacated*, 441 U.S. 919 (1979); National Parks and Conservation Association v. Kleppe, 547 F.2d 673 (D.C. Cir. 1976); General Dynamics Corp. v. Marshall, 572 F.2d 1211 (8th Cir. 1978), *vacated and remanded*, 441 U.S. 919 (1979). For a more extensive list, *see* Clement, *supra* note 7, at 589 n.7.

97. 18 U.S.C. § 1905 (1976). For the full text of section 1905, *see* note 43 *supra*.

98. *See generally* Clement, *supra* note 7, at 602-07; *A New Direction, supra* note 8, at 192-99; Campbell, *supra* note 24, at 143-55.

99. *See* note 97 and accompanying text *supra*.

100. *See, e.g.*, Charles River Park "A," Inc. v. HUD, 360 F. Supp. 212, 213 (D.D.C. 1973), *rev'd and remanded*, 519 F.2d 935 (D.C. Cir. 1975), *vacated*, 441 U.S. 919 (1979); Burroughs Corp. v. Schlesinger, 403 F. Supp. 633, 636 (E.D. Va. 1975).

101. *See A New Direction, supra* note 8, at 193. For a discussion of the third exemption, *see* note 38 *supra*.

102. *See* Westinghouse Elec. Corp. v. Schlesinger, 542 F.2d 1190, 1204-08 (4th Cir. 1976), *cert. denied*, 431 U.S. 924 (1977); Charles River Park "A," Inc. v. HUD, 519 F.2d 935, 941-42 (D.C. Cir. 1975); Clement, *supra* note 7, at 605-06.

103. Charles River Park "A," Inc. v. HUD, 519 F.2d 935, 942 (D.C. Cir. 1975). For a

With respect to the first argument, submitters encountered little success in the courts.[104] Section 1905 is a criminal statute, and courts have consistently construed it narrowly.[105] When courts applied the "Cort test"[106] to determine whether an implied right of action was intended, the contention was rejected. The major stumbling block was the dearth of any legislative intent to imply a right of action.[107]

In contrast with the first argument, the second argument appeared to rest on solid ground following the Supreme Court's decision in *FAA v. Robertson.*[108] In *Robertson,* the Court rejected the notion that Congress meant to repeal by implication those pre-existing nondisclosure statutes that left the issue of disclosure within the realm of agency discretion.[109] In effect, the Court was broadly construing the third exemption to include all pre-existing nondisclosure statutes.[110] Success under the second argument was short lived. In response to *Robertson,* Congress amended exemption 3 in order to expressly overrule the Supreme Court.[111] The broad construction of the third exemption was eliminated in favor of a narrower reading.[112] Eliminated were those nondisclosure statutes existing prior to the FOIA which were considered so broad as to be incompatible with the FOIA's disclosure policy.[113] Though section 1905's inapplicability to the third exemption has never been explicitly stated, the tenor of this 1976 amendment suggests that section 1905 is not to be considered an exemption 3 statute.[114]

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discussion of the "abuse of discretion" standard, *see* notes 69-91 and accompanying text *supra.*

104. *See* Sears, Roebuck & Co. v. Eckerd, 575 F.2d 1197, 1202-03 (7th Cir. 1978), *vacated and remanded sub nom.* Sears, Roebuck & Co. v. Dahm, 441 U.S. 918 (1979); Chrysler Corp. v. Schlesinger, 565 F.2d 1172, 1188 (3d Cir. 1977), *vacated and remanded sub nom.* Chrysler Corp. v. Brown, 441 U.S. 281 (1979); Charles River Park "A," Inc. v. HUD, 519 F.2d 935, 941 n.6 (D.C. Cir. 1975).

105. *See, e.g.,* Charles River Park "A," Inc. v. HUD, 519 F.2d 935, 943 (D.C. Cir. 1975), wherein the court stated: "[T]he Court must bear in mind that section 1905 is a criminal statute and should be narrowly construed."

106. *See* note 57 *supra* for a discussion of the "Cort test."

107. *See* Note, *supra* note 46, at 171.

108. 422 U.S. 255 (1975).

109. *Id.* at 269.

110. For a general discussion of the *Robertson* case, *see* note 38 *supra.*

111. *See* HOUSE CONFERENCE REPORT NO. 94-1441, 94th Cong., 2d Sess. 25, *reprinted in* [1976] U.S. CODE CONG. & AD. NEWS 2244, 2260. *See also* note 38 *supra* for a discussion of *Robertson* and the amendment overruling it.

112. *See* Note, *supra* note 46, at 171.

113. *Id. See also* Campbell, *supra* note 24, at 146-49.

114. *See* note 38 *supra* for the text of the 1976 amendment to the FOIA. *See also* Charles River Park "A," Inc. v. HUD, 519 F.2d 935, 941 n.7 (D.C. Cir. 1975) ("Prior decisions of this court and other courts have made it clear that the FOIA's third exemption ... does not incorporate section 1905 into the FOIA in such a manner as to make section 1905 broader than the fourth exemption."); Metropolitan Life Insurance Company v. Usery, 426 F. Supp. 150, 158 n.15 (D.D. C. 1976), *cert. denied before judgment denied,* 431 U.S. 924 (1977) (In regards to section 1905's applicability: "To a large extent this issue will be of historical interest only. Congress has recently amended the (b)(3) exemption ... to limit its scope. The Committee reports indicate that

The third approach under the Trade Secrets Act has proven more viable than the first two, although it has been the most confusing. The argument starts from the premise that the FOIA is inapplicable to exempt information.[115] Section 1905, a nondisclosure statute, then works to prohibit the release of information unless disclosure was properly authorized by another source.[116] Under the third argument courts were asked to make a dual determination: first, did the information fall within the substantive scope of both the fourth exemption; and section 1905? If it did, then the second determination was whether disclosure would nevertheless be "authorized by law" within the meaning of section 1905.[117] If "authorized by law" the information may still be disclosed.

Despite the simplicity of the test, the dual determination proved troublesome. To start, the scope of the fourth exemption, as well as that of section 1905, was difficult to determine since vagueness allowed for coverage of a vast range of allegedly confidential information. In *National Parks and Conservation Association v. Morton,*[118] the District of Columbia Court of Appeals formulated a two part test to assess confidentiality:

> [C]ommercial or financial matter is "confidential" for purposes of [exemption 4] if disclosure of the information is likely to have either of the following effects: (1) to impair the Government's ability to obtain necessary information in the future; or (2) to cause substantial harm to the competitive position of the person from whom the information was obtained.[119]

The *National Parks* test has provided courts with a working definition as to what information is considered confidential, but the final deter-

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one of the purposes of this amendment is to assure that section 1905 is not considered to be within the ambit of exemption (b)(3)").

115. In other words, the full disclosure mandate of the FOIA specifically makes available to the public those records not covered by one of the nine exemptions. However, records that fall within one of the exemptions are not subject to the absolute disclosure rule. Hence, the FOIA was thought to be inapplicable to these records. *See generally* H.R. REP. NO. 880, 94th Cong., 2d Sess. Part I, 23, *reprinted in* [1976] U.S. CODE CONG. & AD. NEWS 2183, 2205. *See also* Charles River Park "A," Inc. v. HUD, 519 F.2d 935, 941 n.7 (D.C. Cir. 1975).

116. *See* H.R. REP. NO. 880, 94th Cong., 2d Sess. Part I, 23, *reprinted in* [1976] U.S. CODE CONG. & AD. NEWS 2183, 2205, wherein it is stated:

> [I]f material did not come within the broad trade secrets exemption [exemption 4] contained in the Freedom of Information Act, section 1905 would not justify withholding; on the other hand, if material is within the trade secrets exemption of the [FOIA] and therefore subject to disclosure if the agency determines that disclosure is in the public interest, section 1905 must be considered to ascertain whether the agency is forbidden from disclosing the information.

Id. at 2205. *See also* Charles River Park "A," Inc. v. HUD, 519 F.2d 935, 941 n.7 (D.C. Cir. 1975).

117. *See* Note, *supra* note 46, at 172.

118. 498 F.2d 765 (D.C. Cir. 1974).

119. *Id.* at 770.

mination had to be made according to the facts of the particular case.[120]

Equally troublesome has been the determination of what constitutes the proper "authorization of law" needed to disclose section 1905 material. It is agreed that the FOIA itself supplies the requisite authorization if the exemptions are inapplicable.[121] The problems arise when the subject information falls within a FOIA exemption. Prior to *Chrysler,* courts faced with this problem relied on agency regulations to authorize disclosure. One commonly used regulation was 5 U.S.C. § 301,[122] the federal "housekeeping statute." Section 301 empowered an agency to prescribe regulations for "the distribution and performance of its business, and the custody, use, and preservation of its records, papers, and property."[123] The majority of the circuits supported the view that agency regulations promulgated under section 301 were sufficient to provide the proper "authorization of law" needed for disclosure.[124]

In essence, by implying a cause of action under section 1905, submitters seeking to block disclosure sought to alter the permissive mandatory nature of the exemptions. By forcing agencies to consider the ambit of section 1905, an agency decision to disclose information falling within an exemption (usually exemption 4) became more difficult. This was a potent argument, for if section 1905 was violated it would be an abuse of agency discretion under the provision of the APA. However, defining what constituted "confidential information" and "authorization of law" was a difficult proposition, thus providing little help to either party in stating their position. Furthermore, once attention was focused on the legislative history of section 1905 the statute's applicability in this context became suspect.

In summary, the situation prior to *Chrysler* could easily be characterized as one of confusion and disarray. There was little consensus on the proper basis or validity of the reverse FOIA suit; yet there

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120. In National Parks and Conservation Ass'n v. Kleppe, 547 F.2d 673 (D.C. Cir. 1976), the appeals court affirmed the lower court test and also stated: "Conclusory and generalized allegations are ... unacceptable as a means of sustaining the burden of nondisclosure under the FOIA, since such allegations necessarily elude the beneficial scrutiny of adversary proceedings, prevent adequate appellate review and generally frustrate the fair assertion of rights under the Act." *Id.* at 680.

121. *See* notes 115-16 *supra. See also A New Direction, supra* note 8, at 194; Campbell, *supra* note 24, at 145.

122. 5 U.S.C. § 301 (1976). *See* Sears, Roebuck & Co. v. Eckerd, 575 F.2d 1197, 1200 (7th Cir. 1978); Chrysler Corp. v. Schlesinger, 412 F. Supp. 171, 176-77 (D. Del. 1976).

123. 5 U.S.C. § 301 (1976).

124. Sears, Roebuck & Co. v. Eckerd, 575 F.2d 1197, 1200-01 (7th Cir. 1978), *vacated and remanded sub nom.* Sears, Roebuck & Co. v. Dahm, 441 U.S. 918 (1979); General Dynamics Corp. v. Marshall, 572 F.2d 1211, 1217 n.6 (8th Cir. 1978), *vacated and remanded,* 441 U.S. 919 (1979); Chrysler Corp. v. Schlesinger, 565 F.2d 1172, 1186-87 (3d Cir. 1977), *vacated and remanded sub nom.* Chrysler Corp. v. Brown, 441 U.S. 281 (1979). *Cf.* Charles River Park "A," Inc. v. HUD, 519 F.2d 935, 942-43 (D.C. Cir. 1975), wherein the court stated: "Section 301 does not authorize regulations limiting the scope of section 1905."

seemed to be a general feeling that without such a suit, business confidentiality would not be protected. It was recognized that some type of compromise or balance had to be struck between the interests in assuring free access to government files and the interests in preserving the confidentiality of information submitted to the government.

III. *CHRYSLER CORP. V. BROWN:* CORRECTING THE BALANCE

The Supreme Court's decision in *Chrysler Corp. v. Brown*[125] served to eliminate the prior uncertainty surrounding the statutory basis of reverse FOIA suits. The Court held unanimously that the FOIA was a disclosure statute exclusively since it explicitly gives federal courts jurisdiction to enjoin an agency's withholding of records,[126] but does not provide a companion provision to bar disclosure. As a result, the Court rejected those theories which implied a private right of action under either the FOIA[127] or section 1905 of the Trade Secrets Act.[128] The *Chrysler* Court did recognize, however, that while neither the FOIA nor section 1905 provided an independent cause of action, review is available under the APA.[129] Under an APA review, the Court interpreted section 1905 as placing a substantive limit on agency action by prohibiting any disclosure that is not "in accordance with law" within the meaning of the APA.[130]

In *Chrysler,* a government contractor had sued to prevent disclosure of information supplied to the Defense Logistics Agency concerning Chrysler's employment of women and minorities.[131] The Supreme Court had granted certiorari after the Court of Appeals for the Third Circuit had determined that disclosure was proper.[132] In its argument, Chrysler based its prayer for an injunction on three theories: first, that disclosure was barred by the FOIA; second, that disclosure was inconsistent with section 1905 of the Trade Secrets Act; and third, that

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125. 441 U.S. 281 (1979).
126. 441 U.S. at 292. *See* 5 U.S.C. § 552(a)(4)(B) (1976). *See also* note 5 *supra.*
127. 441 U.S. at 294.
128. *Id.* at 316.
129. *Id.* at 317.
130. *Id.* at 318. *See* 5 U.S.C. § 706(2)(A) (1976). *See also* note 5 *supra.*
131. 441 U.S. at 285-88.
132. Chrysler Corp. v. Schlesinger, 565 F.2d 1172, 1186 (3d Cir. 1977). The Third Circuit had begun its analysis by pointing out that "the plain language of § 552(b) and the Congressional reports and debates suggest that no more was intended than a discretionary exception to the general mandatory duty of disclosure." *Id.* at 1185. Furthermore, the court presented a strong argument that:

> judicial reconstruction of the statute to imply from the exemptions either a mandatory duty of non-disclosure or a cause of action to prevent disclosure would be inconsistent with the basic purpose of the FOIA, which was not to afford confidentiality, but to overcome restrictive agency interpretations of the original public information section of the Administrative Procedure Act. . . . Recognizing an implied cause of action to prevent agency disclosure of exempt FOIA information would, we think, be inconsistent with that general philosophy, since it would place in the hands of interested submitters of in-

disclosure was an abuse of agency discretion since it conflicted with the Office of Federal Contract Compliance (OFCCP) rules.[133] In response, the Third Circuit refused to imply a cause of action under the FOIA,[134] and held that section 301, the agency "housekeeping" statute, provided the necessary "authorization of law" required by section 1905 to release Chrysler's records.[135] Moreover, the court held that review under the APA should be limited to the agency record, since a de novo review would be improper.[136]

On direct appeal, the Supreme Court began its analysis by reaffirming the goals and principles behind the FOIA.[137] It viewed the exemption portion of the Act as proof that "[t]here was sentiment that Government agencies should have the latitude, in certain circumstances, to afford the confidentiality desired by . . . submitters" of business information.[138] The Court stated, though, that the congressional concern

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formation, rather than those of presumably disinterested government officials, the authority to take steps which might impede the dissemination of information of public importance.

Id. at 1185-86. Thus, the Third Circuit held that "the FOIA's language, legislative history, and philosophy of full disclosure bar[red] a construction of the Act which [would mandate] agency withholding of exempt information or [which would recognize] an implied cause of action to prevent the disclosure of such information." *Id.* at 1186.

133. Chrysler Corp. v. Brown, 441 U.S. 281, 288 (1979).

134. Chrysler Corp. v. Schlesinger, 565 F.2d 1172, 1185-86 (3d Cir. 1977). *See also* note 132 *supra.*

135. Chrysler Corp. v. Schlesinger, 565 F.2d 1172, 1186 (3d Cir. 1977). The Third Circuit was strongly opposed to the use of section 1905 as a bar to disclosure. To do so would be "totally at odds with its [the FOIA's] central purpose — the elimination of governmental secrecy — as it would transmogrify [section] 1905 into a weapon for those parties who advocate government secrecy." *Id.* at 1187 (footnote omitted). Hence, the court held that section 301 was "a separate source of agency authority for the promulgation of disclosure regulations and that disclosures pursuant to such regulations are authorized by law and immune from the prohibitions of [section] 1905." *Id.*

136. "[T]o permit a federal court to conduct a trial *de novo* in reverse FOIA cases would transfer primary decisional responsibility for agency disclosures from the administrative agencies to the federal courts." *Id.* at 1191. The Third Circuit was unwilling to go that far.

137. The Court noted that it had "consistently recognized that the basic objective of the Act is disclosure." Chrysler Corp. v. Brown, 441 U.S. at 290. The confidentiality interests of submitters, though, were not to be forgotten. "The Act is an attempt to meet the demand for open government while preserving workable confidentiality in government decision making." *Id.* at 292 (footnote omitted). However, the submitter's interest in confidentiality was to be protected "only to the extent that this interest is endorsed by the agency collecting the information." *Id.* at 293. The *Chrysler* Court supported its belief that the FOIA was a disclosure statute by examining the Act's structure:

> The organization of the Act is straightforward. Subsection (a), 5 U.S.C. § 552(a), places a general obligation on the agency to make information available to the public and sets out specific modes of disclosure for certain classes of information. Subsection (b) . . ., which lists the exemptions, simply states that the specified material is not subject to the disclosure obligations set out in subsection (a). By its terms, subsection (b) demarcates the agency's obligation to disclose; it does not foreclose disclosure.
>
> That the FOIA is exclusively a disclosure statute is ... demonstrated most convincingly by examining its provision for judicial relief.

Id. at 291-92.

138. *Id.* at 292.

was with the agency's need for confidentiality.[139] Therefore, the submitters' privacy interest were to be protected "only to the extent that this interest [was] endorsed by the agency collecting the information."[140] The Supreme Court cited legislative history to reaffirm the rule that the exemptions were to be permissive, not mandatory.[141]

At the outset, the Court disposed of Chrysler's first two arguments. First, in accordance with numerous circuit court holdings,[142] the Supreme Court held that the FOIA itself afforded Chrysler no private right of action to enjoin agency disclosure.[143] Second, the Court rejected Chrysler's argument that such an action could be premised on section 1905 of the Trade Secrets Act.[144] Chrysler contended that section 1905 was applicable to the type of disclosure threatened; thus a private right of action should be available to obtain injunctive relief.[145] In rejecting Chrysler's position, the Court emphasized that it "has rarely implied a private right of action under a criminal statute, and where it has done so 'there was at least a statutory basis for inferring that a civil cause of action of some sort lay in favor of someone.' "[146] The Supreme Court did not find such an inference under section 1905.[147]

In addressing Chrysler's trade secrets argument, the Supreme Court

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139. *Id.* at 293.

140. *Id.* It was apparent, however, that the Court seemed ill at ease with the balance struck by Congress. "Enlarged access to governmental information undoubtedly cuts against the privacy concerns of nongovernmental entities, and as a matter of policy some balancing and accommodation may well be desirable." *Id.*

141. The Court held that the legislative history "support[ed] the interpretation that the exemptions were only meant to permit the agency to withhold certain information, and were not meant to mandate nondisclosure." *Id.* at 293-94. *See* 1966 HOUSE REPORT, *supra* note 3:

> [The FOIA] sets up workable standards for the categories of records which *may* be exempt from disclosure. . . .
>
> . . . There may be legitimate reasons for nondisclosure and [the FOIA] is designed to *permit* nondisclosure in such cases.
>
> [The FOIA] lists in a later subsection the specific categories of information which *may* be exempted from disclosure.

Id. at 2422-24. *See also* S. REP. No. 813, 89th Cong., 1st Sess. 10 (1965).

142. *See* cases cited in note 67 *supra.*

143. "Congress did not limit an agency's discretion to disclose information when it enacted the FOIA. It necessarily follows that the Act does not afford Chrysler any right to enjoin agency disclosure." Chrysler Corp. v. Brown, 441 U.S. at 294.

144. 18 U.S.C. § 1905 (1976).

145. 441 U.S. at 295.

146. *Id.* at 316, *quoting* Cort v. Ash, 422 U.S. 66, 79 (1975). The Court's review of the legislative history surrounding section 1905 suggested that there was no intent to create a private right of action. 441 U.S. at 317. The Court believed that such a finding was unnecessary, since review was available under the APA. *Id.*

147. In Sears, Roebuck & Co. v. Eckerd, 575 F.2d 1197 (7th Cir. 1978), *vacated and remanded sub nom.* Sears, Roebuck & Co. v. Dahm, 441 U.S. 919 (1979), the court addressed the issue of the applicability of section 1905 to formal agency action. Citing its own legislative research, the court stated:

> [T]he legislative history of at least one of the predecessors of Section 1905 reveals that those who expressed concern about disclosure (rather than just the investigatory powers involved in the predecessor legislation) seemed to focus their concern not on regulated of-

conducted an analysis of section 1905's legislative history.[148] The *Chrysler* Court held that "[section] 1905 [did] address formal agency action and that the appropriate inquiry [was] whether OFCCP's regulations provide[d] the 'authoriz[ation] by law' required by the statute."[149] This portion of the *Chrysler* decision is critical.[150] For the Court went on to outline the proper procedure to determine whether the agency's regulations allowing disclosure were properly promulgated in accordance with the Court's concept of authorization by law. After an exhaustive analysis of the two OFCCP regulations cited by the government as providing the requisite authorization of law, the Court held that the "regulations [were] not properly promulgated as substantive rules, and therefore not the product of procedures[151] which Congress prescribed as necessary prerequisites to giving a regulation the binding effect of law."[152]

After *Chrysler,* a court should approach a reverse FOIA action in the following manner. If the subject material does not fall within the fourth exemption of the FOIA, then section 1905 is irrelevant since disclosure here would be proper because it is authorized by the FOIA itself. However, if the material is found to be within one of the FOIA's exemptions, then the FOIA is inapplicable. Disclosure must then be examined vis-a-vis the Trade Secrets Act. Since the exemptions are per-

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ficial agency action but rather on unwarranted and uncontrollable action by "poorly paid revenue agents." Even if the legislative history were unclear, limiting the statute's focus to actions by agency employees seems more consistent with the statutory scheme because the enforcement mechanisms within the statute provides only penalties for guilty individuals and offers no restraint on agency action.

575 F.2d at 1201 (citations omitted). If one accepts the *Sears's* argument, the relationship between section 1905 and exemption 4 of the FOIA is not so confusing. Simply, the two statutes might apply to different situations. Section 1905, a mere consolidation of three narrowly drawn statutes enacted prior to the FOIA, would pertain to those situations involving individual government employees who, for whatever personal reasons, had taken it upon themselves to divulge confidential government files. Exemption 4, on the other hand, would be directed toward the actions of the agency as a whole, not an individual acting on his own. It should be emphasized that *Chrysler* held that section 1905 was applicable to agency action. Nevertheless, the logic of the argument is both intriguing and rational.

148. For an in-depth analysis of section 1905's legislative history, *see* Part V *infra.*

149. Chrysler Corp. v. Brown, 441 U.S. 281, 301 (1979). For a more detailed discussion regarding the determination of whether a particular agency regulation provides sufficient authority to release section 1905 material, *see* Part IV *infra.*

150. For a discussion of judicial interpretation of this aspect of *Chrysler, see* Part IV B *infra.*

151. Chrysler Corp. v. Brown, 441 U.S. at 315. The Court analyzed the regulation in terms of the APA requirements for "legislative" and "substantive" rulemaking. Under the APA, courts are required to ensure "that agencies comply with the 'outline of minimum essential rights and procedures' set out in the APA." *Id.* at 313. *See* H. R. REP. NO. 1980, 79th Cong., 2d Sess. 16 (1946); Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519, 549 n.21 (1978).

152. In effect, the *Chrysler* Court was reaffirming the notion that "[t]he legislative power of the United States is vested in the Congress, and the exercise of quasi-legislative authority by governmental departments and agencies must be rooted in a grant of such power by the Congress and subject to limitations which that body imposes." Chrysler Corp. v. Brown, 441 U.S. at 302.

missive, an agency might decide that the public interest would best be served by disclosing the information. It is this decision which is reviewable under the APA. Here is where section 1905 comes in. If it is found that the material was the type contemplated by section 1905, and if it is found that the agency statute authorizing disclosure does not meet the "nexus requirement,"[153] then disclosure would constitute an abuse of that agency's discretion under the APA. In essence, despite refusing to imply private rights of action under the FOIA and the Trade Secrets Act, the *Chrysler* Court has provided submitters with a viable means of countering disclosure through the use of section 1905 in conjuction with the APA. Though the form may have changed, the spirit and utiltiy of the reverse FOIA action is alive and well after *Chrysler Corp. v. Brown.*[154]

IV. THE "AUTHORIZATION OF LAW" REQUIREMENT AFTER *CHRYSLER*

From a practical standpoint, the most important aspect of *Chrysler Corp. v. Brown*[155] is that portion of the opinion dealing with the authorization requirement of section 1905. Prior to *Chrysler,* courts seemed willing to find such authorization within any validly promulgated agency regulation dealing with disclosure.[156] The *Chrysler* decision makes it clear that such regulations will no longer be accorded the deference they were given by some courts in the pre-*Chrysler* period.[157]

A. The Establishment of the Nexus Test

The *Chrysler* Court provided a three step analysis to determine whether a particular agency regulation could provide sufficient authority to release section 1905 material. For a regulation to have the "full force of law," it must be substantive in nature;[158] it must be the product of certain procedural requisites;[159] and most importantly, there must be

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153. For an analysis of the nexus requirement, *see* Part IV A *infra.*

154. 441 U.S. 281 (1979).

155. *Id.*

156. These courts reasoned that "requiring independent statutory authorization would impose a Herculean task upon Congress [since it] would have to review, consider, and enact specific statutes to cover all of the numerous kinds of business information contained in federal agency files." Westchester Gen. Hosp., Inc. v. HEW, 464 F. Supp. 236, 250 (M.D. Fla. 1979) (citation omitted); *accord,* Sears, Roebuck & Co. v. Eckerd, 575 F.2d 1197, 1202 (7th Cir. 1978), *vacated and remanded sub nom.* Sears, Roebuck & Co. v. Dahm, 441 U.S. 918 (1979).

157. The *Chrysler* decision eliminated the FOIA, section 301, and Executive Order 11246 as possible bases for the promulgation of disclosure regulations. *See A New Direction, supra* note 8, at 202.

158. 441 U.S. 281, 302.

159. *Id.* at 303. "[A]gency discretion is limited not only by substantive, statutory grants of power, but also by the procedural requirements which 'assure fairness and mature consideration

a nexus between the regulation and the requisite delegation of authority from Congress.[160] Since the Court vaguely defined a substantive rule as being one "affecting individual rights and obligations,"[161] it is apparent that what constitutes a substantive rule will have to be determined on a case by case basis. Although the Court neglected to provide an example of a substantive rule, a recent district court decision[162] interpreting *Chrysler* has held that an agency regulation[163] drafted pursuant to the Social Security Act,[164] which provided for disclosure of information prohibited by the Trade Secrets Act, was substantive in nature.[165] In contrast, the Supreme Court in *Chrysler* cited section 301, the "housekeeping" statute, as an example of a procedural rule. According to the Court, since the thrust of section 301 was limited to granting an agency the power to regulate its own daily affairs, the statute was procedural in nature.[166]

If a regulation is found to be substantive in nature, two additional determinations must be made. The regulation has to have been promulgated in conformity with procedural requirements imposed by Congress; and the authority to draft such regulations has to emanate from a clear congressional delegation of power.[167] Simply, there must be a

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of rules of general application.' " *Id., quoting* N.L.R.B. v. Wyman-Gordan Co., 394 U.S. 759, 764 (1969). The Court noted that the pertinent procedural limitations were to be found in the APA. 441 U.S. at 303.

160. *See* note 152 *supra.*

161. 441 U.S. at 302, *quoting* Morton v. Ruiz, 415 U.S. 199, 232 (1974). The definition was first articulated in Morton v. Ruiz, 415 U.S. 199, 236 (1974). "The central distinction among agency regulations found in the APA is that between 'substantive rules' on the one hand and 'interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice' on the other." 441 U.S. at 301 (footnote omitted).

162. Brookwood Medical Center, Inc. v. Califano, 470 F. Supp. 1247 (N.D. Ga. 1979), *aff'd mem. sub nom.* Brookwood Medical Center, Inc. v. Harris, 614 F.2d 1295 (5th Cir. 1980).

163. 20 C.F.R. § 422.435 (1979). Under 20 C.F.R. § 405.406(b), plaintiffs were required to file provider cost reports with the Secretary of HEW or a financial intermediary in order to receive reimbursement for services provided under the Medicare program. After receiving requests from third parties for the records, the secretary of HEW informed the submitters that the requested portion of the cost reports would be released pursuant to 20 C.F.R. § 422.435. *See* Brookwood Medical Center, Inc. v. Califano, 470 F. Supp. at 1248.

164. 42 U.S.C. § 1395g (1976).

165. Brookwood Medical Center, Inc. v. Califano, 470 F. Supp. 1247, 1249 (N.D. Ga. 1979). ("[T]here is no doubt that the statute [Social Security Act], governing the public's right to information and the providers' right to confidentiality 'affects individual rights and obligations.' ").

166. Section 301 provides:

> The head of an Executive department or military department may prescribe regulations for the government of his department, the conduct of its employees, the distribution and performance of its business, and the custody, use, and preservation of its records, papers, and property. This section does not authorize withholding information from the public or limiting the availability of records to the public.

5 U.S.C. § 301 (1976). The *Chrysler* Court viewed section 301 as "simply a grant of authority to the agency to regulate its own affairs." 441 U.S. at 309. The Court refused to view section 301 as a statute affecting individual rights and obligations. *Id.*

167. 441 U.S. at 302. *See* note 152 *supra.*

"nexus" between the agency regulation and the congressional authority to draft such a rule.[168]

The *Chrysler* decision did not clarify how close the relationship between the regulation and the legislative grant of authority had to be. However, the Court did provide some general guidelines to be considered when making the determination. "The pertinent inquiry is whether under any of the arguable *statutory* grants of authority the . . . regulations relied on by the [government] are reasonably within the contemplation of that grant of authority."[169] The grant of legislative authority does not have to be specific before regulations promulgated pursuant to the grant can be binding on the courts. However, a statute that implies *some* authority to collect information will not be considered a grant of legislative authority to disclose that information to the public.[170] Furthermore, interpretive regulations or general policy statements will not constitute proper authorization to release section 1905 information.[171]

Chrysler guarantees that those regulations relied upon by agencies to

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168. *Id.* at 304.

169. *Id.* at 306 (emphasis in original). In disposing of the OFCCP disclosure regulations relied on by the Government, the Supreme Court stated:

> Congress was not concerned with public disclosure of trade secrets or confidential business information, and, unless we were to hold that any federal statute that implies some authority to collect information must grant *legislative* authority to disclose that information to the public, it is simply not possible to find in these statutes a delegation of the disclosure authority asserted by the [government] here.

Id. (emphasis in original). To illustrate what is reasonable in this context the Court pointed to Mr. Justice Frankfurter's opinion in National Broadcasting Co. v. United States, 319 U.S. 190 (1943). In *National Broadcasting*, the Court had rejected the argument that the Communications Act of 1934 did not give the FCC authority to issue certain regulations. *Id.* at 224. In so holding, the Supreme Court probed the language and logic of the Communications Act and its legislative history. *Id.* at 209-24. Justice Frankfurter's opinion stated:

> Our duty is at an end when we find that the action of the Commission was based upon findings supported by evidence, and was made pursuant to authority granted by Congress. It is not for us to say that the "public interest" will be furthered or retarded by the Chain Broadcasting Regulations. The responsibility belongs to the Congress for the grant of valid legislative authority and to the Commission for its exercise.

Id. at 224.

170. For further clarification of the nexus requirement, it is helpful to look at the *Chrysler* Court's disposition of the government's contention that section 201 of Executive Order 11246 gave agencies the authority to disclose its records. The purposes behind Executive Order 11246 were to put an "end to discrimination in employment by the Federal Government and those who deal with the Federal Government." Chrysler Corp. v. Brown, 441 U.S. at 307 (1979). Section 201 simply directed the Secretary of Labor to formulate rules and regulations which he deemed appropriate to achieve those purposes. *Id.* at 304. With regard to the nexus requirement, the Supreme Court stated that "[o]ne cannot readily pull from the logic and purposes of the Executive Order any concern with the public's access to information in Government files or the importance of protecting trade secrets or confidential business statistics." *Id.* at 307. Thus, the Court concluded that the nexus between the regulations and the legislative authority was "so strained that it would do violence to established principles of separation of powers to denominate these particular regulations 'legislative' and credit them with the 'binding effect of law.' " *Id.* at 308.

171. *Id.* at 315-16.

disclose exempt information will be closely scrutinized. A review will focus on three issues: first, whether the regulations were properly promulgated; second, whether the regulations were substantive in nature; and third, whether a nexus can be established between the regulation and some form of legislative authority. The analysis will have to be made on a case by case basis, depending on the particular agency, regulation and statute involved.

B. Judicial Reaction to the Nexus Test

Shortly after *Chrysler Corp. v. Brown,*[172] *Cedars Nursing and Convalescent Center, Inc. v. Aetna Life & Casualty Ins. Co.*[173] was decided. In *Cedars,* a provider of medical and custodial services sued to enjoin the release of cost reports to a FOIA requester.[174] The authority relied upon by the government to release the information was a regulation[175] promulgated pursuant to provisions of the Social Security Act.[176]

The *Cedars* court affirmed the *Chrysler* ruling that any disclosure violating the ambit of section 1905 was "not in accordance with law" within the meaning of the APA.[177] In this instance, however, the court found the proper authorization of law under section 1905.[178] Using the *Chrysler* analysis, the court held that section 1106(a) of the Social Security Act[179] was "specifically concerned with the disclosure of information pertaining to a discrete subject matter, and by its very terms contemplate[d] the issuance of substantive regulations permitting such

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172. 441 U.S. 281 (1979).

173. 472 F. Supp. 296 (E.D. Pa. 1979).

174. *Id.* at 297.

175. 20 C.F.R. § 422.435 (1979) provides in pertinent part: "The following shall be made available to the public under the conditions specified: . . . (c) Upon request in writing, cost reports submitted by providers of services pursuant to section 1815 of the Act to enable the Secretary to determine amounts due such providers."

176. Cedars Nursing & Convalescent Center, Inc. v. Aetna Life & Cas. Ins. Co., 472 F. Supp. 296, 297 (E.D. Pa. 1979).

177. *Id.* In light of this, the *Cedars* court restricted its review to the narrow issue of "whether or not the disclosure contemplated in the instant case is one prohibited by § 1905." *Id.*

178. In *Cedars,* the plaintiff argued that 42 U.S.C. § 1306 was indistinguishable from 5 U.S.C. § 301, the housekeeping statute rejected in *Chrysler,* 472 F. Supp. at 298.

179. Section 1106(a) of the Social Security Act, 42 U.S.C. § 1306(a) (1976), provides in pertinent part:

> (a) No disclosure . . . of any file, record, report or other paper, or any information, obtained at any time by the Secretary of Health, Education, and Welfare, or the Secretary of Labor, or by any officer or employee of the Department of Health, Education, and Welfare or the Department of Labor in the course of discharging their respective duties under this chapter, and no disclosure of any such file, record report, or other paper, or information, obtained at any time by any person from the Secretary of Health, Education, and Welfare or the Secretary of Labor, as the case may be, or from any officer or employee of the Department of Health, Education, and Welfare or the Department of Labor shall be made except as the Secretary of Health, Education, and Welfare or the Secretary of Labor, as the case may be, may by regulations prescribe and except as provided in part D of subchapter IV of this chapter. Any person who shall violate any

disclosure."[180] In short, the regulation involved in *Cedars* constituted sufficient authority to release section 1905 material.

In *Brookwood Medical Center, Inc. v. Califano,*[181] this interpretation of section 1106(a) was solidified. Decided in a factual setting nearly identical to *Cedars,*[182] the court used the three step *Chrysler* analysis to find that section 1106(a) did specifically allow disclosure of discrete, otherwise confidential information when required by regulation.[183] Elaborating on its decision, the court pointed out that the statutes rejected as bases for granting legislative authority in *Chrysler* were very general in nature.[184] They did not specifically deal with the problem of disclosure. In this case, the court believed that the nature of section 1106(a) was much more specific.[185] In addition, the court noted that *Chrysler* had held that "something less than an express grant of [statutory] authority to exempt by regulation [was] sufficient."[186]

The *Brookwood* decision was subsequently affirmed by the Fifth Circuit in *St. Mary's Hospital, Inc. v. Harris.*[187] Once again, the case involved providers of Medicare services who were seeking to enjoin the Secretary of the Department of Health, Education & Welfare (HEW) from disclosing their cost reports.[188] In *St. Mary's,* the government had cited the same statute and regulation used in *Cedars* and *Brookwood* to authorize disclosure.[189] Conceding that the Social Security Act[190] might provide the requisite authority for the challenged regulation, *St. Mary's* nonetheless argued that promulgating the regulation constituted an abuse of discretion under the APA in that the regulation was in deroga-

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provision of this section shall be guilty of a misdemeanor and, upon conviction thereof, shall be punished by a fine not exceeding $1000, or by imprisonment not exceeding one year, or both.

180. Cedars Nursing & Convalescent Center, Inc. v. Aetna Life & Cas. Ins. Co., 472 F. Supp. 296, 298 (E.D. Pa. 1979).

181. 470 F. Supp. 1247 (N.D. Ga. 1979), *aff'd mem., sub nom.,* Brookwood Medical Center, Inc. v. Harris, 614 F.2d 1295 (5th Cir. 1980).

182. In *Brookwood,* several hospitals providing Medicare services sought to enjoin the Secretary of the Department of HEW from releasing cost reports. *Id.* at 1248. The regulation used to authorize disclosure in *Brookwood* (20 C.F.R. § 422.435) was the same regulation used in *Cedars. See* note 175 *supra.*

183. 470 F. Supp. at 1250.

184. *Id.*

185. The court stated that section 1106(a), "while not an express grant of such authority, does specifically allow disclosure of discrete, otherwise confidential information when called for by regulation. The 'nexus' between the regulation and delegation of legislative authority, required by *Chrysler* is therefore present." *Id.*

186. *Id.*

187. 604 F.2d 407 (5th Cir. 1979).

188. *Id.* at 408. St Mary's, a non-profit corporation located in Florida, owned and operated a 316 bed hospital. Since St. Mary's was a participant in the Medicare program, the hospital was required to file cost reports with the Secretary to receive reimbursement for the reasonable cost of services to eligible beneficiaries. *Id.* The requesters of the information were the State of Florida Department of Health and Rehabilitative Services and the Palm Beach Post Times. *Id.*

189. 20 C.F.R. § 422.435 (1979). *See* note 175 *supra.*

190. *See* note 179 *supra.*

tion of section 1905.[191] The *St. Mary's* court upheld the logic of both *Cedars* and *Brookwood* without directly referring to them. The court held that the disclosure statute in question "was authorized by law within the meaning of [section 1905], and that this substantive regulation was duly promulgated in accordance with the APA under the authority granted the Secretary in § 1306 [of the Social Security Act]."[192]

In future litigation involving material submitted by providers of medical services to Blue Cross to obtain Medicare reimbursements, regulations of the Department of Health and Human Services authorizing release of such information should be sufficient authority to disclose. The Social Security Act, in particular section 1106(a), has been held a valid base for the promulgation of these disclosure regulations.[193] In other words, the nexus requirement has been met in this context.

In addition to the regulations promulgated pursuant to the Social Security Act, the enabling statutes of other agencies and the regulations promulgated thereunder may provide the authorization of law required under section 1905. For example, in *Martin Marietta Corp. v. FTC,*[194] a cement company sought to enjoin the FTC's proposed release of the transcript of a deposition given by a Marietta officer to the Arizona Attorney General.[195] Adopting the *Chrysler* approach, the court con-

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191. St. Mary's Hosp., Inc. v. Harris, 604 F.2d 407, 409 (5th Cir. 1979).

192. *Id.* at 410. In so holding, the court resorted to statutory language, legislative history and judicial construction for support. It is interesting to note that a similar case, tried under a different theory, had a very different outcome. In Florida Medical Ass'n. v. Department of Health, Education and Welfare, 479 F. Supp. 1291 (M.D. Fla. 1979), physicians had brought an action to enjoin the Department of HEW from disclosing the same type of information sought in *Brookwood* and *St. Mary's. Id.* at 1295. Although the court refused to define the information as confidential or commercial (exemption 4-type material), the court did find that exemption six relating to "personal and medical files and similar files" was applicable. *Id.* at 1310. The court held that disclosure was prohibited by the Privacy Act without the prior consent of each affected individual. *Id.* The court issued a permanent injunction against disclosure. *Id.* at 1311.

193. This conclusion has been further strengthened by a recent Fourth Circuit decision. In Humana of Virginia, Inc. v. Blue Cross of Virginia, 622 F.2d 76 (4th Cir. 1980), 20 C.F.R. § 422.435 (1979) was once again tested. Plaintiffs/appellees, providers of Medicare services, sought to enjoin disclosure of their cost reports after being notified by Blue Cross that the reports were being released to a third party. *Id.* at 77. Finding that the release of such reports would most likely cause substantial harm to the submitters, the district court of Virginia held that the material was protected from disclosure by exemption 4. *Id.* at 77-78. Upon review, the Fourth Circuit limited its review to the agency record, instead of conducting a de novo review. *Id.* at 79. The court held that the promulgation of 20 C.F.R. § 422.435 was not arbitrary and capricious. *Id.* at 80. Accordingly, the Fourth Circuit reversed the district court's decision to withhold the records. *Id.*

194. 475 F. Supp. 338 (D.D.C. 1979).

195. *Id.* at 339-40. It was the FTC's contention that release of the transcript was authorized by section 6(f) of the Federal Trade Commission Act, 15 U.S.C. § 46(f) (1976). Section 6(f) provides that the Commission shall have the power

> [t]o make public from time to time such portions of the information obtained by it hereunder, except trade secrets and names of customers, as it shall deem expedient in the public interest; and to make annual and special reports to the Congress and to submit

cluded that agency release would not be an abuse of discretion.[196] The court stated that it was unnecessary to consider whether the material was prohibited from disclosure by section 1905, since agency authority to release could be found under the Federal Trade Commission Act.[197] Thus, the nexus test was met.

Since the Federal Trade Commission Act contains specific provisions for the dissemination of information to the public,[198] the nexus requirement will be satisfied in other contexts.[199] If, however, certain enabling legislation merely provides for general rules and regulations necessary to carry out the particular agency's functions, the task of establishing a nexus may prove particularly difficult for the government in cases involving government contracts. For instance, this would be the case where the Office of Federal Contracts Compliance is involved since it has no statutory enabling act.[200] Absent future legislative action, section 1905 may succeed in blocking many FOIA requests in those situations where an agency's enabling legislation is amorphous.

V. THE ENHANCEMENT OF SECTION 1905

As a result of the Supreme Court's decision in *Chrysler Corp. v. Brown,*[201] those seeking to block a FOIA release of business records have been given a tool to limit an agency's discretion to disclose material falling within exemption 4.[202] Since the enhancement of section

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therewith recommendations for additional legislation; and to provide for the publications of its reports and decisions in such form and manner as may be best adapted for public information and use.

196. Martin Marietta Corp. v. FTC, 475 F. Supp. 338, 344 (D.D.C. 1979), wherein the court stated: "[T]he FTC's decision to release [the records] to the Arizona Attorney General did not constitute an abuse of the broad discretion conferred upon the agency by section 6(f)."

197. 15 U.S.C. § 46(f) (1976).

198. *See* note 195 *supra,* for the text of this section of the statute.

199. In a pre-*Chrysler* case, Westinghouse Elec. Corp. v. NRC, 555 F.2d 82 (3d Cir. 1977), the Third Circuit held that disclosure regulations promulgated pursuant to such a "general rulemaking authority" provision authorized the release of § 1905 materials. *Id.* at 89. *See* FCC v. Schreiber, 381 U.S. 279 (1965).

200. *See A New Direction, supra* note 8, at 202.

201. 441 U.S. 281 (1979).

202. The Supreme Court's handling of the reverse FOIA issue in *Chrysler* is fascinating, because the Court begins with the premise that "Congress did not limit an agency's discretion to disclose information when it enacted the FOIA." *Id.* at 294. As discussed, Congress did intend to limit an agency's handling of its records by creating nine clearly drawn exemptions. Exercise of agency discretion was to be limited to the nine exemptions; all information not falling within the exemption was to be automatically disclosed. *See* Part I *supra.* It seems clear though, that with regard to these nine exemptions, Congress wished to preserve some element of discretion for these sensitive areas. The Supreme Court's interpretation and use of section 1905 appears to infringe upon this agency discretion when a situation arises where a decision to disclose may be in the public's interest. For if such a situation arises, and if the requisite authorization needed under section 1905 is absent, then disclosure of the material is barred as a result of *Chrysler.* In lieu of Congress's reaction to *Robertson* (*see* note 38 *supra*), it is highly doubtful that Congress intended to allow such a scenario. In effect, the Supreme Court may be limiting agency discretion beyond what Congress had envisaged.

1905 for this purpose appears to contravene the congressional intent behind the FOIA,[203] the need for a careful analysis of the statute's origin and scope is imperative. Although uncertainty regarding the relevance and applicability of section 1905 has always existed, the requisite authorization of law needed to neutralize the statute was usually available.[204] In fact, prior to *Chrysler*, the statute posed no real obstacle to disclosure. The Supreme Court's interpretation of section 1905[205] would seem to indicate that such is no longer the case.

With regard to section 1905, the *Chrysler* Court held that the statute was applicable to formal agency action;[206] but it did not, however, afford a private right of action to enjoin agency disclosure in violation of the statute.[207] Hence, in future reverse FOIA cases, material found to be within both the FOIA's fourth exemption and section 1905 may not be disclosed unless the agency's authority to disclose meets the *Chrysler* nexus test.[208]

An important issue left untouched by the Court was the proper scope of section 1905. The issue warrants careful attention, since the authorization to release section 1905 material will be more difficult to prove after *Chrysler*. If the statute is construed to include a range of

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203. *See* Part I *supra*.

204. *See A New Direction, supra* note 8, at 200, where it is stated: "Because *Chrysler* restricts the availability of agency regulations to provide this authorization of law, it is evident that section 1905 can no longer be so easily set aside and inquiry into its proper scope is imperative."

205. Chrysler Corp. v. Brown, 441 U.S. 281, 294-301, 316-19 (1979).

206. *Id.* at 301. The government had argued that section 1905 simply was not applicable for formal agency action. That is, that section 1905 should be used only in those limited situations where individuals, and not agencies as a whole, had taken it upon themselves to disclose the information. The Supreme Court responded:

> [I]f [section] 1905 is not addressed to formal agency action . . . there should have been no concern in Congress regarding the interrelationship of [section] 1905 and the access legislation, for they would then address totally different types of disclosure.
>
> In fact, the legislative history of all the significant access legislation of the last 20 years evinces a concern with this relationship and a concomitant universal assumption that [section] 1905 embraces formal agency action.

Id. at 299-300 n.29. The Court then listed several examples of congressional concern that agency action would not be circumscribed. *Id.* at 300-01. The Court ended its lengthy note by citing a House Committee on Government Operations Report which indicated that material within the Trade Secrets exemption may be subject to disclosure if the agency determines that disclosure was in the public interest. H. R. REP. NO. 880, 94th Cong., 2d Sess. 23, *reprinted in* [1976] U.S. CODE CONG. & AD. NEWS 2183, 2205. However, section 1905 had to be considered in order to ascertain whether the agency was forbidden from disclosing the information. Chrysler Corp. v. Brown, 441 U.S. at 299 n.29. It is interesting to note that the House Report was citing the *Charles River* decision as authority for these last instructions. *See* Charles River Park "A," Inc. v. HUD, 519 F.2d 935, 941 n.7 (D.C. Cir. 1975). As will be shown below, judicial interpretation of the purpose and scope of section 1905 may be at variance with the historical nature of the statute. *See* notes 247-57 and accompanying text *infra*. For the purposes of this note, it is assumed that the basis for the Court's decision as to the applicability of section 1905 to formal agency action is valid.

207. Chrysler Corp. v. Brown, 441 U.S. 281, 316-17 (1979), wherein the Court stated: "As our review of the legislative history of [section] 1905 — or lack of same — might suggest, there is no indication of legislative intent to create a private right of action."

208. *See* Part IV. A. *supra* for a discussion of the nexus requirement.

material which is greater than that of exemption 4, then the protection of this information would invariably increase unless, of course, an agency possesses the sufficient authority to disclose.[209] If the statute is construed to include a range of material which is less than that of exemption 4, businesses may be justified in arguing that their plight has remained unchanged by *Chrysler*.[210] Simply, future interpretations of section 1905's scope will determine the amount of protection given to business and corporate records. Therefore, the true import of the *Chrysler* decision will not be known until the scope of section 1905 is more clearly delineated.

This section will begin with a brief analysis of the functions and purposes of the three prior nondisclosure statutes which merged to form section 1905. The discussion will then shift to the reasons surrounding the 1948 consolidation which produced the current section 1905. A brief look at recent judicial interpretations of section 1905 will illustrate that the statute's scope is greater today than the combined scope of the three prior nondisclosure statutes.

A. The Previous Nondisclosure Statutes

Section 1905 of the Trade Secrets Act[211] was enacted in 1948 as part of a larger statute which codified several existing laws into Title 18 of the United States Code.[212] Section 1905 consolidated three prior nondisclosure statutes which were last in effect in the 1940 edition of the United States Code.[213] While the legislative histories surrounding the statutes are limited, they do indicate the class of individuals affected and the scope of material covered.

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209. *See* A *New Direction*, *supra* note 8, at 200. It is logical that the protection would increase. If the statute is broadly construed, then the scope of information covered by section 1905 would, at the very least, encompass all information covered by exemption four. Although the exemptions have been considered permissive, agency discretion in these cases would be limited. The agencies would be required to have, in addition to good discretion, the requisite statutory authority to disclose the specific types of information. A broad construction of section 1905 would qualify the permissiveness of the fourth exemption.

210. "A narrow interpretation of this scope would afford [submitters] little protection and would leave agencies with wide discretion to release information." *Id.*

211. 18 U.S.C. § 1905 (1976).

212. Trade Secrets Act of 1948, Pub. L. No. 772, § 1905, 62 Stat. 683 (codified at 18 U.S.C. § 1905 (1976)).

213. Section 1905 consolidated an income tax statute, 18 U.S.C. § 216 (1940) (originally enacted as Rev. Act of 1864, ch. 173, § 38, 13 Stat. 223); a Tariff Commission statute, 19 U.S.C. § 1335 (1940) (orginally enacted as Rev. Act of 1916, ch. 463, § 708, 39 Stat. 756); and a Commerce Department statute, 15 U.S.C. § 176a (1940) (orginally enacted as Act of Jan. 27, 1938, ch. 11, 52 Stat. 8).

1. The Income Tax Nondisclosure Statute

The oldest of the three was an income tax nondisclosure statute.[214] Originally enacted in 1864, the statute prohibited officers and employees of the United States Government from disclosing two specific types of tax related information: the style and operations of a given taxpayer; and any information procured from an individual's tax return.[215] A review of the debates surrounding the 1864 enactment, as well as a similar enactment which took place in 1862, indicated that "Congress [was] attempt[ing] to safeguard the privacy of individual citizens by enacting the 1864 income tax nondisclosure provision."[216]

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214. Act of Feb. 26, 1926, ch. 27, §§ 115-1200(a), 44 Stat. 117, 125 (repealed) provided:

> It shall be unlawful for any collector, deputy collector, agent, clerk, or other officer or employee of the United States to divulge or to make known in any manner whatever not provided by law to any person the operations, style of work, or apparatus of any manufacturer or producer visited by him in the discharge of his official duties, or the amount or source of income, profits, losses, expenditures, or any particular thereof, set forth or disclosed in any income return, or to permit any income return or copy thereof or any book containing any abstract or particulars thereof to be seen or examined by any person except as provided by law; and it shall be unlawful for any person to print or publish in any manner whatever not provided by law any income return, or any part thereof or source of income, profits, losses, or expenditures appearing in any income return; and any offense against the foregoing provision shall be a misdemeanor and be punished by a fine not exceeding $1,000 or by imprisonment not exceeding one year, or both, at the discretion of the court; and if the offender be an officer or employee of the United States he shall be dismissed from office or discharged from employment.

215. *Id.*

216. *See* Clement, *supra* note 7, at 609 n.93. It appears from the debates that the main concerns were with the general question of personal privacy. There was fear that such privacy would be endangered if the "lowly paid tax officials" had access to an individual's records. The following excerpts reflect this concern:

> My reasons for objecting to these amendments is [sic] that they violate every idea of individual right and liberty which belongs to the common law and to our people. The clause as amended proposes to allow an assessor upon mere suspicion, no matter how baseless it may be, . . . to examine into all of his private accounts, to call for his books, and make himself master of all the business transactions of the party. . . . We are fast hurrying on to that state of things when we not only disregard private rights, but everything which is considered sacred under the common law.
>
> . . .
>
> [The Amendments allow], without any probable cause, every little petty officer of all this number scattered through the whole country, to take advantage of his suspicion, whether founded or unfounded, to institute an investigation into the private affairs of the citizen.

68 Cong. Globe, 38th Cong., 1st Sess. 2997 (1864) (remarks of Rep. Brown). The focus of the debate then shifted to a proposal whereby the salaries of the tax official would be raised in order to reduce the temptation to defraud the vulnerable taxpayer:

> The more the Committee of Ways and Means examined [the pay raise] the more they were convinced that these officers were the poorest paid and the hardest working officers engaged in the service of collecting the internal revenue. In the cities it is utterly impossible to get competent men to execute the duties of the office of assistant assessor without a higher compensation.

Id. at 2998 (remarks of Rep. Morrill). This concern for privacy is further understood when one considers that:

> [r]esearchers report that during the Civil War 85% of the operations of the Bureau of Internal Revenue were carried out in the field — "including the assessing and collec-

The 1864 statute was re-enacted numerous times with little change.[217] The legislative history relating to the reenactments, particularly with those changes made in 1894, indicated an ongoing concern with the conflict between the taxpayer's privacy interests and the federal government's interest in thorough and efficient enforcement of the revenue laws.[218] Quite simply, those fighting any disclosure provisions had little trust for the ill paid tax officials.[219] Consequently,

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tion of taxes, the handling of appeals, and punishment for frauds" — and this balance of responsibility was not generally upset until the 20th Century. Agents had the power to enter any home or business establishment to look for taxable property and examine books of accounts. Information was collected and processed in the field.

Chrysler Corp. v. Brown, 441 U.S. 281, 297 n.23 (1979), *citing* L. SCHMECKEBIER & F. EBLE, THE BUREAU OF INTERNALREVENUE 8, 40-43 (1923).

In addition to the 1864 debates, the debates over the Revenue Act of 1862, ch. 119, § 27, 12 Stat. 432, offer additional insight into the congressional objective behind the 1864 nondisclosure provision, the 1862 statute had authorized tax officials to inspect taxpayer financial records. In the debates concerning the enactment, several Senators addressed the general question of personal privacy. One Senator complained about "espionage" in the proposed legislation. 61 Cong. Globe, 37th Cong., 2d Sess. 2330 (1862) (remarks of Sen. Sherman). Senator Fessenden characterized the proposed power to inspection as an "inquisition." *Id.* Thus, when juxtaposed, the debates of 1862 and 1864 imply that Congress was trying to safeguard the privacy interests of individual citizens when it enacted the 1864 income tax nondisclosure provision.

217. *See* Clement, *supra* note 7, at 608-09.

218. The reenactment of the income tax provision in the Tariff Act of 1894, ch. 349, § 34, 28 Stat. 509, represented the provision's most significant modification. The Senate debates on the Tariff Act once again illustrated the congressional concerns for confidentiality and disclosure of tax related information. Extensively considered was the conflict between the taxpayer's interest in confidentiality and the Government's need to inspect financial records in order to enforce the revenue laws. More specifically, the Senate debates revealed two main concerns: first, that a corporation's constitutional right of privacy and freedom from unreasonable seizures was threatened; second, that the tax officials couldn't be trusted to maintain the confidentiality of tax related information. With respect to the former, Senator Gray of Delaware criticized the inspection provision of the tariff bill as having "no other reasonable purpose except to harass, annoy, irritate, and exasperate free American citizens, who live under the aegis and protection of our institutions with the same guaranty of security that the poorest farmer on the western plains has." 26 Cong. Rec. 6894 (1894). In reply, Senator Vest of Missouri argued that "a corporation that was honestly conducting its business would have no objection to its books being examined." *Id.* at 6895. In support of Senator Gray, Senator Hoar of Massachusetts stated that the bill constituted "a bold, bare, gross, coarse, and most unnecessary attempt by a government to enter the private premises of a citizen and such search his private books in direct defiance of the Constitution of the United States, which says that searches and seizures shall not be permitted." *Id. See also id.* at 6932 (remarks of Senator Hill), 6893 (remarks of Senator Aldrich), 6923-24 (remarks of Senator Teller).

With respect to the second concern, Senator Aldrich led the attack against the reliability of tax officers:

> This section proposes to open all the books of every corporation doing business in the United States to an unnumbered army of revenue agents. . . . The secrets of the business of every corporation in the United States are practically to be made known to competitors or made public by this provision. Nearly every corporation engaged in manufacturing has some secret method or formula which constitutes, perhaps, the great value of the business itself, and these are to be turned over to the tender mercies of poorly paid revenue agents.

Id. at 6893. Senator Callom questioned the wisdom of granting federal tax officials the "authority to dig into the private business of either a person or a corporation." *Id.* at 6927. Senator Teller opposed permitting corporate books "to be kept open every day for the idle curiosity of a revenue officer." *Id.* at 6924.

219. *See* Chrysler Corp. v. Brown, 441 U.S. 281, 296-97 (1979) ("Congress was primarily

criminal nondisclosure provisions were included in the hope that they would provide an adequate safeguard against unauthorized disclosures.[220]

2. The Tariff Commission Nondisclosure Statute

The Tariff Commission nondisclosure statute,[221] originally enacted in 1916,[222] prohibited Commission members or government employees from disclosing any "trade secrets or processes of any person ... or association embraced in any ... investigation conducted by the commission. . . ."[223] The statute provided for criminal penalties identical to those of the current section 1905.[224] This statute, as well as the income tax nondisclosure statute, had a much more limited scope than section 1905. Section 1905 is applicable to trade secrets and financial information; it is not limited to information derived from Tariff Commission examinations.[225] Although the legislative history of the 1916 statute is silent regarding the intent of Congress in passing the nondisclosure provisions,[226] a review of the debates surrounding a subsequent amendment to the statute indicates a strong belief that corporations should have the right to keep their valuable business records confidential when subject to review.[227]

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concerned with unauthorized disclosure of business information by feckless or corrupt revenue agents, for in the early days of the Bureau of Internal Revenue, it was the field agents who had substantial contact with confidential financial information").

220. *See* Clement, *supra* note 7, at 610-11.

221. The Tariff Commision statute, Act of Jan. 27, 1938, ch. 11, § 1, 52 Stat. 8 (current version at 15 U.S.C. § 176a (1976)) provided:

> It shall be unlawful for any member of the commission, or for any employee, agent, or clerk of the commission, or any other officer or employee of the United States, to divulge, or to make known in any manner whatever not provided for by law, to any person, the trade secrets or processes of any person, firm, copartnership, corporation, or association embraced in any examination or investigation conducted by the commission, or by order of the commission, or by order of any member thereof. Any offense against the provisions of this section shall be a misdemeanor and be punished by a fine not exceeding $1,000, or by imprisonment not exceeding one year, or both, in the discretion of the court, and such offender shall also be dismissed from office or discharged from employment.

222. Revenue Act of 1916, Pub. L. No. 64-271, 39 Stat. 756 (codified at 18 U.S.C. § 1905 (1976)).

223. Act of Jan. 27, 1938, ch. 11, § 1, 52 Stat. 8 (current version at 15 U.S.C. § 176a (1976)).

224. The penalties contained in the Tariff Commission statute provide that an offense would constitute a misdemeanor, punishable "by a fine not exceeding $1000, or by imprisonment not exceeding one year, or both, in the discretion of the court, and such offender shall also be dismissed from office or discharged from employment." *Id.*

225. *Compare* Act of Jan. 27, 1938, ch. 11, § 1, 52 Stat. 8 (current version at 15 U.S.C. § 176a (1976)), *with* 18 U.S.C. § 1905 (1976). *See also* Clement, *supra* note 7, at 611.

226. *See* S. REP. NO. 793, 64th Cong., 1st Sess. (1916); H. R. REP. No. 922, 64th Cong., 1st Sess. (1916). The debates do not mention the nondisclosure statute.

227. The Tariff Commission statute was amended slightly in 1930 (Tariff Act of 1930, ch. 497, § 335, 46 Stat. 590) before its consolidation into section 1905. Much of the Senate discussion in 1930 concerned a proposed amendment that required the Tariff Commission to release to any member of Congress, upon request, cost-of-production information relevant to pending tariff legislation. *See* 71 Cong. Rec. 4561 (1929). Senator McMaster, the author of the amendment,

3. The Commerce Department Nondisclosure Statute

The third nondisclosure statute,[228] originally enacted in 1938[229] at the request of the Commerce Department,[230] also had a much narrower scope than section 1905.[231] Applicable only to the then existing Bureau of Foreign and Domestic Commerce, the statute prohibited employees from disclosing statistical information furnished in confidence to the Bureau.[232] The statute lay dormant until it was combined with the two other nondisclosure statutes into section 1905.[233]

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stated that its purpose was to force the Commission to cease its practice of obtaining information by a promise of confidentiality. It was felt that this practice has served to insulate from congressional examination all information in the Commission's files concerning individual corporations and that Congress needed such detailed information to formulate tariff policy. *Id.* at 4561-62. In objecting to the provision, Senator Smoot stated:

> From the testimony of the members of the [Tariff] Commission, and from other statements made before the committee, there is not a doubt but that if it were understood and known abroad that the information sought was to be made public here to all their competitors, the members of the commission could not get the information.
>
> Take a manufacturer in the United States having what he considers to be the most up-to-date mode of manufacture, perhaps not known to others. Is it possible to think that we ought to have that information broadcast throughout the country? If that were the plan adopted, we would get no more information out of a concern of that sort than was absolutely dragged out of it.

Id. at 4564. Briefly, the main concerns of the 1930 debate were with the need to preserve the confidentiality of business secrets, while at the same time ensuring Congress' ability to have access to certain business records. The 1930 amendment was viewed by some Senators as a threat to the Tariff Commission's ability to secure such information by assuring businesses that the information would be kept confidential. *Id.* at 4563-66. Such concern over the limited 1930 amendment would seem to indicate that the overall intention behind the 1916 nondisclosure provisions was to ensure that important business data collected by the Tariff Commission be kept confidential.

It is worthwhile to note that during the 1930 debates, which frequently mentioned the nondisclosure provision, disputes arose concerning the meaning of the phrase "trade secrets." The Senators were in general agreement that the "cost of production" was not to be considered a "trade secret." *Id.* at 4565 (remarks of Senator Heflin), 4564-65 (remarks of Senator McMaster). Hence, the 1930 amendment covered information "pertaining to the cost of production," while the nondisclosure provision covered only "trade secrets." *Id.* at 4564. The current language of section 1905 includes the cost of production in its scope.

228. The Commerce Department statute, last codified as 15 U.S.C. § 176a (1940), provided:

> Any statistical information furnished in confidence to the Bureau of Foreign and Domestic Commerce by individuals, corporations, and firms shall be held to be confidential, and shall be used only for the statistical purposes for which it is supplied. The Director of the Bureau of Foreign and Domestic Commerce shall not permit anyone other than the sworn employees of the Bureau to examine such individual reports, nor shall he permit any statistics of domestic commerce to be published in such manner as to reveal the identity of the individual, corporation, or firm furnishing such data.

229. Act of Jan. 27, 1938, ch. 11, 52 Stat. 8 (current version at 18 U.S.C. § 1905 (1976)).

230. Both the Senate and House reports accompanying the 1938 statute indicated that the Commerce Department supported the bill. *See* S. REP. NO. 1165, 75th Cong., 1st Sess. 1 (1937); H. R. REP. NO. 1548, 75th Cong., 1st Sess. 1 (1937). Therefore, unlike section 1905, the Commerce Department statute constituted a prohibition against disclosure. This was done at the direction of Congress upon employees of one agency at the explicit request of that agency.

231. The Commerce Department statute applied only to employees of one agency and encompassed only confidential statistical information.

232. Act of Jan. 27, 1938, ch. 11, § 1, 52 Stat. 8 (current version at 15 U.S.C. § 176a (1976)).

233. *See* Clement, *supra* note 7, at 613.

In sum, the three nondisclosure statutes in effect prior to the 1948 codification were narrowly drawn provisions relating to specific individuals in specific agencies. Moreover, the scope of material covered by these statutes was *limited and clearly delineated.* Despite this, the consolidated version of the nondisclosure statutes has a much broader scope than its three predecessors.[234]

B. The 1948 Codification: A Housekeeping Measure

The legislative history surrounding the 1948 codification indicates a precise congressional intent not to create substantive changes in the pre-existing criminal statutes.[235] Rather, the move was merely to rearrange and consolidate them into one title of the code.[236] The Senate report on the codification supports this conclusion: "The bill makes it easy to find the criminal statutes because of the arrangement, numbering and classification. The original intent of Congress is preserved. A uniform style of statutory expression is adopted."[237] In short, Congress

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234. Instead of narrowly drawn provisions relating to specific individuals in specific agencies, section 1905 appears to cover any government employee who discloses any "trade secrets, processes, operations, style of work, ... confidential statistical data, amount or source of income, profits, losses or expenditures. . . ." 18 U.S.C. § 1905 (1976). In reverse FOIA cases, courts have uncritically applied the sweeping language of the 1948 codification statute without examining the language of its predecessors. In Chrysler Corp. v. Schlesinger, 412 F. Supp. 171 (D. Del. 1976), the court expansively interpreted the coverage of section 1905. "That criminal statute makes it illegal for a government employee to disclose confidential statistical data submitted to the Government by a corporation." *Id.* at 177. In Westinghouse Elec. Corp. v. Schlesinger, 392 F. Supp. 1246 (E.D. Va. 1974), the court presented a vague interpretation of the scope of section 1905: "In view of the finding of confidentiality set forth above, [regarding the fourth FOIA exemption], and the relation of the information contained in the documents to processes, operations and profit margins, [section 1905] is clearly applicable here." *Id.* at 1250. None of the three prior nondisclosure statutes could have resulted in such interpretations.

235. In addition, the Supreme Court has twice analyzed the same 1948 codification and held that Congress did not intend to make substantive changes in the predecessor statutes, including those consolidated. Therefore, seemingly substantive changes inadvertenty resulting from the codification would not be given full force and effect. *See generally* Muniz v. Hoffman, 422 U.S 454 (1975); *See also* United States v. Cook, 384 U.S. 257 (1966); *see* notes 255-57 and accompanying text *infra,* for a discussion of *Cook.*

236. This purpose was clearly expressed in the Senate's brief discussion of the codification statute:

> The purpose of the bill is to codify and revise the laws relating to Federal crimes and criminal procedure.
>
> . . . .
>
> The bill makes it easy to find the criminal statutes because of the arrangement, numbering, and classification. The original intent of Congress is preserved. A uniform style of statutory expression is adopted. . . .
>
> Obsolete and executed provisions are eliminated. Uncertainty will be ended and there will no longer be any need to examine the many volumes of the Statutes at Large as the bill, upon enactment, will itself embody the substantive law which will thus appear in full in the United States Code. . . .
>
> As I said, it is along the line of bringing together the Federal criminal statutes into one place, so as to avoid the necessity of going from one volume to another in order to ascertain what the criminal law of the nation is.

94 Cong. Rec. 8721 (1948) (remarks of Senator Wiley).

237. S. REP. NO. 1620, 80th Cong., 2d Sess. 1 (1948). The Reviser's Notes contained in the

had no intention whatsoever of substantively altering the three nondisclosure statutes. The codification was nothing more than a mere housekeeping measure.

Regardless, the substantive scope of all three prior nondisclosure statutes have been substantially broadened. The 1940 income tax nondisclosure statute[238] prohibited the disclosure of "the amount, source of income, profits, losses, expenditures ... set forth in any income return. . . ."[239] In the 1948 codification, the requirement that information originate with an income tax return is abandoned in favor of the phrase "concerns or relates to."[240] As a result, the 100 year old nondisclosure statute became an all encompassing prohibition that, if read literally, applies to all financial and commercial information in the files of each federal agency. Likewise, prior to 1948, the 1930 Tariff Commission nondisclosure statute[241] prohibited the release of trade secrets and processes discovered in examinations or investigations conducted by the Tariff Commission.[242] After 1948, the prohibition applied to all federal agencies and covered trade secrets not revealed by agency examinations or investigations.[243] Finally, the 1948 codification served to alter the Commerce Department nondisclosure statute[244] which had previously prohibited disclosure of statistical information confidentially furnished to the Bureau of Foreign and Domestic Commerce.[245] Coverage was expanded after 1948 to include confidential statistical information provided to all agencies.[246] However, rules of statutory con-

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House Report, H. R. REP. NO. 304, 80th Cong., 1st Sess. A127-A128, corroborate this purpose. They state that section 1905 "consolidates the three prior nondisclosure statutes appearing in the 1940 Code." *Id.* at A127. In a separate section of the report, entitled "Consolidation of Sections," the meaning of consolidation was explained: "In many instances similar sections were consolidated without making fundamental changes in the offenses involved. . . . [I]n one instance, 11 sections were consolidated into 1, resulting in a tremendous saving of space and notable improvement in style and substance." *Id.* at 8. There is no indication in the Reviser's Notes of a congressional intent to expand the scope of the three nondisclosure statutes through consolidation. Instead, the Notes state that only "[m]inor changes were made in translations and phraseology." *Id.* at A128.

238. Act of Feb. 26, 1926, ch. 27, §§ 115-1200(a), 44 Stat. 117, 125 (repealed). For the text of this statute, *see* note 214 *supra.*

239. *Id.*

240. 18 U.S.C. § 1905 (1976).

241. Act of Jan. 27, 1938, ch. 11, § 1, 52 Stat. 8 (current version at 15 U.S.C. § 176a (1976)). For the text of this statute, *see* note 221 *supra.*

242. *Id.*

243. *Compare* 18 U.S.C. § 1905 (1976) *with* Act of Jan. 27, 1938, ch. 11, § 1, 52 Stat. 8 (current version at 15 U.S.C. § 176a (1976)).

244. Act of Jan. 27, 1938, ch. 11, § 2, 52 Stat. 8 (current version at 15 U.S.C. § 176a (1976)). For the text of this statute, *see* note 228 *supra.*

245. *Id.*

246. *Compare* 18 U.S.C. § 1905 (1976) *with* 15 U.S.C. § 176a (1976).

247. *See* notes 249-50 and accompanying text *infra.*

struction[247] mandate that courts should interpret section 1905 consistently with the scope of the three previous statutes.[248]

C. *Judicial Interpretation of Section 1905*

It is a time honored rule of statutory construction that whenever the language of a codification differs in scope from its predecessors, and the codification was not intended to alter the statutory reach, courts should apply the scope of the predecessor statute.[249] Yet it appears that courts, in reverse FOIA actions, have failed to consider these principles.[250]

For example, in *Chrysler Corp. v. Schlesinger,*[251] the court stated that section 1905 "makes it illegal for a government employee to disclose confidential statistical data submitted to the Government by a corporation."[252] In *Charles River Park "A," Inc. v. Department of HUD,*[253] the District of Columbia Circuit stated that section 1905 "makes it illegal for a government employee to disclose 'to any extent not authorized by law any information coming to him in the course of his employment ... which information concerns or relates to ... the ... amount or sources of any income, profits, losses, or expenditures of any

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248. It has been pointed out that construing the codified language of section 1905 would seem to produce unreasonable results: For example, "making it a crime for a federal employee to disclose that [the] telephone company is in the telephone business unless the employee was 'authorized by law' to do so." *See* Memorandum from Robert L. Saloschin, Director, Office of Information Law and Policy, To All Federal Department and Agencies on Chrysler v. Brown, 441 U.S. 281 (1979), *reprinted in* R. BOUCHARD & J. FRANKLIN, GUIDEBOOK TO THE FREEDOM OF INFORMATION AND PRIVACY ACTS 262 (1980). "[E]ven if the 1948 codification is read to have effected substantive changes, the meaning of [section] 1905 must still be determined in light of the predecessor statutes." R. BOUCHARD & J. FRANKLIN, GUIDEBOOK TO THE FREEDOM OF INFORMATION AND PRIVACY ACTS 262 (1980).

249. In general, interpretation of codified laws should be done in the following manner:

> A statute incorporated into a code is presumed to be incorporated without change even though it is reworded and rephrased and in the organization of the code its original sections are separated. . . . In case of ambiguity it is permissible to resort to the prior legislative history of the act, the form and language of the prior statute, prior interpretation, other legislation in pari materia and all pertinent aids to statutory construction in order to arrive at the true meaning of the code provision.

1A SANDS & SUTHERLAND, STATUTORY CONSTRUCTION § 28.10 (4th ed. 1972). For decisions adopting the general rule of construction that whenever statutory language is unintentionally changed in the process of codification, the new language should be disregarded in favor of the legislative intent underlying the original statute, *see* Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S 240, 255 n.29 (1975); Cass v. United States, 417 U.S. 72, 82 (1974); Tidewater Oil Co. v. United States, 409 U.S. 151, 162 (1972); City of Greenwood v. Peacock, 384 U.S. 808, 815-16 (1966); Fourco Glass Co. v. Transmirra Prods. Corp., 353 U.S. 222, 227-28 (1957).

250. *See* cases cited in note 234 *supra.*

251. 412 F. Supp. 171 (D. Del. 1976).

252. *Id.* at 177.

253. 519 F. 2d 935 (D.C. Cir. 1975).

person.' "[254] In essence, courts have interpreted the scope of section 1905 to include almost every type of business information submitted to any agency or branch of government.

The argument that courts should interpret section 1905 in view of the congressional intent underlying the three prior nondisclosure statutes is strengthened by the Supreme Court's decision in *United States v. Cook*.[255] In *Cook*, the Court examined another portion of the same 1948 codification statute that created section 1905. The case involved the codified version of an embezzlement statute which was in conflict with its precodified form. The Court held that there was no congressional intention to substantively change the embezzlement statute:

> There is no doubt that the 1946 statute covered employees of individuals and in our view it was not intended by adopting the 1948 revision of the Code to make any substantive change in the law by excluding from its coverage the employees of any class of carrier who had been previously covered. The general purpose of the new Code was to "codify and revise. . . . The original intent of Congress is preserved, . . ." and with respect to the new [section] 660, the reviser's note, while noting the consolidation of a portion of [section] 409 and [section] 412 and stating that "[c]hanges were made in phraseology," disclosed no intention of making any change in the substantive content or the coverage of the law.[256]

In light of the purposes behind the 1948 consolidation, the Court concluded that the scope of classes covered by the precodified version of the embezzlement statute should be applied, not the scope of the codified version.[257]

It is submitted that the section 1905 controversy is analogous to the embezzlement statute in *Cook*. It is unmistakably clear that the combined scope of the three nondisclosure statutes preceding section 1905 falls far short of the present breadth of section 1905. It is equally obvious that the 1948 consolidation was meant only as a housekeeping measure; not as an effort to substantively change the effected statutes. Hence, rules of statutory construction dictate that courts should adhere to the purposes and scope of those precodified nondisclosure statutes which now form section 1905. Once the courts pay greater attention to the principles of statutory construction the scope of section 1905 will be narrower than the FOIA's fourth exemption.

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254. *Id.* at 941 (citation omitted).
255. 384 U.S. 257 (1966).
256. *Id.* at 260 (citation omitted).
257. *Id.*

CONCLUSION

It is apparent from the pattern of reverse FOIA suits that such litigation has caused substantial interference with the flow of information under the FOIA. The time needed to resolve reverse FOIA actions has created a serious threat to the utility of the FOIA in providing expedient access to government documents. Reverse FOIA actions filed while requests are pending disrupt agency proceedings by prematurely involving the courts. In addition, these actions may unduly restrict an agency's discretion to release information within the public interest.

Conversely, the reverse FOIA action has provided submitters with a method of protecting confidential documents from unwarranted disclosure. It is clear that courts have recognized the importance of allowing submitters a remedy and have been willing to hear reverse FOIA actions. Moreover, judicial review of agency practices and procedures regarding the release of requested information is consistent with the principles underlying both the FOIA and the APA.

Without doubt, the Supreme Court decision in *Chrysler Corp. v. Brown* will affect the attempts by submitters to prevent disclosure to third parties of confidential information submitted by them to the government. The *Chrysler* decision dispelled any notion that a private right of action to enjoin government disclosure could be implied from either the FOIA or section 1905 of the Trade Secrets Act. The Court did rule however, that a cause of action may arise via the general review provisions of the APA. This review should "ordinarily" be limited to review of the agency record and should not be undertaken de novo by district courts. The Court's reluctance to definitively resolve the de novo issue leaves this crucial question open. *Chrysler's* true import lies in its recognition of a submitter's right to review. By holding that there must exist some "identifiable" nexus between an agency disclosure regulation and the delegation of the legislative authority for that rule's promulgation, the Supreme Court adopted a stringent standard that may provide submitters with a powerful tool to limit an agency's discretion to disclose.

The Supreme Court's enhancement of section 1905 represents an attempt to increase the protection of confidential business information submitted to the government. However, the legislative history of the statute indicates that the scope of section 1905 is not as broad as its literal language suggests. If the meaning of section 1905 is interpreted in light of its predecessors, and it should be, then the statute's value in protecting confidential data is questionable. That the *Chrysler* Court neglected to define the substantive scope of section 1905 is not surprising. Undoubtedly, the *Chrysler* Court was aware of this dilemma

when it handed down its decision. The Court apparently believed that it was necessary to disregard the limitations of section 1905 in order to develop some meaningful protection for those who submit confidential records to the federal government. The problem, however, is that any judicially imposed limitations on an agency's discretion to disclose is contrary to the full disclosure mandate of the FOIA. As a result, the Supreme Court's actions in *Chrysler Corp. v. Brown,* like those in *FAA v. Robertson,* will prove to be illusory. It is submitted that the problems underlying the reverse FOIA phenomenon will not be resolved until Congress is convinced that intervention is necessary.

KEVIN W. GRIFFIN

The Continuing Separation of Functions Problem Under Section 554(d) of the Administrative Procedure Act

"[I]t is unreasonable that any man should determine his own quarrel. . . ."[1]

One of the most important aspects of our current legal system is the adjudication of disputes by impartial decision makers. In contrast, decision makers in federal administrative bodies were given blended powers by Congress thus incorporating within one organization a number of functions that our legal system seeks to separate: adjudication, legislation and prosecution. Although this prospect of combining the function of adjudication with any other function clashes with our fundamental legal and political ideals, the intermingling of functions remains a characteristic and enduring aspect of a federal regulatory agency.

A source of continuing controversy exists when an administrative law judge (ALJ) presides over a case which he has previously investigated or prosecuted for an agency. This procedural framework has repeatedly given rise to biased triers of fact. Yet, under section 554(d) of the Federal Administrative Procedure Act (APA) a person "engaged in the performance of investigative or prosecuting functions for an agency in a case may not, in that or a factually related case, participate or advise in the decision [or] recommended decision. . . ."[2] The major underlying

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1. W. BLACKSTONE, COMMENTARIES ON THE LAW OF ENGLAND 91 (1771).

2. Pub. L. No. 89-554, 60 Stat. 237 (1946) (codified at 5 U.S.C. § 554(d) (1976)). This section of the Administrative Procedure Act states in its entirety:

> (d) The employee who presides at the reception of evidence pursuant to section 556 of this title shall make the recommended decision or initial decision required by section 557 of this title, unless he becomes unavailable to the agency. Except to the extent required for the disposition of ex parte matters as authorized by law, such an employee may not —
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> (1) consult a person or party on a fact in issue, unless on notice and opportunity for all parties to participate; or
>
> (2) be responsible to or subject to the supervision or direction of an employee or agent engaged in the performance of investigative or prosecuting functions for an agency.
>
> *An employee or agent engaged in the performance of investigative or prosecuting functions for an agency in a case may not, in that or a factually related case, participate or advise in the decision, recommended decision, or agency review pursuant to section 557 of*

concern of section 554(d) is that such an overlap in functions or exposure to ex parte information[3] serves as a potential source of bias or prejudgment.[4] It is this preconceived point of view that affects the weight of evidence in formal administrative adjudication. Once such prejudgment taints an administrative proceeding, subsequent adjudication should not be allowed to stand. In order to fully satisfy due process requirements, section 554(d) requires administrative hearings to be conducted in an impartial manner. The basis for determining objectivity, however, remains complex and inconsistent.

Disagreement persists over when such prior participation or ex parte contact actually has a prejudicial effect on the outcome of the administrative decision making process. The question inevitably arises concerning which test the courts will implement to determine whether the parties in interest received an impartial hearing before an ALJ. Two principal tests have arisen. One line of authority would provide an ALJ with a "presumption of honesty and integrity,"[5] while another more closely inspects the "appearance of complete fairness"[6] during an administrative adjudication. Despite the more onerous burden that a presumption of an ALJ's honesty and integrity imposes upon a claimant, under either test the claimant must nevertheless prove that an adjudicator failed to be impartial. A corollary issue which must also be addressed is what level of prior participation or ex parte contact will be sufficient to disqualify an ALJ. Although the rules for disqualification

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this title, except as witness or counsel in public proceedings. This subsection does not apply —

(A) in determining applications for initial licenses;

(B) to proceedings involving the validity or application of rates, facilities, or practices of public utilities or carriers; or

(C) to the agency or a member or members of the body comprising the agency.

Id. (emphasis added).

3. Ex parte communication is that information gained which is not in the record of the case. Often, it takes the form of extra quasi-judicial information such as letters, documents or conversations. The prejudicial effect that such contact may have is quite obvious: the party against whom this information is offered will not have the opportunity to rebut. The risk of ex parte contact in administrative proceedings is heightened due to the overlap in duties that may reside in one individual. *See* Grolier Inc. v. FTC, 615 F.2d 1215 (9th Cir. 1980). *See also* notes 101-07 and accompanying text *infra.* Ex parte prohibitions are also raised under other provisions of the APA. *See* 5 U.S.C. § 557(d)(1) (1976). When such a commingling of duties or level of ex parte contact is sufficient to form a certain prejudice in the mind of the adjudicator, he is deemed to have prejudged the matter.

4. Prejudgment involves a resolution of disputed issues precedent to a hearing on the facts of a particular case. Of course, if an essential element of the conclusion is a factual determination, the prejudgment of the conclusion presupposes the prejudgment of facts, and hence to the extent that the latter prejudgment is proscribed, the former is proscribed also.

5. *See* Withrow v. Larkin, 421 U.S. 35 (1975). For a discussion of *Withrow* and its implications, *see* notes 57-64 and accompanying text *infra.*

6. *See* Amos Treat and Co. v. SEC, 306 F.2d 260 (D.C. Cir. 1962). For a discussion of *Amos Treat* and its implications, *see* notes 70, 71, 73-82 and accompanying text *infra.*

appear to be clear, application of section 556(b)[7] in particular cases presents practical difficulties for agency review boards and courts of law.

This Note will compare and analyze the different tests used by federal courts in determining when an adjudicator should be disqualified due to prejudgment. Part I focuses attention on the APA and its legislative history, the rise of the ALJ and the method for disqualification. Part II examines the judicially created tests employed to determine whether or not an ALJ has prejudged a particular action. In Part III, the Note concludes with a brief comparison of both tests and a proposal for stricter separation among various administrative functions.

I. DEVELOPMENT OF THE APA AND THE SEPARATION OF FUNCTIONS PRINCIPLE

A. Federal Agencies in the Pre-APA Period

The history of the modern administrative process has been marked by a rapid rate of expansion.[8] The fundamental purpose of these agencies was to alleviate much of the burden from the courts by adjudicating and regulating certain matters of expertise which were perceived as being beyond the competence of the courts. Prior to passage of the APA in

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7. 5 U.S.C. § 556(b) (1976). *See* notes 30-39 and accompanying text *infra*.

8. Approximately one-third of all present federal administrative agencies were created prior to 1900. Most notably, the Interstate Commerce Commission was instituted in 1887 and the Civil Service Commission in 1893. An additional one-third of federal agencies were created between 1900 and 1930, in particular the Federal Reserve Board in 1913, the United States Tariff Commission in 1916, and the Federal Trade Commission in 1924. By the time Franklin Roosevelt became President in 1933, reliance upon the administrative process was an established practice. Nevertheless the dominance of the administrative process in modern American government is commonly associated with President Roosevelt. The New Deal era which Roosevelt developed radiated a faith in the capacity of the administrative process, perhaps exceeding that of any prior administration. In fact, the New Deal did create a large number of administrative agencies to attack the nation's economic and social problems. Six agencies which eventually wrought change in American life included the Federal Deposit Insurance Corporation (1933), the Tennessee Valley Authority (1933), the Federal Communications Commission (1934), the Securities and Exchange Commission (1934), the National Labor Relations Board (1935), and the Civil Aeronautics Board (1938).

The period from 1920-1945 created the most concern for those legislators, judges and commentators who viewed the growth of the administrative process as beyond control. Since the mid-1930's, however, federal agencies have grown larger and more powerful than at anytime previously.

The tradition of answering social and economic problems through various administrative channels persists. Under Democratic and Republican presidents alike, Congress has regularly chosen to rely upon administrative regulation. After the Depression, Congress initiated numerous new agencies to deal with present and imminent difficulties facing America. These included the Atomic Energy Commission (1946), the Selective Service Commission (1948), the National Aeronautics and Space Administration (1958), the Federal Maritime Commission (1961), the Equal Employment Opportunity Commission (1965), the Environmental Protection Agency (1970), the Office of Safety and Health Review (1970), and the Consumer Products Safety Commission (1972).

1946,[9] federal administrative agencies followed a variety of procedural outlines.[10]

One early, though major concern, was focused on the role of courts in reviewing administrative determinations. Often, federal courts deferred to the particular administrative expertise which developed within each of the different agencies.[11] Courts which reviewed federal agency decisions quite consistently rejected contentions that a combination of functions within one individual violated the due process rights of aggrieved parties.[12] These courts went so far as to invoke the rule of necessity[13] to justify the participation of hearing officers in the judging function despite the fact that they had been influenced by prior investigation or prosecution.[14] Similarly, some courts recognized that due

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9. Act of June 11, 1946, Pub. L. No. 89-554, 60 Stat. 237 (codified at 5 U.S.C. §§ 551-576, 704-706) (1976).

10. *See* FREEDMAN, CRISIS AND LEGITIMACY: THE ADMINISTRATIVE PROCESS AND THE AMERICAN GOVERNMENT 59 (1978).

11. J. Landis, *Administrative Policies and the Courts,* 47 YALE L.J. 519, 530 (1937-1938).

12. Many federal courts believed that due process consisted of only notice and an opportunity to be heard. *See* NLRB v. Botany Worsted Mills, 133 F.2d 876 (3d Cir. 1943); NLRB v. Baldwin Locomotive Works, 128 F.2d 39 (3d Cir. 1942). *See also* Brinkley v. Hassig, 83 F.2d 351 (10th Cir. 1936) ("agency as expert" doctrine given great weight due to the substantive expertise possessed by agencies); Reynolds v. United States, 68 F.2d 346 (7th Cir. 1934). Commentators, such as James W. Landis, in a classic discussion of the administrative process written in 1938, argued that with "the rise of regulation, the need for expertise became dominant; for the art of regulating an industry requires knowledge of the details of its operation and the ability to shift requirements as the condition of the industry may dictate." J. LANDIS, THE ADMINISTRATIVE PROCESS 23 n.32 (1938).

13. The great exception to disqualification is the rule of necessity which permits an adjudicator or commission tainted with legal bias, to continue adjudicating in a proceeding if there is no available substitute. *See* Edwards, *Disqualification of Federal Trade Commission or Members Thereof,* 8 A.L.R. FED. 300, 306 (1971).

14. These courts deferred to agency expertise to such a degree so as to permit an aggrieved party to face a biased hearing examiner. *See* Brinkley v. Hassig, 83 F.2d 351 (10th Cir. 1936), where the Tenth Circuit Court of Appeals stated:

> From the very necessity of the case has grown the rule that disqualification will not be permitted to destroy the only tribunal with power in the premises. If the law provides for a substitution of personnel on a board or court, or if another tribunal exists to which resort may be had, a disqualified member may not act. But where no such provision is made, the law cannot be nullified or the doors to justice barred. . . .

Id. at 357.

In Marquette Cement Mfg. Co. v. FTC, 147 F.2d 589 (7th Cir. 1945), the court discussed the possibilities of disqualifying the entire Commission from participating in a particular proceeding. Even if it were to reach a determination of bias against the Commission, the court determined that the Congress had not prescribed a provision in the APA for disqualification of an entire commission membership. *Id.* at 592. Furthermore, the court recognized that the doctrine of necessity as stated in *Brinkley* would not allow the court to disqualify every member of the Commission. The court pronounced: "The fact remains that the Federal Trade Commission is the only tribunal clothed with the power and charged with the responsibility of protecting the public against unfair methods of competition and price discrimination." *Id.* at 594.

For a discussion on the doctrine of necessity and the concentration of functions problem within administrative agencies, *see* Davey, *Separation of Functions and the National Labor Relations Board,* 7 U. CHI. L. REV. 328 (1940). Commentators were sensitive to the problems that could potentially be encountered if agency officials were deprived of information gained from acting in several capacities. Davey stated that "[w]hile there may be ample theoretical justification for

process did not forbid the combination of judging with other apparently inconsistent functions.[15] However, other states recognized the anomaly in procedure and adopted the position that it was necessary for the review of administrative decisions to closely examine the administrative record with a view toward protecting the fundamental rights of the parties involved.[16]

As a result of divergent views over the gravity of potential due process violations, various proposals were set forth calling for reform in administrative management.[17] The dilemma facing Congress was to separate the inconsistent functions in such a way as to protect the efficacy of agency expertise. The final blueprint for what would eventually become the APA was primarily the result of three governmental commissions: The Attorney General's Committee on Administrative Procedure, The President's Committee on Administrative Management and The Senate Judiciary Committee.

The Attorney General's Committee was the major force behind the formulation of the APA. This Committee believed that an internal

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denying examiners access to such materials, in administrative practice such a policy has little in its favor. Judicial fairmindedness appears more likely to be assured by the examiner's having an accurate knowledge of the facts than by his remaining in virtual ignorance." *Id.* at 336. Davey stated further that he could see "no legitimate reason for transferring the judicial functions of the board either to another administrative body or to the federal courts." *Id.* at 345. He urged that such change would mean still further delay in those cases requiring formal procedure.

15. *See* Hawkins v. Grand Rapids, 192 Mich. 276, 158 N.W. 953 (1916) (a council committee which formulated removal charges subsequently adjudicated those charges).

16. *See* Ging v. Board of Educ., 213 Minn. 550, 7 N.W.2d 544 (1943) where the Minnesota Supreme Court observed that a handicap accompanied administrative bodies due to their concentration of functions. This state board combined the roles of complainant, prosecutor and judge which to the petitioner represented that predetermination of issues was likely. As such the court reasoned "that reviewing administrative decisions courts zealously examine the record with a view to protecting the fundamental rights of the parties. . . ." *Id.* at 565, 7 N.W.2d at 553. The court also found merit in the American Bar Association's efforts to reconcile such malfunctions in agency procedure. Until a divorce between these inconsistent functions could be established, the court accepted "reluctantly" the apparent "irresistible tendency of administrative bodies everywhere to predetermine matters of a judicial nature coming before them." *Id.* at 556, 7 N.W.2d at 554. *See also* J. DICKINSON, ADMINISTRATIVE JUSTICE AND THE SUPREMACY OF THE LAW IN THE UNITED STATES (1927). Dickinson's writings indicate that full due process protections were being denied to interested parties who went before administrative agencies for conflict resolution. For a current critique of the administrative process, *see* FREEDMAN, CRISIS AND LEGITIMACY: THE ADMINISTRATIVE PROCESS AND THE AMERICAN GOVERNMENT (1978).

17. The American Bar Association (ABA) was a rather prominent force in seeking fundamental changes in federal administrative procedure. A bill drafted and published by the Association provided:

> [A]ll hearing, deciding, or reviewing officers shall personally consider the whole or such parts of the record as are cited by the parties, with no other aid than that of clerks or assistants who perform no other duties; and no such officer, clerk or assistant shall consult with or receive oral or written comment, advice, data, or recommendations respecting any such case from other officers or employees of the agency or from third parties.

Proposed Federal Administrative Procedure Act, 30 A.B.A.J. 226, 228 (1944). *See also* H.R. REP. NO. 1980, 79th Cong., 2d Sess. 15 (1945), *reprinted in* [1946] U.S. CODE CONG. & AD. NEWS 1195, 1196-1204.

separation of functions would be the wisest policy to follow with respect to those federal administrative agencies which perform more than one function.[18] The Committee suggested that such internal separation of functions would afford all interested parties who appear before a particular agency similar protections as "substantially complete separation,"[19] without damaging the structure of these agencies and thereby hampering their ability to fully investigate cases for the benefit of the public. At the same time, however, the Committee conceded that a mere internal splitting up of functions would not in itself cure the administrative procedural deficiencies of the past. Taking cognizance of the "factors of mind and experience which play an integral role in the decision making process,"[20] the Committee did not conclusively find that an overlap in functions could be eliminated through internal separation.[21] To insure a substantial division of functions, it was suggested that an independent panel of hearing officers be established within each agency who would be insulated from all phases of a case other than hearing and deciding.[22] The President's Committee on Administrative Management expressed an similar concern for continued

18. The Attorney General's Committee on Administrative Procedure had urged for a provision requiring a strict internal separation of functions. It urged that "for an individual to serve as both the advocate and judge in the same case is obviously improper, because a man who has buried himself in one side of an issue is disabled from bringing to its decision that dispassionate judgment which Anglo-American tradition demands of officials who decide questions." REPORT OF THE ATTORNEY GENERAL'S COMMITTEE ON ADMINISTRATIVE PROCEDURE, S. DOC. NO. 8, 77th Cong., 1st Sess. 50, 56 (1941). For example, the Civil Aeronautics Board, the Securities and Exchange Commission, the Federal Trade Commission, among other federal agencies, act through the exercise of numerous interrelated powers, deciding cases and prescribing rules and regulations. It is these agencies which conduct formal adjudicatory hearings to determine violations of agency rules.

On the other hand, the prescribed separation of functions as proposed by the Committee, and later incorporated in the APA, does not apply to determinations by agencies involving the validity and application of rates, facilities or practice of public utilities or carriers. *See* 5 U.S.C. § 554(d)(2)(A) & § 554(d)(2)(B) (1976). The legislative history surrounding the formulation of the APA shows an overall intention to develop the separation of functions principle in the limited circumstance of an accusatory hearing. Thus, the agencies which are not directly affected by the separation of functions provision proposed by the Committee include the Federal Deposit Insurance Commission, the Patent and Trademark Office, the Internal Revenue Service, and the Social Security Administration. With respect to such agency exemption from § 554(d), one noted commentator stated, "[C]ombination of investigation with judging may be bad in such prosecuting agencies as the NLRB and FTC, but it may be harmless and even affirmatively desirable in claims agencies which are as much interested in making payments to the deserving as in withholding payments from the undeserving." K. Davis, *Separation of Functions in Administrative Agencies,* 61 HARV. L. REV. 389, 394 (1948).

19. *See* REPORT OF THE ATTORNEY GENERAL'S COMMITTEE ON ADMINISTRATIVE PROCEDURE, S. DOC. NO. 8, 77th Cong., 1st Sess. 55 (1941). The Committee noted that "[i]t is important . . . not to make the mistake of conceiving of an agency as a collective person and concluding that, because the agency initiates action and renders decision thereafter, the same person is doing both. . . . Such internal separation by no means eliminates the problem of combination of functions; but it alters, or if wisely done may alter, its entire set and cast." *Id.*

20. *Id.*

21. *Id.*

22. *Id.* at 56.

agency stability, but went one step further by recommending complete separation.[23] The primary responsibility of the Senate Judiciary Committee was to frame the final bill which became an integration of various committee and organizational evaluations.[24]

B. Immediate Impact of the APA

Subsequent to its enactment, the main goal of the APA, of effectuating needed reforms in federal administrative procedure, was not carried out on a consistent basis. The Congress, after imposing the separation of functions principle through passage of section 554(d), began to selectively exempt federal agencies from that same requirement.[25] These exemptions from section 554(d) have been the subject of

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23. The President's Committee on Administrative Management had studied the intensification of the administrative process in federal government. The dilemma facing the Committee was clear: how to remedy the present situation without unduly interfering with necessary governmental operations. Unlike the Attorney General's Committee, this evaluating body found complete separation of functions to be the only viable solution. It stated:

> There is conflict of principle involved in their [federal agencies] make-up and functions. . . . They are vested with duties of administration . . . and at the same time they are given important judicial work. . . . The evils resulting from this confusion of principles are insidious and far reaching. . . . Pressures and influences properly enough directed toward officers responsible for formulating and administering policy constitute an unwholesome atmosphere in which to adjudicate private rights. But the mixed duties of the commissions render escape from these subversive influences impossible. Furthermore, the same men are obliged to serve both as prosecutors and as judges. This not only undermines judicial fairness; it weakens public confidence in that fairness.

H.R. REP. NO. 1980, 79th Cong., 2nd Sess. 24, *reprinted in* [1946] U.S. CODE CONG. AD. NEWS 1195. Commentators see complete separation as a somewhat radical solution to a problem which does not warrant radical answers. Such separation would require very basic structural changes in all administrative agencies as they presently exist and existed at the time the proposal was put forth. Such a structural reform would involve a controversial question. The proposal calls for one agency to serve as an investigative and prosecutive wing and a separate agency for adjudicating purposes. Commentators question whether complete separation is necessary for agencies which fix rates in hearings rather than adjudicate violations of agency regulations. *See* K. Davis, *Separation of Functions in Administrative Agencies,* 61 HARV. L. REV. 389 (1948).

24. On November 19, 1945, the Senate Committee on the Judiciary unanimously reported the APA bill as revised. They stated affirmatively that "the Committee on the Judiciary is convinced that, at least in essentials, there should be some simple and standard plan of administrative procedure." S. REP. NO. 752, 79th Cong., 1st Sess. 1 (1945), *reprinted in* [1946] U.S. CODE CONG. & AD. NEWS 1204.

25. The Immigration and Naturalization Service has been exempted from the separation of functions provision of the APA. A brief history surrounding this exemption is helpful in understanding the issues which confronted the courts and the Congress in their early interpretation of the separation of functions principle under the APA.

In Wong Yang Sung v. McGrath, 339 U.S. 33 (1950), the United States Supreme Court examined the scope of the newly passed APA and considered whether the Act embraced deportation proceedings within the Immigration and Naturalization Service. The Court traced the history of the APA emphasizing its nature as legislation designed to correct the evils inherent in existing administrative procedures. *Id.* at 36-41. Since the APA's theme was manifestly one of reform, the Court found that the duty of the judiciary was to effectuate "its remedial purposes where the evils it was aimed at appear." *Id.* at 41. One such evil was the commingling in a single individual of the incompatible offices of prosecutor and adjudicator.

The Court recognized that since immigration hearings were mandated by constitutional direc-

criticism by judges, commentators and the American Bar Association. Proposals recommending a stricter adherence to APA requirements were sought.[26]

Significantly, the APA did not grant examiners the independence of federal judges. However, it made them semi-independent by removing them from individual agency control, in favor of oversight by the Civil Service Commission. Under the APA, the examiner has gradually developed into an ALJ.[27] The APA gives the ALJ decision making powers comparable to those of a trial judge,[28] yet his appointment is made from Civil Service Commission's register of eligibles.[29] If an ALJ

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tives of due process rather than by immigration laws, the procedures under the APA were applicable because "[w]hen the Constitution requires a hearing, it requires a fair one, one before a tribunal which meets at least currently prevailing standards of impartiality." *Id.* at 50.

Wong Yang Sung triggered immediate Congressional response. Within six months, the House of Representatives attached a rider to an appropriations bill which specifically exempted the Immigration and Naturalization Service and the Immigration Act of 1917 from the adjudicatory mandates of the APA. *See* Act of Sept. 27, 1950, 64 Stat. 1044 (codified at 8 U.S.C. § 155(a) (1950) (codified at 8 U.S.C. § 1252(b) (1954)). For further information on the separation of functions principle and the Immigration and Naturalization Service, *see* Note, *Administrative Procedure — Immigration — Inapplicability of the Administrative Procedure Act to Adjudicator before the Board of Immigration Appeals,* 8 SETON HALL L. REV. 250 (1976-1977).

26. *See* UNITED STATES COMMISSION ON ORGANIZATION OF THE EXECUTIVE BRANCH OF THE GOVERNMENT (1953-1955); TASK FORCE ON LEGAL SERVICES AND PROCEDURE (1955). The irony of this report was that it did not assure effective separation of functions. The draftsmen of the task force assumed that cutting off substantially all consultation with staff would result in separation. In comparison, the Attorney General's Committee on Administrative Procedure was a more realistic appraisal, recognizing that substantial separation through internal division would not entirely remedy this problem. *See* note 19 and accompanying text *supra.*

27. In 1972, the Civil Service Commission adopted the use of the title "administrative law judge" to replace the title of hearing examiner. *See* Fed. Reg. 16,787 (1972). In 1978, the Code was amended by replacing "hearing examiner" with administrative law judge. *See* Act of Mar. 27, 1978, Pub. L. No. 95-251, 92 Stat. 183 (codified at 5 U.S.C. § 1305 (1978)). For further legislative history on the ALJ, *see also* [1978] U.S. CODE CONG. & AD. NEWS 496.

28. 5 U.S.C. §§ 556 & 1305 (1978). *See also* Scalia, *The ALJ Fiasco — A Reprise,* 47 U. CHI. L. REV. 57 (1979). As Professor Scalia notes:

> Of course, administrative law judges perform many other important functions: they make findings of fact of an often extraordinarily difficult nature, not primarily dependent upon the credibility of demeanor evidence; they make important decisions regarding statutory law and agency policy; they write opinions that marshal the facts and frame the issues in a comprehensible fashion; and they conduct proceedings so as to assure a full and informative record.

Id. at 71.

29. B. SCHWARTZ, ADMINISTRATIVE LAW 298 (1976). According to Schwartz, such an appointment is absolute the day the individual enters duty and he does not have to worry about promotion since there is only one grade of ALJ within each federal agency. *See* 5 U.S.C. § 3105 (1978). Civil Service domination of the ALJ employee selection process was not contemplated by the framers of the APA. The Attorney General's Committee on Administrative Procedure urged for the creation of an office of federal administrative procedure which would be responsible for the appointment of hearing examiners. The office would be additionally responsible for the removal of a hearing examiner. *See also* REPORT OF THE ATTORNEY GENERAL'S COMMITTEE ON ADMINISTRATIVE PROCEDURE, S. DOC. NO. 8, 77th Cong., 1st Sess. 47-49 (1941). In addition, ALJs are exempt from performance evaluations by their agencies. *See* 5 U.S.C. § 4301 (1978). The current hiring process represents an effort to preclude the possibility of agency pressure on the reemployment of ALJs. In an effort to induce impartiality through life tenure appointment, an ALJ has the same job

is challenged with a plea for disqualification by an aggrieved party, he will not, under Civil Service hiring practices, be relieved of his duties. Additionally, administrative agencies can be relied upon to consistently reinforce the impartiality of an ALJ who is the subject of a claim for disqualification.[30] A problem occurs when an ALJ will not be in fear of punitive measures, such as removal from office, even though he has been repeatedly disqualified.[31] This problem is aggrandized when the available expertise in a particular agency is limited to only a few individuals.[32] It is submitted that this freedom from long-term reproach may encourage an ALJ to overstep his purely judicial responsibilities to

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security and insulation from outside pressures as provided for federal judges under the Constitution. *See* [1978] U.S. CODE CONG. & AD. NEWS 497.

30. Commissions will rarely if ever disqualify one of their own ALJs. Recently, the FTC in particular was confronted with numerous motions for disqualification of its ALJs. *In re* Kellogg Co., 93 F.T.C. 213 (1979), was a case in which the FTC denied a motion by the petitioner to disqualify the presiding ALJ. The Commission stated that the assertion of the petitioner did not warrant the relief requested. The Commission pronounced that "[u]nder the circumstances we do not believe that any bias, prejudgment or apparent unfairness has been demonstrated." *Id.* Similarly, *In re* Standard Oil Company of California, 78 F.T.C. 1580, *rehearing denied,* 78 F.T.C. 1595 (1971) was an instance where the FTC Board of Appeals regarded the petitioner's challenge for disqualification as within the primary jurisdiction of the ALJ, thus resting within the sole exercise of the allegedly biased examiner's own discretion. The Commission pointed to a number of important countervailing considerations against disqualifying an ALJ who is adjudicating in a particular proceeding, stating that if a disqualification is to take effect it should be initiated by the judge himself. The Commission stated that under § 556(b) of the APA, it had the power to determine whether a presiding officer conducting a hearing on behalf of the Commission is subject to disqualification due to personal bias. However, the Commission was not clear on what procedure to follow concerning disqualification. It reiterated language often used by the Commission in previous cases:

> It is extremely difficult and delicate for a tribunal to assume the responsibility of weighing, objectively, the ability of one of its own members to make an objective judgment in a case. Further, the exercise of such a power to disqualify carries with it an inherent danger of abuse, as a potential instrument for suppression of dissent.

Id. at 1596 (citations omitted).

Finally, *In re* All State Indus., 73 F.T.C. 1242 (1968), the respondent's appeal to the Commission was based on a letter from ALJ Paul Rand Dixon to Senator Warren Magnuson. The respondent's claim was that the letter constituted prejudgment on the part of Dixon. Inevitably, the Commission came to the defense of its own officer, rebutting the respondent's charges by proffering the letter in controversy. According to the Commission, there was no prejudgment. *Id.* at 1246.

31. This is particularly patent where the ALJ who is also a commissioner of the agency in question. Paul Rand Dixon of the FTC has been the subject of repeated disqualification challenges, many of which were successful. Although having been the subject of these challenges, Dixon remained as Chairman of the Commission throughout. *See* Cinderella Career and Finishing Schools, Inc. v. FTC, 425 F.2d 583 (D.C. Cir. 1970), where the court pointed to Dixon's earlier disqualifications from adjudicatory proceedings. *See also* notes 91-98 and accompanying text *infra.* For Dixon's personal comments on disqualification and its effect on the administrative process, *see* Dixon, *Disqualification of Regulatory Agency Members: The New Challenge to the Administrative Process,* 25 FED. B.J. 273 (1965). For a discussion of this article, *see* note 98 *infra.*

32. The rise in rule-making legislation in the major regulatory agencies has had a concomitant effect of increasing hearings to enforce those rules and regulations. However, as of February 1, 1980, the number of ALJs in the following federal agencies were surprisingly few. Federal Trade Commission-13; Civil Aeronautics Board-14; Securities and Exchange Commission-8; Nuclear

engage in activities violative of section 554(d)'s internal separation of functions principle. An increased reliance on government agencies for conflict resolution has necessarily resulted in a concomitant increase in the number of challenges to agency procedure on due process grounds. Thus, the question of when an administrative adjudicator is to be disqualified on the basis of prejudgment becomes a somewhat frequent and delicate problem in judicial administration. The APA sets forth procedures[33] by which a petitioner can seek disqualification of an ALJ.[34] The party asserting such disqualification is required to file, in good faith,[35] a timely[36] and sufficient affidavit[37] setting forth the basis for such disqualification.[38] However, the APA fails to include tests or standards for measuring conduct alleged to be violative of section 554(d), rather deferring to judicial precedent.[39]

The factual distinctions between various cases are central in deter-

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Regulatory Commission-1; U.S. Postal Service-2. *See* Scalia, *The ALJ Fiasco — A Reprise,* 47 U. CHI. L. REV. 57, 63 (1979).

33. The APA states in pertinent part:

> A presiding or participating employee may at any time disqualify himself. On the filing in good faith of a timely and sufficient affidavit of personal bias or other disqualification of a presiding or participating employee, the agency shall determine the matter as a part of the record and decision in the case.

5 U.S.C. § 556(b) (1976).

34. For comments on the structure and format of this provision, *see* Edwards, *Disqualification of Federal Trade Commission or Members Thereof,* 8 A.L.R. FED. 300 (1971).

35. *See* Long Beach Federal Sav. and Loan Ass'n v. Federal Home Loan Bank Bd., 189 F. Supp. 589, 612 (S.D. Cal. 1960), *rev'd on other grounds,* 295 F.2d 403 (9th Cir. 1961). This case articulates in full the standards of good faith, timeliness and sufficiency of an affidavit as prescribed under § 556(b) of the APA.

36. *See* Safeway Stores Inc. v. FTC, 366 F.2d 795 (9th Cir. 1966). There, the moving party filed its affidavit nine months after the hearing was decided. This was not considered to be a timely filing under the APA, § 556(b).

37. *See* Long Beach Federal Sav. and Loan Ass'n v. Federal Home Loan Bank Bd., 189 F. Supp. 589, 612 (S.D. Cal. 1960), *rev'd on other grounds,* 295 F.2d 403 (9th Cir. 1961). Here, sufficiency speaks to the substantive allegations made in the affidavit which set forth the grounds for disqualification.

38. After the plea has been set in motion, the ALJ rules on the affidavit submitted. If the ALJ refuses to recuse himself, and if appealed, the agency shall determine the matter as part of the record with a view toward timeliness and sufficiency. "Recusation" is defined as the process by which a judge disqualifies himself from participating in a proceeding due to interest or prejudice. *See* BLACK'S LAW DICTIONARY 1148 (5th ed. 1979). Since disqualification is a procedural matter, any ruling on it is an interim one which may not usually be appealed to a court immediately. However, if an adjudicator's impartiality is sustained by his agency, a claim of prejudgment may later raise the issue in the courts.

39. In proposing a regulation governing such procedures for disqualification, the FTC's position is that the agency should not:

> Attempt itself to embody the substantive standards governing disqualification. Because such standards have evolved in the context of a particular case, and such evolution can be expected to continue, the Commission believes it advisable not to attempt to fix such standards in its rules, but rather to incorporate by general reference the legal standards applicable to the given proceeding.

45 Fed. Reg. 82,956 (1980).

mining what type of conduct will constitute dismissal. An additional factor is the judicial balancing of private claims of due process violations against claims for continued efficient administrative agency operation.

II. STANDARDS FOR DISQUALIFICATION

A. Test I: The Presumption of Honesty and Integrity

Early Supreme and federal court decisions provided the foundation for establishment of the ALJ's "presumption of honesty and integrity." One of the two constituent strands of analysis which led to adoption of the presumption is elucidated in *FTC v. Cement Institute.*[40] There, the Supreme Court upheld the "agency as expert" doctrine, stating "[t]he kind of specialized knowledge Congress wanted its agency to have was an expertness that would fit it [the agency] to stop at the threshold every unfair trade practice — that kind of practice which, if left alone, 'destroys competition and establishes monopoly.' "[41] Furthermore, the court asserted that in the normal course of agency procedure, overlap and contact between staff is essential to produce an outcome that is in the best interest of the public. This view dominated jurisprudential attitudes toward federal administrative procedure during the years immediately following the passage of the APA.[43] Potential due process problems stemming from the combination of functions within an agency were never considered by the courts to counterbalance the concerns of administrative efficiency due to expertise.

During the 1960's and 1970's federal courts were repeatedly summoned to address the problem of overlapping administrative functions. These decisions adhered to the belief that a combination of functions was not in itself a violation of due process. Such a view was supported by a continued deference to administrative expertise and the larger public interest which would be served by such expertise. In *Pangburn v. Civil Aeronautics Board,*[44] the petitioner's claim was based on a challenge that the Civil Aeronautics Board, by its earlier involvement

40. 333 U.S. 683 (1948). In *Cement Institute,* the FTC had instituted proceedings concerning the respondent's multiple basing point delivered system. It was determined that prior to the hearing, several Commission members had sent reports to Congress, calling the respondent's activities illegal. Nonetheless, the Supreme Court found that these members were not "irrevocably closed on the subject of the respondent's basing point practices." *Id.* at 701.

41. *Id.* at 720. The Court believed that Congress created the federal agency "whose membership would at all times be experienced, so that its conclusions would be the result of an expertness coming from experience." *Id.*

42. *Id.* at 716.

43. *See* notes 14-15 and accompanying text *supra.*

44. 311 F.2d 349 (1st Cir. 1962).

with the facts of the case, was automatically prejudiced toward the petitioner. The First Circuit found that the Board was exempt under the APA exemption clause[45] which expressly excuses from section 554(d)'s operation the "agency or any members of the body comprising the agency."[46]

The court concluded that if there is to be any change in the statutory framework, the impetus for that change must come from Congress and "not from this court."[47] It was acknowledged that the public interest factor was present in sustaining both the statutory exception for agency expertise and the CAB's expertise which was to investigate and report the probable cause of domestic airplane disasters.

The "agency as expert" justification for overlapping administrative functions was followed with minor variations in several later decisions.[48] For example, in *SEC v. R. A. Holman and Co.*,[49] the court seemed reluctant to disqualify the SEC Commissioner for fear that such would undermine agency stability and encourage attempts to disqualify officials. Moreover, the court found that disqualification would destroy the agency's expertise, pronouncing that it would tend to "prevent the

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45. *Id.* at 356. The court was exempting the agency under 5 U.S.C. § 1004 (1946).

46. 5 U.S.C. § 554(d)(2)(C) (1976). The exemption from the separation of functions provision was also justified due to the fact that the Civil Aeronautics Board, under another Congressional statute, the Federal Aviation Act, Pub. L. 78-293, 52 Stat. 1011 (1938) (codified at 49 U.S.C. § 559 (1938)), was specifically permitted to act in more than one capacity, in this case, as both an investigator and adjudicator. The overlap in functions was permitted to allow the agency to develop the causes of domestic airplane accidents so that corrective action could be taken swiftly and to report such findings to the public. The Civil Aeronautics Board has since implemented its own separation of functions provision. *See* 14 C.F.R. § 300.4 (1978).

47. The same basic policy analysis is evident in Berkshire Employees Ass'n v. NLRB, 121 F.2d 235 (3d Cir. 1941). There, the Third Circuit Court of Appeals stated that "[w]hether it is wise public policy to handle certain government functions through such an agency is a problem for the legislative body and not for the courts." *Id.* at 238.

48. *See* Skelly Oil Co. v. Federal Power Comm'n, 375 F.2d 6 (10th Cir. 1967). In *Skelly*, the claim was raised by the petitioner that two commissioners had prejudged an issue which was central to the case. The court found that "[i]n our opinion no basis for disqualification arises from the fact or assumption that a member of an administrative agency enters a proceeding with advance views on important economic matters in issue." *Id.* at 18. The court reaffirmed that examiners were men of high intellectual discipline and as such, the court deferred to their wisdom. *See also* FTC v. Cinderella Career and Finishing Schools, Inc., 404 F.2d 1308 (D.C. Cir. 1968), where the court used the agency as expert doctrine to uphold the Commission's practice of reviewing the recommendations of subordinate investigative employees of the Commission and then making a decision whether to issue a complaint. *Id.* at 1315.

49. 323 F.2d 284 (D.C. Cir. 1963). It must be noted that the decision in *Holman* followed shortly after the decision in Amos Treat & Co. v. SEC, 306 F.2d 260 (D.C. Cir. 1962), where an ALJ was disqualified due to his prior involvement in a case. The *Holman* court was reluctant to disqualify another SEC Commissioner with the fear that repeated disqualification would upset the expertise of administrators by not allowing them to take more of a role in the actual case other than adjudicating. Then appellate judge, Warren Burger, pronounced that "[t]he administrative proceedings cannot be stopped to allow for excursions in the courts with prolonged evidentiary hearings." SEC v. R.A. Holman and Co., 323 F.2d 284, 287 (D.C. Cir. 1963). For a discussion of *Amos Treat, see* notes 70, 71, 73-82 and accompanying text *infra*.

appointment to the Commission of persons who have had previous experience with its work.'"[50]

Similarly, in *Kennecott Copper Corp. v. FTC,*[51] the agency as expert doctrine remained the chief reason for upholding the decision of the adjudicator.[52] The petitioner sought disqualification of an FTC commissioner, who in its view, had not provided a fair hearing. In the second of two challenges, the petitioner asserted that an interview by the Commissioner in a well-known magazine gave an appearance that she indeed had prejudged the case.[53] The court denied both challenges for disqualification. It based its holding on the fact that technical knowledge is required of expert administrators in order to determine when a particular corporation is in violation of trade regulations. Where a company seeks to monopolize a new natural resources market, as here, it becomes the expert's duty to inform the public of such detrimental corporate conduct. These interviews were determined to be "'routine communications'" and as such were "within 'the performance of expert's public functions.' "[54]

The second analytical strand underlying the presumption of honesty and integrity derives from *United States v. Morgan.*[55] There, the Secretary of Agriculture's position in the context of a rate setting hearing was alleged to be biased against the petitioner. In the absence of clear evidence to the contrary, the Court took the position that administrative officials are "assumed to be men of conscience and intellectual discipline, capable of judging a particular controversy fairly on the basis of its own circumstances."[56]

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50. 323 F.2d at 288.

51. 467 F.2d 67 (10th Cir. 1972).

52. Although the court found that expertise in these proceedings was necessary, the appearance of fairness test was given consideration and said to be satisfied because the "commissioners were mindful of this and are accustomed to evaluating matters before them in accordance with issues and evidence." *Id. Cf.* Texaco, Inc. v. FTC, 336 F.2d 754 (D.C. Cir. 1964), *vacated and remanded on other grounds,* 381 U.S. 739 (1965). Other cases that considered the appearance of fairness test found that no appearance of fairness had been violated. Although the agency as expert doctrine remained central to upholding administrative integrity and efficiency, the impact of *Amos Treat* and the appearance of fairness test had a definite impact on the manner in which administrative agencies conducted its hearings. *See* Safeway Stores, Inc. v. FTC, 366 F.2d 795 (9th Cir. 1966), where the petitioner raised the contention that some of the questions presented by the commissioner were similar to those raised while he served on a Senate Subcommittee which investigated certain corporate activities of the petitioner. It was held that this supposed fixed view did not represent an opinion and that a "disinterested observer" would have no reason to believe that he prejudged the dispute. *Id.* at 802.

53. Commissioner Jones, in that prior interview, stated: "When we look at the structure of a market, we must look at the barriers to entry. . . . Perhaps it's easier to see in a case like the *Kennecott Copper-Peabody Coal complaint.* We have here an instance of a copper company that was actually moving into the coal industry on its own." Kennecott Copper Corp. v. FTC, 467 F.2d 67, 80 (10th Cir. 1972).

54. *Id.* at 79-80.

55. 313 U.S. 409 (1941).

56. *Id.* at 421.

Considering the *Cement Institute* line of cases' reliance on the "agency as expert" theory together with *Morgan's* basic assumption of the integrity of administrative officials, it is not difficult to foresee a justification for overlapping agency functions relying upon the honesty and integrity of expert agency officials. Once an area of the law has been relegated to an agency, it naturally may follow that reliance upon the agency's experts to professionally and correctly perform their functions without bias is justified.

The United States Supreme Court, in *Withrow v. Larkin,*[57] seems to have adopted just such a rationale. In *Withrow,* a state medical examination board performed both investigative duties and licensing functions based on those investigations. The petitioner sought to enjoin a hearing on his application based on the contention that this overlapping of functions resulted in prejudgment by those conducting the proceeding.

In reversing the federal district court[58] the Supreme Court required the petitioner to plead and prove circumstances above and beyond the existence of overlapping administrative functions; circumstances which would permit an inference of prejudgment. The petitioner's establishment of such circumstances, in order to overcome a presumption of "honesty and integrity" now afforded administrative officials, seemed doubtful to the Court. The establishment of this presumption had the practical effect of casting the burden upon a petitioner to "convince that, under a realistic appraisal of psychological tendencies and human weaknesses, conferring investigative and adjudicative powers in the same individual poses such a risk of actual bias or prejudgment that the practice must be forbidden if the guarantee of due process is to be adequately implemented."[59]

Specifically, the Court conceded that such a combination of functions created a risk of prejudgment, but it was unwilling to assume, without more, that such a risk was conclusive enough to establish a due process violation.[60] The Supreme Court realized the concerns of legislators and

57. 421 U.S. 35 (1975).

58. The district court's opinion can be found at 368 F. Supp. 793 (E.D. Wis. 1973).

59. Withrow v. Larkin, 421 U.S. 35, 47 (1975). The Attorney General's Committee on Administrative Procedure was equally concerned about such human tendencies that might affect the decision making process. However, the Committee, aware that such tendencies are heightened particularly in the administrative setting, would seek to alleviate these irregularities by mandating a stricter separation of functions. Conversely, the *Withrow* Court accepts this risk of subjectivity and only upon a heightened showing of bias would it find prejudgment.

60. *Id.* at 58. It must be noted that the *Withrow* decision does not involve an agency under the guise of the APA. The APA only applies to federal agencies. However, the application of *Withrow,* to federal agency decisions has been widespread. Although the Supreme Court was addressing the combination of functions in a state agency not governed by the APA, it addressed the separation of functions principle under § 554(d) and the federal court decisions which have interpreted this provision.

courts over whether, in the operation of administrative bodies, distinctive administrative functions should be performed by the same person.[61] Conceding that such a solution to the problems of prejudgment was not easily attainable, the Court asserted that "[t]he incredible variety of administrative mechanisms in this country will not yield to any single organizing principle."[62]

It is noteworthy that the decision in *Withrow* is limited to the proposition that the combination of investigation and prosecution with adjudication is not in itself sufficient to support the conclusion that due process has been denied. Moreover, *Withrow* reinforces earlier jurisprudential thinking which deferred to the knowledge and wisdom of administrative agency officials.[63] This underpinning of "agency as expert" has formed an additional burden for the claimant, who now must overcome the threshold of an expert's presumption of honesty and integrity. What this presumption does is to raise the burden of the petitioner seeking disqualification in order to prove that prejudgment has occurred.[64]

The *Withrow* threshold will be overcome if the moving party can prove that a violation of due process has occurred. In *National Rifle Ass'n v. United States Postal Service,*[65] the plaintiff claimed that his due process rights were violated when the agency's division manager performed several duties which included investigation and adjudication. Initially, the district court stated that the outcome should be based on the Supreme Court's decision in *Withrow,* which set forth the preferable rule that the "combination of functions in the same official or agency is not, without more, a violation of due process."[66] However, in this case the special facts and circumstances required under *Withrow* to overcome the burden of persuasion was present.[67] The plaintiff proffered evidence at trial which consisted of the division manager's answer

61. *Id.* at 51.
62. *Id.* at 52.
63. *Id.* at 58.
64. *Id.* at 47.
65. 407 F. Supp. 88 (D.D.C. 1976).
66. *Id.* at 92, *quoting* Withrow v. Larkin, 421 U.S. 35, 58 (1975).
67. National Rifle Ass'n v. United States Postal Serv., 407 F. Supp. 88, 92 (D. D.C. 1976). However, several recent cases enforce the *Withrow* threshold to deny a petitioner's plea for disqualification. Prior involvement was also an integral issue in Porter County Chapter of the Izaak Walton League of America, Inc. v. Nuclear Regulatory Comm'n, 606 F.2d 1363 (D.C. Cir. 1979), where the threshold of a presumption of honesty and integrity was not overcome by the petitioner. In its interpretation of *Withrow,* this court believed that a distinction remained between claims of structural bias, those claims directed toward the bias which might stem from an overlap in administrative functions for which there is a strong presumption of honesty and integrity, and those claims of individual bias, where the presumption weakens. Reinforcing the presumption of honesty and integrity in instances of structural bias, the agency as expert doctrine was invoked to justify the present administrative overlap in functions. The court asserted:

There is no requirement for the duplication of staffs for each of these preliminary func-

to an interrogatory. The answer indicated that the manager had prejudged the petitioner's eligibility for preferential postal rates. The answer read, in pertinent part, "I, therefore, had the opinion that plaintiff was not qualified for the special second-and-third-class rates before plaintiff's appeal was considered."[68] On the basis of this evidentiary material, the court found that the petitioner had overcome *Withrow's* burden of proof and took cognizance that indeed his due process rights were violated.[69]

B. The Appearance of Fairness

Cases supporting the presumption of honesty and integrity reflect the confidence of the courts in the individual presiding at a formal administrative hearing. However, there exists a contrasting view whereby the "appearance of fairness" consideration becomes more crucial than the presumption of honesty and integrity in determining the credibility of administrative procedure. The appearance of fairness test views administrative agencies and officials in a more critical manner, taking into consideration that the concentration of different powers in one individual may not be advantageous to the interested parties' due process rights.

Where a fundamental infirmity arising out of a case is so great that it establishes an absolute lack of an appearance of fairness, immediate district court review will be granted.[70] In such a situation, exhaustion of

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> tions. The limited number of available experts might preclude such a course in any event. But there is more to it than that. The point is that the various preliminary functions are interrelated and their efficient discharge is aided by the staff's familiarity with developing situations. The staff's expertise is central and integrative. This is an inherent part of agency expertise.

Id. at 1372. This court went so far as to proclaim that "the due process clause makes a basic assumption of intellectual integrity in assessing a whole record in the light of new information." *Id.*

Similarly, in Ash Grove Cement Co. v. FTC, 577 F.2d 1368 (9th Cir. 1978), the petitioner failed to demonstrate any outstanding factors which would lead the court to find actual bias on the part of the adjudicator. The *Withrow* presumption of administrative integrity was not adequately rebutted when Ash Grove sought to prove that many of the facts reported by the staff in its "Economic Report" and some of the tentative conclusions subsequently reached in the enforcement policy were mirrored in the complaint against the petitioner. *Id.* at 1376. The court affirmed the credibility of the Commission's procedure and held that such an overlap in functions did not rise to the level of prejudgment. *Id.*

68. National Rifle Ass'n v. United States Postal Serv., 407 F. Supp. 88, 93 (D.D.C. 1976).

69. *Id.* at 94.

70. *See* Amos Treat & Co. v. SEC, 306 F.2d 260 (D.C. Cir. 1962). In *Amos Treat,* the fundamental infirmity was established through a showing by the petitioner that the adjudicator was exposed to both ex parte communication and that he was previously involved with the case as an investigator. If the fundamental infirmity claimed was not the result of both ex parte contact and prior participation, "[s]uch irregularities, subject to review upon the whole record, would have provided no basis for action by the District Court. . . ." *Id.* at 262. For a more complete discussion of *Amos Treat, see* notes 73-82 and accompanying text *infra.*

Similarly, district court review has been granted in other cases. *See* Sterling Drug, Inc. v.

administrative remedies will not be necessary if it is demonstrated that these administrative procedures were inadequate to prevent irreparable injury. In related instances, a violation of the appearance of fairness may exist, but immediate district court review will not be mandated if the impropriety is not of sufficient magnitude. In these cases, exhaustion of administrative remedies must generally be accomplished before courts will intercede.[71] The appearance of fairness in either situation can be breached and a finding of prejudgment found in three instances: (1) prior participation, (2) ex parte contact and (3) preformed opinion.[72]

The leading case in this area was *Amos Treat and Co. v. SEC.*[73] This decision marked the beginning of a developing line of cases which ascertained that the appearance of fairness was as important as the actual fairness of the hearing.[74] The *Amos Treat* court sought precedent from

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FTC, 450 F.2d 698 (D.C. Cir. 1971); Fitzgerald v. Hampton, 467 F.2d 755 (D.C. Cir. 1972); Association of Nat'l Advertisers, Inc. v. FTC, 460 F. Supp. 996 (D.D.C. 1978). For further information on *Association of Nat'l Advertisers* and the applicability of disqualification in rulemaking proceedings, *see* note 100 and accompanying text *infra*.

Immediate judicial review is not the normal course of relief for an aggrieved party to follow. The district court will deny review where the agency conduct forming the basis for the complaint is not sufficiently egregious or has not resulted in a fundamental infirmity. Thus a claim of ex parte communications between agency officials and one party before the agency, without more, should await final agency action before judicial review is available. *See* SEC v. R.A. Holman and Co., 323 F.2d 284 (D.C. Cir. 1963). For a discussion of the *Holman* case, *see* notes 49-50 and accompanying text *supra*.

Recently, petitioners have been denied direct court review. In Coastal States Gas Corp. v. DOE, 84 F.R.D. 278 (D. Del. 1979), the deprivation of due process was not of such a fundamental nature as to necessitate court action prior to final agency determination. Recognizing that immediate district court review was only an exception to the usual exhaustion of administrative remedies under 5 U.S.C. § 704 (1976), the court denied such review. *Id.* at 283.

71. *See* note 70 *supra*.

72. Early federal court cases rejected the belief that preconceived opinion may be called prejudgment. *See* Lumber Mutual Cas. Ins. Co. v. Locke, 60 F.2d 35, 38 (2d Cir. 1932); National Lawyers Guild v. Brownell, 126 F. Supp. 730 (D.D.C. 1954). Although both may be the end product of subjectivity, it should be noted that an important distinction remains between prejudgment of fact and preformed opinion on non-legal issues. This distinction is best exemplified when an ALJ merely enters a proceeding with advanced views on important matters in issue. This alone will not constitute grounds for disqualification under any test. However, prejudgment will occur as in Texaco, Inc. v. FTC, 336 F.2d 754 (D.C. Cir. 1964), *vacated and remanded on other grounds,* 381 U.S. 739 (1965), where the commissioner delivered a press release prior to adjudication and where that press release evidenced an already formed opinion as to the guilt or innocence of the parties involved in the matter presently before the agency. The APA, at present, does not have any provision regarding disqualification due to preconceived opinion.

73. 306 F.2d 260 (D.C. Cir. 1962).

74. The decision in *Amos Treat* developed from earlier federal case law. The appearance of fairness test was first applied to administrative adjudication in TWA v. Civil Aeronautics Bd., 254 F.2d 90 (D.C. Cir. 1958). The court held that a strict appearance of fairness test was based on a clear separation of functions. Following *TWA,* in Gilligan, Will & Co. v. SEC, 267 F.2d 461 (2d Cir.), *cert. denied,* 361 U.S. 896 (1959), the appearance of fairness test was more sharply defined. An added ingredient to the test was whether a "disinterested" observer could conclude that the adjudicator under question adjudged the "facts as well as the law of a particular case in advance of hearing it." *Id.* at 469. This consideration became an integral part of the general appearance of fairness test applied in cases that succeeded *Amos Treat. See, e.g.,* Cinderella Career and Finishing Schools, Inc. v. FTC, 425 F.2d 583 (D.C. Cir. 1970).

those decisions which upheld the importance of the appearance of fairness in a criminal proceeding. The earlier case of *In re Murchison*[75] laid the basis for the appearance of fairness test. There, the Supreme Court pronounced:

> A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness. . . .
>
> Fair trials are too important a part of our free society to let prosecuting judges be trial judges of the charges they prefer.[76]

The court in *Amos Treat* applied such reasoning to the conduct of an adjudicator in an administrative proceeding, stating that "[a]t the very least, quasi-judicial proceedings entail a fair trial."[77] Such a concept was later termed "fair play."[78] In *Amos Treat,* a commissioner of the SEC[79] served as director of a Commission finance committee which was investigating the petitioner-corporation prior to a hearing before the SEC. The commissioner participated in developing the facts during the investigation and further, outlined specific recommendations based on those investigative duties.[80] The overlap in function created such an appearance of unfairness at the SEC hearing that a fundamental infirmity to the due process rights of the petitioner was found.[81] Immediate district court review was granted despite contentions by the Commission that the commissioner was exempt from the APA's separation of functions requirement.[82] The due process violation was viewed as so extreme that the exemption from the APA's requirements was accorded

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75. 349 U.S. 133 (1955).

76. *Id.* at 136-37.

77. 306 F.2d 260, 263 (D.C. Cir. 1962).

78. *Id.* at 264.

79. Commissioner Cohen was also the target of another challenged disqualification in San Francisco Mining Exchange v. SEC, 378 F.2d 162 (9th Cir. 1967).

80. 306 F.2d 260, 266 (D.C. Cir. 1962).

81. Therefore, due to the existence of a fundamental infirmity, exhaustion of administrative remedies was not required. One commentator has found *Amos Treat* to be an "extreme case," standing for a doctrine that has a rather limited future, if any. K. DAVIS, ADMINISTRATIVE LAW TEXT § 13.02 (1972). Certainly, the reasoning in Withrow v. Larkin, 421 U.S. 35 (1975), would substantially bolster this evaluation and would greatly restrict immediate district court review where there has not yet been a full exhaustion of administrative remedies.

82. The exemption asserted by the Commission was under 5 U.S.C. § 1004(c) (1946) (current version at 5 U.S.C. § 554(d)(c) (1976)), which stated that the separation of functions provision should not be applicable in any manner "to the agency or a member or any members of the body comprising the agency." In response to this assertion, the court determined that Congress did not intend to permit a Commissioner to participate in the ultimate decision making process while working as an investigator in the same case. To hold otherwise "would be tantamount to that denial of administrative due process against which both the Congress and the Courts have inveighed." Amos Treat and Co. v. SEC, 306 F.2d 260, 266 (D.C. Cir. 1962).

little weight. The appearance of fairness test has been repeatedly upheld in the years following *Amos Treat.*[83]

In *American Cyanamid Co. v. FTC,*[84] the Tenth Circuit Court of Appeals placed the appearance of fairness examination within the disqualification provisions of the APA, which mandates that "all hearings conducted under this title shall be conducted in an impartial manner."[85] In this case, the Commissioner of the FTC, Paul Rand Dixon, was challenged by five aggrieved petitioners who sought to disqualify him from presiding over their agency hearing. It was found by the court that Dixon played an active role in the FTC's earlier investigation of the American Cyanamid Company. Dixon even admitted that " 'as counsel, I played an active role in the accumulation and presentation of this factual data to the members of the Subcommittee.' "[86] Cognizant of the inherent dangers accompanying the concentration of functions in one individual, the court stated that " '[w]e do not expect a Trade Commissioner to be neutral on anti-monopoly policies.' "[87] However, following *Amos Treat,* the court found Mr. Dixon's prior participation to be violative of the appearance of fairness test,[88] as the subject of both the prior investigation and the agency hearing were identical.[89] The court widened the scope of the appearance of fairness test, stating that "[w]herever there may be reasonable suspicion of unfairness, it is best to disqualify."[90] On the other hand, the court chose to maintain the traditional deference given to administrative agencies and its officials by stating: "In holding that Chairman Dixon was disqualified to sit in this case, it is not the intention of this court to reflect in any way upon or

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83. *See* Texaco, Inc. v. FTC, 336 F.2d 754 (D.C. Cir. 1964), *vacated and remanded on other grounds,* 381 U.S. 739 (1965). *Texaco* represented an intermediate point between *Amos Treat* and American Cyanamid v. FTC, 363 F.2d (6th Cir. 1966), in the development of the appearance of fairness test. *See* notes 84-91 and accompanying text *infra.* In *Texaco,* Commissioner Paul Rand Dixon had delivered a speech prior to the hearing which revealed that he had already concluded that Texaco was violating a trade regulation. Following the "disinterested observer" test set forth in Gilligan, Will & Co. v. SEC, 267 F.2d 461 (2d Cir. 1959), the court concluded that a "disinterested reader of Chairman Dixon's speech could hardly fail to conclude that he had in some measure decided in advance that Texaco had violated the Act." 336 F.2d at 760. Surprisingly, immediate district court review was not granted in *Texaco.* Although the court believed that the current commissioner's participation in this case had perhaps greater potential consequences to the petitioner's rights than in *Amos Treat.* Instead of immediate district court review, the court chose to remand the matter to the FTC for *de novo* consideration and without the participation of Chairman Dixon. *Id.* at 764.

84. 363 F.2d 757 (6th Cir. 1966).

85. 5 U.S.C. § 1006(a) (1946) (current version at 5 U.S.C. § 556(b) (1976)).

86. 363 F.2d at 765.

87. *Id.* at 764, *quoting* Texaco, Inc. v. FTC, 336 F.2d 754, 764 (D.C. Cir. 1964) (Washington, J., dissenting).

88. *Id.* at 767.

89. *Id.* at 768.

90. *Id.* at 767.

question in the slightest degree the integrity, ability or dedication of the distinguished Chairman of the Commission."[91]

Not every federal court would hold an administrator in such favorable esteem. For example, Dixon was in fact disqualified in two other major FTC matters. In *Cinderella Career and Finishing Schools, Inc. v. FTC,*[92] Commissioner Dixon made a speech to the press, mentioning his views concerning the subject of an upcoming agency hearing.[93] The court stated that "we are charged with the responsibility of making certain that the image of the administrative process is not transformed from a Reubens to a Modigliani."[94] In other words, like a Reubens painting that leaves nothing to the imagination, the impartiality of a judge should be evident upon first impression. In the instant case, the court sought to balance the public interest served by such a commingled participation against the prejudgment which may be concomitant to such involvement. It was determined that Chairman Dixon's speech rose to the level of prejudgment.[95] The statement made by Dixon to the press was held to have disrupted the appearance of fairness in the agency proceeding.[96] Not only was a determination reached that an appearance of fairness had been violated, but the court found Dixon's "insensitiv[ity] to reality" disgraceful when considering

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91. *Id.* at 768.

92. 425 F.2d 583 (D.C. Cir. 1970).

93. *Id.* at 590. The subject of press releases was controversial in other cases as well. *See* note 83 *supra. See also* Rombough v. Federal Aviation Administration, 594 F.2d 893 (2d Cir. 1979). Here, the petitioner tried unsuccessfully to disqualify the ALJ on the ground of predetermination of crucial facts in a press release. Recognizing that although prejudgment may in fact exist in a formal administrative setting, the court held that certain predeterminations would not constitute prejudgment, stating, "it is not improper for members of regulatory commissions to form views about law and policy on the basis of their prior adjudications of similar issues which may influence them in deciding later cases." *Id.* at 900. Additionally, in Kennecott Copper Corp. v. FTC, 467 F.2d 67 (10th Cir. 1972), no prejudgment was found even though the commissioner had conducted an interview with a magazine in which the petitioner's company was named prior to the actual adjudication. *See* notes 51-54 and accompanying text *supra.*

94. 425 F.2d at 590.

95. While an appeal from the examiner's decision was pending before him, Dixon made a speech before the Government Relations Workshop of the National Newspaper Association in which he stated in pertinent part:

> How about ethics on the business side of running a paper? . . . What would be the attitude toward accepting good money for advertising by a merchant who conducts a "going out of business" sale every five months? *What about carrying ads that offer college educations in five weeks . . . ?* . . . Without belaboring the point, I'm sure you're aware that advertising acceptance standards could stand more tightening by many newspapers. . . .

Id. at 589-90 (emphasis in original).

96. *Id.* at 590 n.10. Dixon's speech gave the appearance that he had prejudged the case. The turning point in reaching this determination was the timing of the speech in relation to the proceedings. Since Dixon was going to hear the same case upon appeal as was mentioned in his press conference, a "disinterested observer" could infer that a definite relationship existed between these comments and the pending matter.

the need for upholding due process protections.[97] Although Dixon was an expert in his field, his expertise could not overshadow the compelling need for an impartial tribunal. Looking to earlier decisions, the court concluded that Dixon was repeatedly "pouncing on the most convenient victim[s]."[98]

Despite the fact that *Withrow v. Larkin*[99] had become accepted by a growing number of federal courts, the appearance of fairness test continued to be utilized and was broadened to include FTC rulemaking proceedings.[100] Although the federal courts have adopted these two

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97. *Id.* at 590.

98. *Id.* at 591. Mr. Dixon's repeated violations of the separations of functions principle may be attributed to his own beliefs as to the manner in which the administrative process should be organized and conducted. In a 1965 article that he authored, Dixon stated:

> This argument misconceives the entire character of the administrative process. It assumes that the regulatory agencies are mere umpires, sternly holding the scales evenly balanced while the "private" and "public" interests fight it out on equal terms. But the terms were never equal. The public is by definition unorganized and mute except when its elected representatives in Congress give its officers to guard its interests. In other words, the Federal Power Commission is not some neutral third force standing between private and public interests — under existing law, it *is* the public voice in these matters. If it stands mute, the public interest goes by default.

Dixon, *Disqualification of Regulatory Agency Members: The New Challenge to the Administrative Process,* 25 FED. B.J. 273, 280 (1965).

However, time and time again federal courts have defined justice in the administrative process somewhat differently than Dixon. One federal tribunal has voiced its disapproval of Dixon's conduct. In Cinderella Career and Finishing Schools, Inc. v. FTC, 425 F.2d 583 (D.C. Cir. 1970), Dixon's manner of providing an equitable hearing before the Commission was called into question. The court pronounced: "We find it hard to believe that former Chairman Dixon is so indifferent to the dictates of the Courts of Appeals that he has chosen once again to put his personal determination of what the law requires ahead of what the courts have time and again told him the law requires." *Id.* at 591.

But Dixon does raise some provocative points. If Congress created these agencies to guard the interests of the public, it may be necessary that agency experts serve in more than one capacity and therefore develop agency efficiency by a combination of zealous research, investigation and prosecution. Furthermore, since much of the investigation and prosecution is highly technical in nature, it may be best to allow one person to follow the case to its conclusion by performing several functions.

In many instances, neutrality toward a corporate-petitioner is not the means by which an agency may safeguard the public at large. If the public interest in a particular violation is sufficient enough, it maybe best to give administrative adjudicators a presumption of honesty and integrity rather than question whether there was an appearance of fairness. The problem is not one which lends itself to simple answers. Indeed, it seems desirable and even necessary for the official to have greater latitude in order to achieve results which are in the best interests of the public, as prescribed by Congress.

99. 421 U.S. 35 (1975).

100. In Association of Nat'l Advertisers, Inc. v. FTC, 460 F. Supp. 996 (D.D.C. 1978), *rev'd,* 627 F.2d 1151 (D.C. Cir. 1979), it was held that rulemaking proceedings in the FTC must follow similar procedures to those used in formal adjudicatory hearings. The FTC had traditionally followed "hybrid" rulemaking procedures, consisting of adjudicative and rulemaking elements. *Id.* at 997. It was determined that no commissioner may jeopardize the adjudicatory process, and that each must follow the appearance of fairness test as enunciated by Amos Treat and Co. v. SEC, 306 F.2d 260 (6th Cir. 1962). *Id.* at 998. In this case the petitioner was a party to a regulatory procedure initiated by the Commission in which it sought an order to disqualify the Chairman of

tests for assessing the impartiality of an adjudicator in an administrative proceeding, difficulties remain in arriving at any given standard for determining what level of ex parte information or prior participation will constitute an infringement of a party's due process rights. The recent case of *Grolier Inc. v. FTC,*[101] continued to enlarge the scope of *Amos Treat* and signified that ex parte contact remains problematic, particularly within the FTC. In this case, the petitioner, after learning of the ALJ's former association with his case as an investigator, requested that the ALJ disqualify himself from further participation in the proceedings.[102] The court recognized that the separation of functions principle applied to those persons who performed commingled duties.[103] Then, the court added a new element to the traditional appearance of fairness test. Noting that the Commission, on the basis of its performance in the instant case, had developed the appearance of a "will to win," the court found that such zeal exhibited by an adjudicator deterred him from providing the petitioner with an objective tribunal.[104] The court's concern for such "zeal" is derived from the legislative intent of the APA which was concerned with maintaining objectivity.[105] In reaching its final determination, the court did not merely focus on the ALJ's former position, but upon his actual ex parte contact while in that former position.[106] Through such ex parte contact it is

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the Commission from further participation in the proceedings. Since the commissioner's conduct was considered highly improper, and was combined with a very substantial showing that the commissioner had prejudged the matter, immediate district court review was granted. 460 F.Supp. at 999. The fundamental infirmity arose out of the Chairman's prior ex parte contact, "conclusory language" and his use of derogatory terms. After reviewing the administrative record, district court review was granted. The court rejected the Commission's contention that the record could not be evaluated until all administrative recourse was exhausted. *Id.* Note however, that the District Court was reversed on appeal. 627 F.2d 1151 (D.C. Cir. 1979).

101. 615 F.2d 1215 (9th Cir. 1980).

102. *Id.* at 1217.

103. *Id.* at 1219.

104. *Id.* However, it seems desirable and even necessary for the official to possess this "zeal" in order to achieve the desired results. *See* Jaffee, *The Reform of Federal Administrative Procedure,* 2 PUB. AD. REV. 141 (1942), where Jaffee remarks that "our tradition rightly interpreted that the judge shall be neutral toward the question of whether or not the specific defendant is guilty. It is a perversion of that tradition that the judge be neutral toward the purposes of the law." *Id.* at 149. *See also* K. DAVIS, ADMINISTRATIVE LAW TEXT § 13.01 (1959).

105. Grolier Inc. v. FTC, 615 F.2d 1215, 1219 (9th Cir. 1980).

106. *Id.* at 1220. In addition to upholding the ex parte information proscription of § 554(d)(1), *see* note 3 *supra,* the court cited § 557(d)(1) which also contained an ex parte prohibition. Section 557(d)(1) states in part:

> In any agency proceeding which is subject to subsection (a) of this section, except to the extent required for the disposition of ex parte matters as authorized by law — (A) no interested person outside the agency shall make or knowingly cause to be made to any member of the body comprising the agency, administrative law judge, or other employee who is or may reasonably be expected to be involved in the decisional process of the proceeding, an ex parte communication relevant to the merits of the proceeding.

5 U.S.C. § 557(d)(1) (1976).

quite likely that the adjudicator may become psychologically predisposed toward one result before he has heard any testimony or received any evidence. Further, in pursuit of the laudable goal of efficiency, he may seek to limit testimony and evidence which he has already determined to be irrelevant. Following the dictates of section 554(d), the court held that "attorney-advisors are precluded from participating in the adjudication of cases in which they have actually performed such [investigative and prosecuting] functions, and in 'factually related' cases."[107]

C. Comparison and Summary

Under *Withrow v. Larkin,*[108] it is recognized that one of the primary advantages of administrative adjudication is the expertise that administrative officials have developed within their particular fields.[109] Such expertise presumes that administrators will be able to exercise their discretion in a particular case on the basis of their accumulated knowledge and experience.

If ALJs were limited to solely adjudicative functions, without involvement in other aspects of a case, the result might seem inconsistent with either the purpose of the administrative process or a fair determination of the particular controversy in question. Only as a result of his diversified participation in agency proceedings is the ALJ able to draw proper inferences from basic facts.[110] For this reason, the APA's separation of functions provision was criticized thusly: "This monstrosity of draftsmanship would prohibit an examiner from talking about his case with his fellow examiner. It would prevent a commissioner from asking the examiner, about witnesses, and, literally interpreted, it would even prohibit conferences among the commissioners who are deciding the case."[111]

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107. Grolier Inc. v. FTC, 615 F.2d 1215, 1221 (9th Cir. 1980), *citing* Au Yi Lau v. Immigration and Naturalization Serv., 555 F.2d 1036, 1043 (D.C. Cir. 1977).

The matter was finally remanded to the Commission for further proceedings on the issue of the ALJ's possible ex parte contact. The breach of § 554(d) could only be established if the Commission released certain documents which would have permitted the petitioner to sustain its burden of proving the commissioner's degree of ex parte knowledge.

108. 421 U.S. 35 (1975).

109. *Id.* at 58.

110. *See In re* Segal and Smith, 5 F.C.C. 3 (1937).

111. K. Davis, *Separation of Functions Within Administrative Agencies,* 61 HARV. L. REV. 389, 396 (1947). *Cf.* Elman, *Administrative Reform of the Federal Trade Commission,* 59 GEO. L. J. 777 (1971). Elman, a former commissioner for the FTC, asserts a radically different perspective toward the use of ex parte information by ALJs. He believes that contact with other staff would provide a "fertile breeding ground for dark rumors and ugly suspicions." *Id.* at 789. He adds further: "They [ex parte communications] permit the appearance of impropriety to cast a cloud over whatever action is taken and to this extent reduce public confidence in the . . . wisdom of Commission action." *Id.*

To the contrary, if we grant a presumption of honesty and integrity along with the status of a judge to these administrative officials, the question arises as to whether they are capable of impartiality while working in more than one capacity. The agency most frequently called upon to decide questions of alleged prejudgment, the FTC, has consistently held that the decision to remove himself from the proceeding will be left "within the exercise of the [administrator's] sound and responsible discretion."[112] If an agency refuses to disqualify one of its own members for prejudice, the result would seem to be final in the absence of outrageous conduct. The appearance of fairness test offered by *Amos Treat* looks critically at current administrative agency organization with a realistic view that a combination of functions in an ALJ creates a situation where prejudgment can more readily exist. Similarly, the presumption of honesty and integrity should not be allowed to overshadow the essential element of impartiality, for it is imperative that federal agencies afford similar protections to parties as those offered by the more orthodox judicial processes of the courts.

Whether an ALJ is eventually disqualified, the effect of a challenge is that it makes already interminable proceedings even longer.[113] Indeed, in many instances delay may be viewed as a corporate tactic. Alternatively, delay may even be an agency effort to forestall the inevitable disqualification of an ALJ. In *Grolier Inc. v. FTC,*[114] the Commission's refusal to proffer requested discovery materials which might have indicated whether the ALJ was indeed biased,[115] is a prime example of an agency creating its own undue delay. Further procedural delays arise where courts intercede in administrative proceedings in which a fundamental infirmity has been found. In this case, the consequence of abbreviating the normal administrative process in order to afford immediate court review presents impediments to effectuating a more stable and efficient administrative process.

Assuming arguendo that a standard of determining bias has been formulated, under the present internal structure of many agencies, there is no concrete way of determining whether an adjudicator will be affected by his involvement in a case. This involvement may arise through either (1) participating in the investigation directly; (2) advising or supervising

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112. *See* Hearst Corp., 80 F.T.C. 1040 (1972). In an order denying respondent's motion to disqualify the commissioner from the proceeding, the Commission believed that this practice was proper and consistent with the law. *Id.*

113. For instance, Grolier Inc. v. FTC, 615 F.2d 1215 (9th Cir. 1980), was first reported as *In re* Grolier Inc., 87 F.T.C. 179 (1976). The administrative process which was designed to take the burden away from the courts and handle cases speedily and efficiently is disturbed by interminable proceedings such as in *Grolier*.

114. 615 F.2d 1215 (9th Cir. 1980).

115. *Id.* at 1222.

subordinates in conducting the investigation; (3) reading ex parte reports on the case from staff employees or conversing with them about it; (4) appearing before the commission or board with respect to some aspect of the investigation or prosecution of the case; or (5) advising or supervising the prosecution. Under this myriad of possible influences, once an adjudicator has taken a position apparently inconsistent with an ability to judge the facts fairly, no amount of insistence on his own objectivity will restore an air of impartiality, let alone a presumption of honesty and integrity to the administrative process.

CONCLUSION

Due process remains an elusive concept whose exact boundaries are undefinable, and whose content varies according to specific factual situations. In order to more consistently ensure the protection of due process rights in administrative proceedings, a more defined separation of functions mandate under section 554(d) of the APA should be sought. The much criticized union of different functions which often reside in one individual is an integral part of agency procedure. Its very presence has enhanced administrative efficiency and simultaneously has created a concomitant appearance of unfairness.

A number of steps can be taken to counteract these internal perils to fairness and impartiality without disturbing the framework of agency adjudication and administration. If basic procedural due process rights are to be safeguarded, the ALJ must serve in no other capacity than that of an adjudicator. Although the Report of the Attorney General's Committee has become the blueprint for the APA and is still a primary source of information about the federal administrative process, its application has been inconsistent and misunderstood. The court in *Grolier* realized the exigency for a return to a stricter separation of functions under section 554(d) as originally advocated by the Committee.

By following a stricter format of separation of functions, as orginally intended by the framers of the APA, the gathering and assessment of evidence regarding a particular violation of law should be left to a high level agency staff official. A commission adjudicator or board would then limit its inquiry to adjudication based on the facts which were established by other agency personnel. This degree of isolation would fulfill the intentions of the framers of the APA who sought strict internal separation over complete separation. By requiring that an adjudicator be more isolated, administrative decisions will necessarily be more objective and thus, achieve greater credibility in many courts. The primary role of agency judges would be enhanced to the extent that their roles are circumscribed, using their expertise only to judge the particular facts before them. Through this separation, governmental in-

terests may in fact be promoted. These interests include preserving the public appearance of impartial justice at the administrative level. This effort must be afforded full statutory authority through leglislation which *clearly* mandates an enforcible means of separating administrative functions. If not, the chronic problem of overlapping functions will continue to deny parties before federal agencies the right to a full and fair hearing.

DAVID SCOTT KATZ

COMMENTS

Aaron v. SEC:[1] The Scienter Requirement In SEC Enforcement of Section 10(b)

Against the backdrop of an economic depression, Congress enacted the Securities Exchange Act of 1934[2] (Exchange Act) geared toward the regulation and policing of the securities market.[3] The Exchange Act, in addition to establishing the Securities and Exchange Commission[4] (SEC), regulates the activities of both purchasers and sellers of securities.[5]

The United States Supreme Court in *Aaron v. Securities Exchange Commission,*[6] recently held that SEC enforcement of section 10(b),[7] the

1. 446 U.S. 680 (1980).

2. Pub. L. No. 291, 48 Stat. 881 (codified at 15 U.S.C. §§ 78a to 78kk (1976)). During the period following the Depression, much legislation was enacted involving the securities market. *See generally* Securities Act of 1933, Pub. L. No. 22, 48 Stat. 74 (codified at 15 U.S.C. §§ 77a to 77mm (1976)); Public Utility Holding Company Act of 1935, Pub. L. No. 333, 49 Stat. 838 (codified at 15 U.S.C. §§ 79 to 79z-6 (1976)); Trust Indenture Act of 1939, Pub. L. No. 253, 53 Stat. 1149 (codified at 15 U.S.C. §§ 77aaa to 77bbbb (1976)); Investment Company Act of 1940, Pub. L. No. 768, 54 Stat. 789 (codified at 15 U.S.C. §§ 80a-1 to 80a-52 (1976)); Investment Advisers Act of 1940, Pub. L. No. 768, 54 Stat. 847 (codified at 15 U.S.C. §§ 80b-1 to 80b-21 (1976)).

3. The Exchange Act begins by stating its purpose "[t]o provide for the regulation of securities exchanges and of over-the-counter markets operating in interstate and foreign commerce and through the mails, to prevent inequitable and unfair practices on such exchanges and markets, and for other purposes." Securities Exchange Act of 1934, 15 U.S.C. §§ 78a to 78kk (1976) (preamble).

4. 15 U.S.C. § 78d(a) (1976).

5. *See* note 3 *supra.*

6. 446 U.S. 680 (1980).

7. Section 10(b) of the Exchange Act provides:

> It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange —
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> . . .
>
> (b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

15 U.S.C. § 78j(b) (1976).

general anti-fraud provision of the Exchange Act, will only succeed upon a showing of the common law element of scienter.[8] This delineation of the SEC injunctive power is the culmination of a history of disagreement among the federal circuits as to the degree of intent necessary to violate section 10(b). *Ernst & Ernst v. Hochfelder*[9] imposed the scienter requirement in the context of the judicially implied private right of action as a remedy to section 10(b) violations.[10] As a result of *Hochfelder,* many courts and commentators wrestled with the question of whether SEC enforcement of section 10(b) should also be subject to the scienter requirement.[11]

The *Aaron* Court relied heavily on the *Hochfelder* rationale[12] in ruling that the language of section 10(b) points to a congressional proscription of only willful conduct.[13] This surprised those courts and commentators who believed that the equitable, policing nature of the SEC injunctive power rendered the *Hochfelder* holding inapplicable to such proceedings.[14] This Comment, after setting out the facts and procedural

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8. Aaron v. SEC, 446 U.S. 680, 691 (1980). "The term 'scienter' is used throughout this opinion ... to refer to 'a mental state embracing intent to deceive, manipulate or defraud.' " *Id.* at 686 n.5, *quoting* Ernst & Ernst v. Hochfelder, 425 U.S. 185, 193 n.12, at 194 (1976). For a discussion of the concept of scienter in the context of the securities laws, *see* 3 L. LOSS, SECURITIES REGULATION 1431 (1961); 3 A. BROMBERG, SECURITIES LAW: FRAUD § 8.4 (1977).

9. 425 U.S. 185 (1976).

10. *See* note 44 and accompanying text *infra.*

11. *See generally* SEC v. Blatt, 583 F.2d 1325 (5th Cir. 1978); SEC v. World Radio Mission, Inc., 544 F.2d 535 (1st Cir. 1976); SEC v. Wills, 472 F. Supp. 1250 (D.D.C. 1978); SEC v. Cenco Inc., 436 F. Supp. 193 (N.D. Ill. 1977); Berner & Franklin, *Scienter and Securities and Exchange Commission Rule 10b-5 Injunctive Actions: A Reappraisal in Light of* Hochfelder, 51 N.Y.U.L. REV. 769 (1976); Harkleroad, *Requirements for Injunctive Actions Under the Federal Securities Laws,* 2 J. CORP. LAW 481 (1977); Note, *The Scienter Requirement in SEC Injunctive Enforcement of Section 10(b) After* Ernst & Ernst v. Hochfelder, 77 COLUM. L. REV. 419 (1977); Note, *Scienter and Injunctive Relief Under Rule 10b-5,* 11 GA. L. REV. 879 (1977); Note, *SEC Enforcement Actions to Enjoin Violations of Section 10(b) and Rule 10b-5: The Scienter Question,* 5 HOFSTRA L. REV. 831 (1977); Note, *Scienter's Scope and Application in Rule 10b-5 Actions: An Analysis in Light of* Hochfelder, 52 NOTRE DAME L. REV. 925 (1977); *Scienter and SEC Injunctive Suits:* SEC v. Bausch & Lomb, Inc. and SEC v. World Radio Mission, Inc., 90 HARV. L. REV. 1018 (1977).

12. The *Aaron* Court adopted *Hochfelder* as precedent, stating:

> In determining whether scienter is a necessary element of a violation of § 10(b) and Rule 10b-5, we do not write on a clean slate. Rather, the starting point for our inquiry is *Ernst & Ernst v. Hochfelder,* ... a case in which the Court concluded that a private cause of action for damages will not lie under § 10(b) and Rule 10b-5 in the absence of an allegation of scienter. Although the issue presented in the present case was expressly reserved in *Hochfelder,* ... we nonetheless must be guided by the reasoning of that decision.
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> ...
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> In our view, the rationale of *Hochfelder* ineluctably leads to the conclusion that scienter is an element of a violation of § 10(b) and Rule 10b-5, regardless of the identity of the plaintiff or the nature of the relief sought.

446 U.S. at 689-91 (citations omitted). For a discussion of the Court's treatment of rule 10b-5, also alleged to have been violated in *Aaron,* see notes 20 & 34 and accompanying text *infra.*

13. 446 U.S. at 691.

14. *See* note 11 *supra.*

history of *Aaron,* will examine the Court's ruling in the light of policy considerations, statutory language and legislative history.

I. FACTS AND PROCEDURAL HISTORY

Aaron was a managerial employee of E. L. Aaron & Co., a registered broker-dealer in securities. His duties involved overseeing the activities of the various firm representatives and keeping due diligence files[15] on those securities for which the firm was serving as market maker.[16]

For ten months beginning in November, 1975 the firm was serving as market maker for the common stock of Lawn-A-Mat Chemical and Equipment Corporation. On a continuing basis during this period two of the firm representatives made false and misleading statements regarding the Lawn-A-Mat common stock.[17] Lawn-A-Mat officers were subsequently contacted by some of the affected investors and notified of the false statements being made by the Aaron Co. representatives. An officer of Lawn-A-Mat consequently contacted Aaron and notified him of these reports. Aaron took no affirmative steps to stop these false and misleading statements aside from suggesting that one of the involved representatives contact the complaining Lawn-A-Mat officer.[18] The SEC brought an injunctive action[19] alleging that Aaron had

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15. Due diligence files are records which establish compliance with the full disclosure requirements of the Securities Act of 1933.

16. Aaron v. SEC, 446 U.S. 680, 682 (1980). A firm serving as market maker in a given stock stands continuously ready to buy and sell such stock from and to retail customers and brokers. This function is essential to provide a ready market for a given stock which otherwise might not be available for trade. A firm serving as market maker is called a stock exchange specialist. *See* N. WOLFSON, R. RUSSO, T. PHILLIPS, REGULATION OF BROKERS, DEALERS AND SECURITIES MARKETS § 3.03(1), at 9 n.28 (1977).

17. 446 U.S. at 682. The misrepresentations led the prospective investors to believe that Lawn-A-Mat was about to market a newly designed and manufactured car and tractor in the near future. No such plan existed. The representatives of the Aaron Company also indicated that the stock was due to rise sharply in price. Lawn-A-Mat was, in fact, losing money at the time.

18. *Id.*

19. The injunction is one of several enforcement tools of the SEC, expressly granted by Congress in § 20(b) of the Securities Act of 1933, 15 U.S.C. § 77t(b) (1976), and § 21(d) of the Securities Exchange Act of 1934, 15 U.S.C. § 78u(d) (1976). For the text of section 21(d), see note 28 *infra.* Its purpose is to prevent future violations of the securities laws, the likelihood of which can be inferred from past violations. SEC v. Keller Corp., 323 F.2d 397, 402 (7th Cir. 1963). Professor Loss states:

> The main problem in most actions for injunction instituted by the SEC is whether there is "equity" — which is usually reduced to the question whether the violations occurred recently enough to warrant the conclusion that there is a threat that the illegal practices will be resumed. . . .
>
> The ultimate test is whether the defendant's past conduct indicates — under all the circumstances . . . that there is a reasonable likelihood of further violations in the future.

3 L. LOSS, SECURITIES REGULATION 1975-76 (1961). The SEC injunction has been described as a "mild prophylactic" in arguing that all the elements of proof necessary for criminal actions should

violated section 10(b)[20] of the Exchange Act. The district court enjoined Aaron from such future violations, finding the facts sufficient to establish Aaron's scienter as a matter of law.[21]

The Second Circuit Court of Appeals affirmed the actions of the district court but on entirely different grounds.[22] Instead of affirming the lower court's finding of scienter, the Second Circuit ruled that scienter need not be established by the SEC in equitable enforcement actions.[23] In reaching its decision, the court relied on a line of Second Circuit cases, in which that court had consistently held that scienter is not an essential element to SEC injunctive actions.[24]

In light of the conflict among the various federal courts concerning the elements of liability required in SEC enforcement actions,[25] the

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not be required in SEC injunctive actions. SEC v. Capital Gains Research Bureau, 306 F.2d 606, 613 (2d Cir. 1962) (Clark, J., joined by Smith, Kaufman & Marshall, J.J., dissenting).

20. For the text of section 10(b), see note 7 *supra*. Also alleged in *Aaron* was a violation of rule 10b-5, promulgated by the SEC pursuant to authority granted in § 10(b). Rule 10b-5 provides:

> It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange,
> (a) To employ any device, scheme, or artifice to defraud,
> (b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or
> (c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security.

17 C.F.R. § 240.10b-5 (1979). The rule was modeled on the language of section 17(a), the general anti-fraud provision of the Securities Act of 1933, 15 U.S.C. § 78j(b) (1976), and designed to "apply to both purchasers and sellers under § 10(b) the legal duty that § 17(a) had applied to sellers alone." Aaron v. SEC, 446 U.S. 680, 715 (1980) (Blackmun, J., joined by Brennan and Marshall, J.J., concurring in part, dissenting in part).

21. The district court stated: "While negligence alone may suffice as a standard for liability in Commission enforcement proceedings, . . . (citations omitted) the fact that Peter Aaron intentionally failed to terminate the false and misleading statements made by Schreiber and Jacobson, knowing them to be fraudulent, is sufficient to establish his scienter under the securities laws." SEC v. E. L. Aaron & Co., [1977-1978 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 96,043, at 91,685 (S.D.N.Y. May 5, 1977). It should be noted that neither the Second Circuit nor the Supreme Court expressed disagreement with the factual findings of the district court.

22. In SEC v. Aaron, 605 F.2d 612, 619 (2d Cir. 1979), the Court stated: "[W]e hold that the scienter requirement enunciated in *Hochfelder* is not applicable to government enforcement actions brought under §§ 10(b) and 21(d) of the 1934 Act."

23. *Id.*

24. *See generally* SEC v. Coven, 581 F.2d 1020 (2d Cir. 1978), *cert. denied*, 440 U.S. 950 (1979); SEC v. Management Dynamics, Inc., 515 F.2d 801, 809 (2d Cir. 1975); SEC v. Manor Nursing Centers, Inc., 458 F.2d 1082, 1096 (2d Cir. 1972); SEC v. Texas Gulf Sulfur Co., 401 F.2d 833, 863 (2d Cir. 1968), *cert. denied sub nom.* Coates v. SEC, 394 U.S. 976 (1969).

25. *Compare* SEC v. World Radio Mission, 544 F.2d 535, 541 n.10 (1st Cir. 1976) (scienter unnecessary element of SEC enforcement of section 10(b) and rule 10b-5) *and* SEC v. Management Dynamics, Inc., 515 F.2d 801, 809 (2d Cir. 1975) (scienter non-essential element to SEC enforcement of section 10(b)) *and* SEC v. Coffey, 493 F.2d 1304, 1314 (6th Cir. 1974), *cert. denied*, 420 U.S. 908 (1975) (recklessness will suffice for SEC enforcement of section 10(b)) *and* SEC v. Dolnick, 501 F.2d 1279, 1284 (7th Cir. 1974) (lack of scienter no defense to SEC enforcement of section 10(b)) *with* SEC v. Blatt, 583 F.2d 1325, 1333-34 (5th Cir. 1978) (scienter required in SEC

United States Supreme Court granted certiorari.[26] The Supreme Court reversed the Second Circuit, ruling that the language of section 10(b) proscribes only "knowing or intentional misconduct."[27] This reading of the statute necessarily precluded SEC injunctive enforcement of section 10(b) in response to negligent acts.[28]

II. THE HOCHFELDER PRECEDENT

In ruling that SEC enforcement of section 10(b) requires a showing of scienter, the *Aaron* Court focused on the statutory interpretation enunciated in *Ernst & Ernst v. Hochfelder.*[29] This strict adherence to the *Hochfelder* Court's interpretation of section 10(b), the meaning of which has been conceded as ambiguous by the Supreme Court,[30] glosses over the very different policy considerations at the basis of *Aaron.*[31] These considerations led many courts and commentators to believe that *Hochfelder* would not serve as precedent in an SEC injunctive proceeding.[32]

The most basic reason that *Hochfelder* might be ill-founded precedent for *Aaron* is the judicially implied status of the private remedy in

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enforcement of section 10(b) and rule 10b-5) *and* SEC v. Cenco Inc., 436 F. Supp. 193, 200 (N.D. Ill. 1977) (expanded definition of scienter required for violations of section 17(a), the anti-fraud provision of the Securities Act of 1933).

26. Aaron v. SEC, 444 U.S. 914 (1979).

27. 446 U.S. at 690, *quoting* Ernst & Ernst v. Hochfelder, 425 U.S. 185, 197 (1976).

28. This injunctive power of the SEC derives from section 21(d) of the Exchange Act, 15 U.S.C. § 78u(d) (1976), which provides in relevant part:

> Whenever it shall appear to the Commission that any person is engaged or about to engage in acts or practices *constituting a violation of any provision of this chapter* . . . it may in its discretion bring an action in the proper district court of the United States . . . to enjoin such acts or practices, and upon a proper showing a permanent or temporary injunction or restraining order shall be granted without bond.

Id. (emphasis added). Since the Court's reading of section 10(b) rules out negligent violations of section 10(b), negligence does not constitute a "proper showing" for purposes of section 21(d) actions.

29. 425 U.S. 185 (1976). "It was the view of the [Hochfelder] Court that the terms 'manipulative,' 'device,' and 'contrivance' . . . quite clearly evinced a congressional intent to proscribe only 'knowing or intentional misconduct.' " Aaron v. SEC, 446 U.S. 680, 690 (1980), *quoting* Ernst & Ernst v. Hochfelder, 425 U.S. at 199. *See* note 12 and accompanying text *supra.*

30. "[W]e would by no means be understood as suggesting that we are able to devine from the language of § 10(b) the express 'intent of Congress' as to the contours of a private cause of action under Rule 10b-5." Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 737 (1975). *See* notes 70-81 and accompanying text *supra.*

31. Unlike *Hochfelder, Aaron* involved an SEC injunction sought pursuant to section 21(d) of the Exchange Act. The language of section 21(d) points to a congressional intent to give the SEC wide latitude and discretion in its enforcement actions "in the public interest or for the protection of investors." 15 U.S.C. § 78j(b) (1976). For the language of section 21(d) *see* note 28 *supra.* This contrasts sharply with the lack of express statutory authority for a private damages remedy under section 10(b). *See* notes 33-47 and accompanying text *infra.*

32. *See* note 11 and accompanying text *supra.*

Hochfelder.[33] The judicial creation of a private remedy under section 10(b) and rule 10b-5[34] was criticized.[35] When Congress drafted section 10(b), they intended that it be enforced by the SEC only under expressly authorized provisions for such agency actions.[36] Yet the private remedy under the statute proved a workable judicial innovation.[37] In a seeming desire to maintain the integrity of the judicial creature, the Court interpreted section 10(b) and its progeny restrictively in order to limit the class of potential plaintiffs under the statute.[38]

This judicial reticence to expand the class of potential section 10(b) private plaintiffs was most notably addressed in *Blue Chip Stamps v. Manor Drug Stores.*[39] The plaintiffs in *Blue Chip* claimed that an overly

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33. *See* Ernst & Ernst v. Hochfelder, 425 U.S. 185, 196-97 (1976). The first case to recognize the private right of action under rule 10b-5 was Kardon v. National Gypsum Co., 69 F. Supp. 512 (E.D. Pa. 1946). The Supreme Court adopted the implied remedy twenty-five years later in Superintendent of Insurance v. Bankers Life and Casualty Co., 404 U.S. 6, 13 n.9 (1971), and reaffirmed the private remedy in Affiliated Ute Citizens v. United States, 406 U.S. 128, 150-54 (1972). *See also* Ernst & Ernst v. Hochfelder, 425 U.S. 185, 196 (1976); Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 737 (1975).

34. It should be noted here that the *Aaron* Court, following the rationale of *Hochfelder* and *Blue Chip,* ruled that the scienter requirement for section 10(b) is controlling as to rule 10b-5 "since the Commission's rulemaking power was necessarily limited by the ambit of its statutory authority. . . ." 446 U.S. at 691. *But see* note 7 and accompanying text *supra,* for the language of section 10(b). When read as a whole the statute seems to provide little more than a granting of authority to the SEC to make rules in order to sharpen and define the terms "manipulative or deceptive device or contrivance." 15 U.S.C. § 78j(b) (1976). This view has merit as evidenced by section 13(e) 1 of the Exchange Act which makes it unlawful for certain issuers "to purchase any equity security issued by it if such purchase is *in contravention of such rules and regulations as the Commission, in the public interest or for the protection of investors, may adopt* (A) *to define acts and practices which are fraudulent, deceptive, or manipulative. . . .*" 15 U.S.C. § 78m(e)1 (1976) (emphasis added). This language closely follows that of § 10(b) which proscribes "any *manipulative* or *deceptive device* or *contrivance in contravention of such rules and regulations as the Commission may prescribe* as necessary or appropriate in the public interest or for the protection of investors." 15 U.S.C. § 78j(b) (1976) (emphasis added). It should be noted that the *Aaron* Court's view that section 10(b) substantively limits the rules promulgated thereunder to conduct involving scienter makes section 10(b) and rule 10b-5 interchangeable in discussing cases and other relevant authority in the context of scienter.

35. *See, e.g.,* Ruder, *Civil Liability Under Rule 10-5: Judicial Revision of Legislative Intent?,* 57 NW. U.L. REV. 627, 642-60 (1963); Note, *Negligent Misrepresentations Under Rule 10b-5,* 32 U. CHI. L. REV. 824, 828 (1965).

36. *See* 1 A. BROMBERG, SECURITIES LAW: FRAUD § 2.2 at 23, 24 (1977); 3 L. LOSS, SECURITIES REGULATION 1757-59 (1961).

37. *See* note 33 and accompanying text *supra.*

38. The first case limited private damage plaintiffs under § 10(b) and rule 10b-5 to actual purchasers and sellers of securities. *See* Birnbaum v. Newport Steel Corp., 193 F.2d 461 (2d Cir.), *cert. denied,* 343 U.S. 956 (1952). The *Birnbaum* rule was embraced by the Supreme Court in Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723 (1975). *See* note 40 and accompanying text *infra. Blue Chip* rested on the language "in connection with the purchase or sale of any security." 17 C.F.R. § 240.10b-5 (1979). Yet the Court's focus upon this language was subservient to the dominant purpose of that decision, to limit the class of potential section 10(b) plaintiffs. *See* notes 39-43 and accompanying text *infra.*

39. 421 U.S. 723 (1975).

pessimistic prospectus constituted a violation of rule 10b-5 in that it caused them to *abstain* from buying certain securities.[40] The *Blue Chip* Court focused on the language "in connection with the purchase and sale" of any security found in section 10(b) and rule 10b-5, ruling that plaintiffs did not satisfy the standing requirement in that no purchase or sale took place.[41] However, the standing requirement found in *Blue Chip* was more directly attributable to the judicial desire to limit the class of private plaintiffs under the statute, than to any technical restrictions found in the statutory language.[42] In an exhaustive discussion of the historical development of the judicially implied remedy under section 10(b), Justice Rehnquist stated: "When we deal with private actions under rule 10b-5 we deal with a judicial oak which has grown from little more than a legislative acorn."[43] The opinion then went on to discuss the potentially burdensome and unworkable result of failing to

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40. As the result of a civil antitrust action, Blue Chip Stamp Co. entered into a consent decree providing for reorganization into a newly formed corporation, "New Blue Chip." The nine retailers who owned 90% of the stock of "Old Blue Chip" were to be divested of most of their shares by way of an offering of New Blue Chip shares to past users of the stamp service, in proportion to the amount of such usage. The prospectus which was circulated as a result of the offering of "New Blue Chip" was overly pessimistic, according to respondent who was a user of "Old Blue Chip" and therefore an offeree of the reorganizational offering. Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 725-26 (1975). The complaint alleged:

> that the prospectus prepared and distributed by Blue Chip in connection with the offering was materially misleading in its overly pessimistic appraisal of Blue Chip's status and future prospects . . . in order to discourage respondent and other members of the allegedly large class whom it represents from accepting . . . so that the rejected shares might later be offered to the public at a higher price.

Id. at 726-27.

41. *Id.* at 733. This reading of the statute was enunciated in Birnbaum v. Newport Steel Corp., 193 F.2d 461 (2d Cir. 1952), and embraced in *Blue Chip* on the basis of the policy consideration of limiting the class of section 10(b) private plaintiffs. 421 U.S. at 740.

42. This is not to suggest that the Court was on less than solid ground in its reading of the statute. Congress expressly rejected a proposed amendment to section 10(b) which would have expanded the proscription of section 10(b) to frauds "in connection with the purchase or sale of, or *any attempt to purchase or sell any security.*" 103 CONG. REC. 11,636 (1957) (emphasis added); *SEC Legislation Hearings Before A Subcommittee of the Senate Committee on Banking and Currency on S. 1178-1182,* 86th Cong., 1st Sess. 367-68 (1959). The major reason cited for opposition to the proposed amendment was the potential for an onslaught of actions based on the proposed, less restrictive standing requirement. *Id.* at 368.

43. 421 U.S. at 737. It is suggested that this is the consideration mostly responsible for the *Blue Chip* holding. It speaks to the Court's deference to the judicially implied status of the section 10(b) based private action and the resulting desire to limit its use. The Court further stated, "we believe that the concern expressed for the danger of vexatious litigation which could result from a widely expanded class of plaintiffs under rule 10b-5 is founded in something more substantial than the common complaint of many defendants who would prefer avoiding lawsuits entirely to either settling them or trying them. *Id.* at 740. The Court then went on to discuss the difficulty of proof which would accompany a lifting of the *Birnbaum* rule. *Id.* at 742-43. It should be noted that the *Blue Chip* Court rested its decision on policy by conceding the ambiguity of section 10(b). *See* note 30 and accompanying text *supra.*

strictly construe the "in connection with the purchase or sale" language in the context of private actions.

In *Hochfelder,* the Court faced yet another fact pattern with the potential of enlarging the class of section 10(b) plaintiffs, possibly beyond manageable proportions.[44] This was a prime consideration in *Hochfelder,* and thus raises questions as to its precedential value in *Aaron.* In limiting the private action under section 10(b) to conduct involving scienter, the *Hochfelder* Court relied largely on the statutory language.[45]

Underlying this statutory interpretation, however, was the *Blue Chip* concern of limiting the class of potential private plaintiffs under the statute.[46] This concern is inapplicable to *Aaron* since the SEC is invariably the plaintiff in section 21(d) injunctive actions.[47] The only effect of waiving the scienter requirement in *Aaron* might have been to enlarge the class of potential targets of the SEC injunction. The SEC, limited in its resources, would have to be more selective in its choice of enforcement proceedings if indeed a negligence standard were found to

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44. In *Hochfelder,* a Chicago brokerage firm, First Securities, retained accounting firm Ernst & Ernst to audit its books periodically. In connection therewith, Ernst & Ernst prepared the annual reports required of First Securities by the SEC pursuant to section 17(a) of the Securities Act of 1933. Ernst & Ernst prepared those reports, failing to include therein the existence of First Securities' "mail rule," an unusual practice which prohibited anyone from opening mail addressed to the President of First Securities, Leston B. Nay. Nay undertook a scheme of soliciting investment in a non-existent high-yield escrow account for which all collected funds were converted to his personal use. Nay committed suicide so the defrauded investors sought damages from Ernst & Ernst, whose failure to report the mail rule as an unorthodox practice, precluding a proper audit, was alleged to have aided and abetted Nay in the section 10(b) violation. Ernst & Ernst v. Hochfelder, 425 U.S. 185, 188-90 (1976). The basis of the complaint was negligent non-feasance. *Id.* at 190 n.5. The Court held that a private action under section 10(b) could not succeed absent proof of scienter, relying on the language of section 10(b) as proscribing only willful conduct. *Id.* at 197-98. Also considered by the Court were the legislative history of section 10(b), *id.* at 201, and the inter-relation of the securities laws, *id.* at 206. For an exhaustive discussion on the complexities inherent in the fact pattern of *Hochfelder,* including negligence as a basis for accountant liability, negligence as a basis for aiding and abetting, and the various meanings given the term scienter, *see* Bucklo, *The Supreme Court Attempts to Define Scienter Under Rule 10(b)-5:* Ernst & Ernst v. Hochfelder, 29 STAN. L. REV. 213 (1977). For additional law review articles involving *Hochfelder* see note 11 *supra.*

45. In response to the SEC's argument that Congress has been explicit in requiring willful conduct, the Court said, "The argument simply ignores the use of the words 'manipulative,' 'device,' and 'contrivance,' — terms that make unmistakable a congressional intent to proscribe a type of conduct quite different from negligence." Ernst & Ernst & Hochfelder, 425 U.S. 185, 199 (1976).

46. *See* Note, *The Scienter Requirement in SEC Injunctive Enforcement of Section 10(b) After* Ernst & Ernst v. Hochfelder, 77 COLUM. L. REV. 419, 426 n.48 (1977). The Court in *Hochfelder* stated that policy considerations need not be discussed when the statutory language is clear and consistent with its legislative history. 425 U.S. at 214-16 n.33. *But see* notes 70-108 and accompanying text *infra.* Nevertheless, the Court said: "The class of persons eligible to benefit from [a negligence] standard, though small in this case, could be numbered in the thousands in other cases." 425 U.S. at 215-16 n.33.

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

expand the size of the class of potential section 21(d) targets. More importantly, adopting a negligence standard for such proceedings may serve as a deterrent to those who might scheme to deceive behind the ultimate defense of alleged good faith. These policy arguments serve to sharpen the contrast between *Aaron* and *Hochfelder*. In fact, however, the *Aaron* Court declined to discuss policy considerations, stating: "[I]f the language of a provision of the securities laws is sufficiently clear in its context and not at odds with the legislative history, it is unnecessary 'to examine the additional considerations of 'policy' . . . that may have influenced the lawmakers in their formulation of the statute.' "[48] As will be discussed, both the language of section 10(b)[49] and its legislative history[50] are amenable to conflicting interpretations as to the degree of intent contemplated by Congress.[51] First, a brief discussion of the policy considerations applicable to *Aaron* is in order.

III. THE LAW-EQUITY DISTINCTION

The SEC injunctive enforcement at the basis of *Aaron* is a proceeding equitable in nature.[52] Courts have historically abandoned strict common law requirements when interpreting the securities laws and their enforcement.[53] The most notable example of this proposition is *SEC v. Capital Gains Research Bureau.*[54] Under the Investment Advisers Act

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48. Aaron v. SEC, 446 U.S. 680, 695 (1980), *quoting* Ernst & Ernst v. Hochfelder, 425 U.S. 185, 214-16 n.33 (1976).

49. *See* notes 70-81 and accompanying text *infra.*

50. *See* notes 82-108 and accompanying text *infra.*

51. *See* note 25 and accompanying text *supra.*

52. *See* note 19 and accompanying text *supra.*

53. *See, e.g.,* TSC Industries, Inc. v. Northway Inc., 426 U.S. 438 (1976); Affiliated Ute Citizens v. United States, 406 U.S. 128 (1972); SEC v. Capital Gains Research Bureau, Inc., 375 U.S. 180 (1963). *Cf.* People v. Federated Radio Corp., 244 N.Y. 33, 154 N.E. 655 (1926) (wherein the term "fraudulent practice" was given a "wide meaning" in the context of a New York General Business Law statute). A good example of the Supreme Court's application of this flexible standard occurred in Rondeau v. Mosinee Paper Corp., 422 U.S. 49 (1975). In *Rondeau,* a private party sought injunctive relief alleging violations of section 13(d) of the Exchange Act, 15 U.S.C. § 78m(d) (1976). 422 U.S. at 50-51. The Supreme Court, in ruling that traditional equitable principles should apply, stated:

> We are dealing here with the requirements of equity practice with a background of several hundred years of history. . . . *The historic injunctive process was designed to deter, not to punish.* The essence of equity jurisdiction has been the power of the Chancellor to do equity and to mould [sic] each decree to the necessities of the particular case. Flexibility rather than rigidity has distinguished it. The qualities of mercy and practicality have made equity the instrument for nice adjustment and reconciliation between the public interest and private needs as well as between competing private claims. We do not believe that such a major departure from that long tradition as is here proposed should be lightly implied.

422 U.S. 49, 61 (1975) (emphasis added by the Court), *quoting* Hecht v. Bowles, 321 U.S. 321, 329-30 (1944).

54. 375 U.S. 180 (1963).

of 1940,[55] the SEC is authorized to seek enforcement injunctions in a provision closely paralleling section 21(d) of the Exchange Act.[56] Pursuant to this authority, the SEC sought to enjoin an investment advisory firm from violating the anti-fraud provision of the Investment Advisers Act.[57] The issue in *Capital Gains* was whether intent to injure was a necessary element to violation of section 206(2) of the Act, which makes unlawful any practice which "operates as a fraud or deceit upon any client or prospective client."[58] The Court found no such requirement.

The Court's analysis began by describing the Investment Advisers Act as one of a series of Acts designed to "substitute a philosophy of full disclosure for the philosophy of *caveat emptor* and thus to achieve a high standard of business ethics in the securities industry."[59] In defense of waiving the intent requirement, the Court found its ruling "not in

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55. 15 U.S.C. §§ 80b-1 to 80b-21 (1976).

56. Section 209(e) of the Investment Advisers Act of 1940 provides:

> Whenever it shall appear to the Commission that any person has engaged, is engaged, or is about to engage in any act or practice constituting a violation of any provision of this subchapter, or of any rule, regulation, or order hereunder, . . . it may, in its discretion bring an action in the proper district court of the United States . . . to enjoin such acts or practices and to enforce compliance with this subchapter or any rule, regulation, or order hereunder. Upon a showing that such person has engaged, is engaged, or is about to engage in any such act or practice . . . a permanent or temporary injunction or decree or restraining order shall be granted without bond.

15 U.S.C. § 80b-9(e) (1976).

57. Section 206(2) of the Investment Advisers Act of 1940 provides:

> It shall be unlawful for any investment adviser by use of the mails or any means or instrumentality of interstate commerce, directly or indirectly —
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> (1) to employ any device, scheme, or artifice to defraud any client or prospective client;
>
> (2) to engage in any transaction, practice, or course of business which operates as a fraud or deceit upon any client or prospective client;
>
> (3) acting as principal for his own account, knowingly to sell any security to or purchase any security from a client, or acting as broker for a person other than such client, knowingly to effect any sale or purchase of any security for the account of such client, without disclosing to such client in writing before the completion of such transaction the capacity in which he is acting and obtaining the consent of the client to such transaction. The prohibitions of this paragraph shall not apply to any transaction with a customer of a broker or dealer if such broker or dealer is not acting as an investment adviser in relation to such transaction.
>
> (4) to engage in any act, practice, or course of business which is fraudulent, deceptive, or manipulative. The Commission shall, for the purpose of this paragraph . . . by rules and regulations define, and prescribe means reasonably designed to prevent, such acts, practices, and courses of business as are fraudulent, deceptive or manipulative.

15 U.S.C. § 80b-(6) (1976).

58. *Id.* In *Capital Gains,* respondent First Securities embarked in a series of acts known as "scalping." This involved purchasing for their own account securities which they were about to recommend for long-term investment in their Capital Gains Report, mailed monthly to approximately 5,000 subscribers. 375 U.S. 180, 182-83 (1980). Upon the rise in price caused by the recommendations, respondents would sell their recently purchased stock for a profit. *Id.* at 183. The injunction sought by the SEC would have forced respondents to disclose their own pecuniary interest in any future reports recommending securities. *Id.*

59. SEC v. Capital Gains Research Bureau Inc., 375 U.S. 180 (1963).

derogation of the common law of fraud ... [but] finds support in the process by which the courts have adapted the common law of fraud to the commercial transactions of our society."[60] The *Capital Gains* Court then quoted several authorities in support of the proposition that the equitable remedy for fraud is flexible enough so that intent to defraud is not a necessary element of the SEC injunctive action.[61] Moreover, the Court hinted that these principles were applicable to SEC injunctive actions, regardless of the securities law being enforced, stating: "Congress intended the Investment Advisers Act of 1940 to be construed *like other securities legislation* 'enacted for the purpose of avoiding frauds,' not technically and restrictively, but flexibly to effectuate its remedial purposes."[62]

Faced with this precedent, the Court in *Aaron v. SEC*[63] distinguished *Capital Gains,* contrasting the language of section 10(b)[64] with that of section 206(2),[65] which prohibits acts that *operate* as a fraud or deceit upon any client or prospective client. The term "operates" was interpreted as focusing upon the public effect rather than the adviser's subjective intent.[66] Thus, the language of section 10(b) was dispositive of *Aaron* on several levels. It acted as a common thread with *Hochfelder,*[67] it served as a basis for distinguishing *Capital Gains*[68] and its clarity in

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60. *Id.* at 192.

61. *Id.* at 193-94. The Court quoted as follows:

> Law had come to regard fraud ... as primarily a tort, and hedged about with stringent requirements, the chief of which was a strong moral, or rather immoral element, while equity regarded it, as it had all along regarded it, as a conveniently comprehensive word for the expression of a lapse from the high standard of conscientiousness that if exacted from any party occupying a certain contractual or fiduciary relation towards another party.

Id., quoting H. HANBURY, MODERN EQUITY 643 (8th ed. 1962).

> Fraud is infinite and were a Court of Equity once to lay down rules, how far they would go and no farther, in extending their relief against it, or to define strictly the species or evidence of it, the jurisdiction would be cramped, and perpetually eluded by new schemes which the fertility of man's invention would contrive.

Id. at 193 n.41, *quoting* E. SNELL, PRINCIPLES OF EQUITY 496 (25th ed. 1960). "Fraud has a broader meaning in equity [than at law] and intention to defraud or to misrepresent is not a necessary element." *Id.*, at 193, *quoting* W. DE FUNIAK, HANDBOOK OF MODERN EQUITY 235 (2d ed. 1956). "Fraud, indeed, in the sense of a court of equity properly includes all acts, omissions and concealments which involve a breach of legal or equitable duty, trust, or confidence, justly reposed, and are injurious to another, or by which an undue and unconscientious advantage is taken of another." *Id.*, at 194, *quoting* Moore v. Crawford, 130 U.S. 122, 128 (1889).

62. SEC v. Capital Gains Research Bureau, 375 U.S. 180, 195 (1963) (footnote omitted) (emphasis added).

63. 446 U.S. 680 (1980).

64. For the text of section 10(b) see note 7 *supra.*

65. For the text of section 206(z), see note 57 *supra.*

66. 446 U.S. 680, 694 (1980). "[I]t is quite clear that the language in question in *Capital Gains* ... focuses not on the intent of the investment adviser, but rather on the effect of a particular practice." *Id.*

67. *See* note 29 and accompanying text *supra.*

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

context precluded the Court from discussing policy considerations.[69] An examination of the language of section 10(b), however, raises doubts as to the foundation upon which the *Aaron* decision rests.

IV. THE LANGUAGE OF SECTION 10(b)

The *Aaron* decision has is roots deeply imbedded in the *Hochfelder* interpretation of section 10(b). Section 10(b)'s proscription of any "manipulative or deceptive device or contrivance" was interpreted in both cases as clearly referring to "knowing or intentional misconduct."[70] Yet, the language of section 10(b) does not clearly express congressional intent on the scienter issue.[71]

The *Hochfelder* Court found the term manipulative "especially significant" in that "[i]t is and was virtually a term of art when used in connection with securities markets."[72] However, the statute couples "manipulative" with "deceptive," connected by the disjunctive "or."[73] The addition of the term "deceptive" was an after-thought of the conference committee which considered the precursor to section 10(b) indicative of an intent to expand the scope of liability.[74] Moreover, the term "deceptive" has been interpreted as focusing upon effect rather than intent.[75] As such, its appearance as an alternative to "manipulative" in section 10(b) can reasonably infer a congressional intent to proscribe negligent, in addition to willful conduct. The general protective purpose of the securities laws reinforces this view, since deception affects the public regardless of the presence or absence of scienter.[76]

Similarly, the term "contrivance," which seems to connote willful activity, is coupled with "device," again connected by the disjunctive "or."[77] The term "device" is defined as "that which is formed by

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69. *See* note 46 and accompanying text *supra.*

70. Aaron v. SEC, 446 U.S. 680, 690 (1980), *quoting* Ernst & Ernst v. Hochfelder, 425 U.S. 185, 197 (1976).

71. Witness the pre-*Aaron* split of authority as to degree of intent necessary to violate section 10(b). *See* note 25 and accompanying text *supra.*

72. Ernst & Ernst v. Hochfelder, 425 U.S. 185, 199 (1976).

73. For the text of section 10(b), see note 7 and accompanying text *supra.*

74. *See* 1 A. BROMBERG, SECURITIES LAW: FRAUD § 2.2 at 24 (1977).

75. *See* Note, *The Scienter Requirement in SEC Injunctive Enforcement of Section 10(b) After* Ernst & Ernst v. Hochfelder, 77 COLUM. L. REV. 419, 426 (1977). *Cf.* People v. Wahl, 3 Cal. App. Supp. 196, 197, 100 P.2d 550, 551 (App. Dep't. Super. Ct. 1940) (wherein the term "deceptive," in the context of a false advertising statute is categorized as "not always imply[ing] intent to deceive"). It should be noted that in setting out the language of section 10(b) which connotes scienter, "deceptive" is not discussed by either the *Hochfelder* Court, 425 U.S at 199, nor the *Aaron* Court, 446 U.S. at 690.

76. *See* text accompanying note 97 *infra.*

77. For the text of section 10(b), see note 7 and accompanying text *supra.*

design; a plan. . . .''[78] Although the design or plan of a device can be to deceive, the word is not definitionally so restricted.[79] At its inception the design of a device may be wholly innocent. Moreover, ''[t]he legislative history of the [Exchange] Act used [device] as a synonym for 'practice,' a word without any strong connotation of scienter, and it expressed a desire to confer upon the Commission authority under section 10(b) to prohibit 'any ... manipulative or deceptive practices ... detrimental to the interests of the investor.' ''[80]

In short, use of the disjunctive ''or'' as it appears in the statute indicates that section 10(b) proscribes, in addition to willful activity, ''deceptive devices.'' This hints that Congress contemplated SEC enforcement of section 10(b) based on negligent conduct. The design of a device may be totally innocent, yet it may have a deceptive effect on the investing public. It is unlikely that Congress intended such a development to go unchecked merely because the device was employed by one unaware of its deceptive nature.

The ambiguity of the language of section 10(b) is further evidenced by the pre-*Aaron* split of authority as to its meaning in the scienter context.[81] In relying so heavily on the language of section 10(b), the Court in *Aaron* rested a decision with potentially profound impact on a shaky and controversial foundation.

V. LEGISLATIVE HISTORY SURROUNDING THE SEC INJUNCTIVE POWER

Aaron v. SEC, while resting largely on the language of section 10(b), purported to find additional support in ''the legislative history of section 10(b) and the structure of the civil liability provisions'' of the securities laws.[82] Conceding that the legislative history of section 10(b) is '' 'bereft of any explicit explanation of Congress' intent,' [the Court found that it] contained 'no indication ... that § 10(b) was intended to

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78. WEBSTER'S NEW TWENTIETH CENTURY DICTIONARY 499 (2d ed. unabr. 1980).

79. *Cf.* Armour Packing Co. v. United States, 209 U.S. 56, 71 (1908) (Interpreting the term device as it appeared in the Elkins Act, 49 U.S.C. § 41 (1903), the Court stated: ''[W]e find the word device disassociated from any such words as ... scheme or contrivance. ... A device need not be necessarily fraudulent; the term includes anything which is a plan or contrivance.'').

80. Aaron v. SEC, 446 U.S. 680, 707 (1980) (Blackmun, J., joined by Brennan and Marshall, J.J., concurring in part, dissenting in part), *quoting* S. REP. NO. 792, 73d Cong., 2d Sess. 18 (1934).

81. *Compare* SEC v. Texas Gulf Sulfur Co., 401 F.2d 833, 855 (2d Cir. 1968) (plurality opinion), *cert. denied,* 394 U.S. 976 (1969) [and] Myzel v. Fields, 386 F.2d 718, 734-35 (8th Cir. 1967) *cert. denied,* 390 U.S. 951 (1968) [and] Ellis v. Carler, 291 F.2d 270, 274 (9th Cir. 1961) *with* Kohn v. American Metal Climax Inc., 458 F.2d 255, 280 (3rd Cir. 1972) (Adams, J., concurring and dissenting), *cert. denied,* 409 U.S. 874 (1972) [and] Globus v. Law Research Service Inc., 287 F. Supp. 188, 197 (S.D.N.Y. 1968), *aff'd,* 418 F.2d 1276 (2d Cir. 1969), *cert. denied,* 397 U.S. 913 (1970) (reading a scienter requirement into the statute).

82. Aaron v. SEC, 446 U.S. 680, 690 (1980).

proscribe conduct not involving scienter.' "[83] This view stemmed from the observation that wherever Congress intended to premise civil liability on negligent conduct, it said so expressly.[84] This interpretation, taken from *Ernst & Ernst v. Hochfelder,* is inapplicable to the injunctive proceeding at the basis of *Aaron.*[85] Since the private right of action under section 10(b) is judicially implied,[86] it is not surprising that the *Hochfelder* Court found the legislative history of section 10(b) unhelpful.[87] Conversely, the section 21(d) injunctive enforcement action in *Aaron* has the benefit of legislative history and statutory comparisons not applicable to *Hochfelder* but worthy of note.

The contention that Congress would have expressly provided for negligent violations of section 10(b) if that were its intent has been criticized.[88] Had Congress wished to restrict the ambit of liability under section 10(b) to willful conduct only, it would have done so expressly. For example, section 32(a) of the Exchange Act, which provides for criminal prosecutions under the Act, expressly restricts certain penalties to conduct involving scienter.[89] Similarly, the scienter requirement is expressly set out in section 15(b)(4)(A), (D), and (E) of the Exchange Act which provides for the suspension or revocation of a broker's license.[90] The express restriction of these remedial provisions to conduct involving scienter indicates that the lack of a scienter restriction in section 21(d) can be interpreted as allowing a negligence standard for SEC injunctive actions. Justice Blackmun, in his dissenting opinion in *Aaron,* noted the lack of an express scienter requirement in section 21(d) and the analogous provision of the Securities Act of 1933 (Securities Act),[91] stating:

> In both Acts, state of mind is treated with some precision. Congress used terms such as "knowing," "willful," and "good faith," when it wished to impose a state-of-mind requirement. The omission of such terms in statutory provisions authorizing the Commission to sue for injunctive relief contrasts sharply with their inclusion in provisions authorizing criminal prosecution.[92]

Legislative history of other provisions of the Exchange Act also lend

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83. *Id., quoting* Ernst & Ernst v. Hochfelder, 425 U.S. 185, 201-02 (1976).

84. 446 U.S. at 690.

85. Section 21(d) is fairly explicit in stating what the SEC must prove in order to get injunctive relief. For the text of section 21(d), see note 28 *supra.* Thus, the lack of statutory guidance respecting the § 10(b) private action, understandably a concern of the *Hochfelder* Court, is not a consideration in *Aaron.*

86. *See* note 33 and accompanying text *supra.*

87. *See* SEC v. Aaron, 605 F.2d 612, 621 (2d Cir. 1979).

88. *See* Note, *The Scienter Requirement in SEC Injunctive Enforcement of § 10(b) After* Ernst & Ernst v. Hochfelder, 77 COLUM. L. REV. 419, 427 n.49 (1977).

89. 15 U.S.C. § 78ff(a) (Supp. III, 1979).

90. 15 U.S.C. § 78(o)(b)(4) (1976).

91. Section 20(b) of the Securities Act of 1933, 15 U.S.C. § 77t(b) (1976), is analogous to, and closely parallels, section 21(d) of the Exchange Act, 15 U.S.C. § 78u(d) (1976).

92. 446 U.S. at 713-14 (Blackmun, J., joined by Brennan and Marshall, J.J., dissenting in

support to a negligence standard for SEC injunctive actions. During the Securities Acts Amendments of 1975,[93] Congress enacted section 21(g)[94] which requires SEC consent before private actions can be consolidated with SEC injunctive actions. The Senate Committee responsible for the legislation stated:

> Private actions frequently will involve more parties and more issues than the Commission's enforcement action, thus greatly increasing the need for extensive pretrial discovery. In particular, issues related to ... scienter, causation, and the extent of damages, are elements *not* required to be demonstrated in a Commission injunctive action.[95]

More recently, in considering the Foreign Corrupt Practices Act of 1977,[96] Congress again focused upon the SEC's enforcement powers. The House Committee in charge stated:

> In the context of an SEC action to enjoin future violations of the securities laws, a defendant's state of mind should make no difference. The harm to the public is the same regardless of whether or not the violative conduct involved *scienter*. Because an SEC enforcement action is designed to protect the public against the recurrence of violative conduct, and not to punish a state of mind, this Committee intends that *scienter* is not an element of any Commission enforcement proceeding.[97]

While not dispositive of Congress' intent in 1934, the views of today's Congress lend support to a negligence standard for SEC injunctive actions, regardless of the statute alleged to have been violated.

Legislative history of provisions of the Securities Act of 1933[98] also lend support to a negligence standard for SEC enforcement actions.[99] Analogous to section 10(b) of the Exchange Act is the general antifraud provision of the Securities Act, section 17(a).[100] Congress, intend-

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part). Other provisions of the Securities Laws which lack express language indicating a scienter requirement have been interpreted as not requiring a showing of scienter. *See, e.g.*, Aaron v. SEC, 446 U.S. 680, 695-96 (1980) (interpreting § 17(a)(2) & (3) of the Exchange Act, 15 U.S.C. § 78g(a) (1976); SEC v. Spectrum Ltd., 489 F.2d 535, 541-42 (2d Cir. 1973) (interpreting section 5 of the Securities Act of 1933, 15 U.S.C. § 77(e) (1976)).

93. Pub. L. No. 94-29, 89 Stat. 97 (1975); *See Securities Acts Amendments of 1975: Hearings on S. 249 before the Subcommittee on Securities of the Senate Committee on Banking, Housing and Urban Affairs*, 94th Cong., 1st Sess. 1 (1975).

94. 15 U.S.C. § 78u(g) (1976).

95. S. REP. NO. 75, 94th Cong., 1st Sess. 76 *reprinted in* [1975] U.S. CODE CONG. & AD. NEWS 179, 254 (emphasis in original).

96. Act of Dec. 19, 1977, Pub. L. No. 95-213, § 101, 91 Stat. 1494 (codified at 15 U.S.C. § 78a, m dd-1, dd-2, ff. (Supp. III 1979)).

97. H. R. REP. No. 640, 95th Cong., 1st Sess. 10 (1977).

98. 15 U.S.C. §§ 77a to 77jj (1976).

99. *See Securities Act, Hearings on S. 875 before the Senate Committee on Banking and Currency*, 73d Cong., 1st Sess., 207 (1933), wherein it is said, "civil liability exists even in the case of an innocent mistake."

100. Section 17(a) of the Securities Act of 1933 provides:

ing section 17(a) to be enforced by the SEC injunction, enacted section 20(b) of the Securities Act, which closely parallels section 21(d) of the Exchange Act. Under section 20(b) of the Securities Act, the SEC is free to enjoin negligent violations of section 17(a) based on the *Aaron* Court's interpretation of the latter provision[101] as well as the legislative history of section 17(a) itself.

The precursor to section 17(a),[102] introduced in identical bills in both houses of Congress, would have made it unlawful *"willfully* to employ any device, scheme or artifice to defraud or to obtain money or property by means of any false pretenses ... or to engage in any transaction ... which operates or would operate as a fraud upon the purchaser."[103] The term "willfully" was rejected in the compromise draft of the statute which eventually became section 17(a).[104] The conference committee also rejected a proposal which would have added "with intent to defraud" as modifying "to employ any device, scheme or artifice."[105] These deliberate omissions of scienter language in section 17(a) indicate congressional intent to proscribe negligent as well as willful conduct under section 17(a). Accepting the view that the securities laws were intended to operate in harmony, it is difficult to see why Congress would allow a remedy for the negligent actions of sellers under section 17(a) while precluding such a remedy against purchasers under section 10(b).[106] This result of the *Aaron* decision has been described as "driv-

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It shall be unlawful for any person in the offer or sale of any securities by the use of any means or instruments of transportation or communication in interstate commerce or by the use of the mails, directly or indirectly —

(1) to employ any device, scheme, or artifice to defraud, or

(2) to obtain money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

(3) to engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser.

15 U.S.C. § 77q(a) (1976).

Petitioner in *Aaron* was also charged with violation of this provision.

101. In ruling on section 17(a) the *Aaron* Court again focused on the language of the statute, concluding that section 17(a)(1) violations require proof of scienter while violations of §§ 17(a)(2) and 17(a)(3) can be negligent. 446 U.S. at 697. This ruling is not a serious obstacle to SEC enforcement of the statute since the latter two sub-provisions are definitionally broad enough to encompass any activity which might come within the language of section 17(a)(1). Thus the SEC need only draft their section 17(a) complaints alleging violations of one of the latter two sub-provisions, section 17(a)(2) or section 17(a)(3).

102. *See* H. R. 4314, 73d Cong., 1st. Sess. § 16(a) (1933); S. 875, 73d Cong., 1st Sess. § 13 (1933).

103. H. R. 4314, 73d Cong., 1st Sess. § 16 (1933); S. 875, 73d Cong., 1st Sess. § 13 (1933).

104. *See* H. R. 5480, 73d Cong., 1st Sess. § 16(a) (1933).

105. *See* H. R. REP. NO. 152, 73d Cong., 1st Sess. 12,26-27 (1933).

106. The Securities Act of 1933 is aimed at regulation of sellers only. The preamble of the Act states its purpose, "[t]o provide full and fair disclosure of the character of securities *sold* in interstate commerce and foreign commerce and through the mails, and to prevent frauds in the *sale* thereof, and for other purposes." Securities Act of 1933, 15 U.S.C. §§ 77a to 77jj (1976) (Preamble) (emphasis added).

ing a wedge" between the Acts of 1933 and 1934.[107] Justice Burger's concurring opinion in *Aaron* places the responsibility for this "bad public policy" squarely in the lap of Congress,[108] a daring statement in light of the legitimate questions surrounding the Court's interpretation of congressional intent in drafting the language of section 10(b).

CONCLUSION

The Supreme Court's requirement in *Aaron v. SEC* that scienter be established as a predicate to SEC injunctive enforcement of section 10(b) rests largely on implications drawn from its interpretation of statutory language. This interpretation was borrowed directly from the Court's decision in *Ernst & Ernst v. Hochfelder,* yet the *Aaron* Court failed to address critical distinctions between these cases. In drafting other provisions of the securities laws, Congress has indicated its intention to impose a scienter requirement only expressly and not by implication.

The holding in *Aaron* is in conflict with the proposed Federal Securities Code, drafted by the American Law Institute[109] and approved by the American Bar Association.[110] Although the present congressional mood seems to favor relieving the SEC of the burden of proving scienter in enforcement actions, it is questionable whether the effect of *Aaron* will be substantial enough to warrant a statutory amendment of section 10(b). If proof of the slippery element of scienter proves burdensome enough to impact the effectiveness of SEC enforcement of section 10(b), Congress may need to act in the near future.

NICHOLAS T. NASHAWATY, JR.

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107. 446 U.S. at 715 (Blackmun, J., joined by Brennan and Marshall, J.J., dissenting in part, concurring in part.) "I have searched in vain for any reason in policy or logic to support this division. Its only support so far as I can tell, is to be found in the Court's technical linguistic analysis." *Id.*

108. *Id.* at 702-03 (Burger, C.J., concurring).

109. *See* ALI Fed. Securities Code §§ 262(d), 297(a), 1602(a), 1819(a)(3), 1819(a)(4) (1978 Draft).

110. *ABA Midyear Meeting Wrapup,* 65 A.B.A.J. 297, 341 (1979).

The Scope of Federal Trade Commission Rulemaking: *Katharine Gibbs School v. FTC*

In 1975, Congress enacted the Magnuson-Moss Warranty-Federal Trade Commission Improvement Act.[1] Part II of the Act explicitly granted to the Federal Trade Commission (FTC) substantive rulemaking authority for the purpose of preventing unfair or deceptive acts or practices in or affecting commerce and prescribed a procedural framework by which rulemaking proceedings would be governed.[2] Within one year, the Commission had set in motion sixteen rulemaking proceedings on a wide range of industry practices.[3]

One of the first rules to be completed under Magnuson-Moss procedures was the Commission's Vocational School Rule which required proprietary, vocational and home study schools to follow various strict affirmative procedures in their dealings with students.[4] The rule also

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1. Pub. L. No. 93-637, 88 Stat. 2183 (1975).

2. *Id.* Current version of Part II rulemaking provisions at 15 U.S.C. § 57a (1976) [hereinafter cited as Magnuson-Moss]. Part I extended increased protections to consumers in regard to warranties on consumer products. For an explanation of the warranty provisions, see H.R. REP. NO. 1107, 93d Cong., 2d Sess. 20-29, 34-44, *reprinted in* [1974] U.S. CODE CONG. & AD. NEWS 7702, 7702-11, 7716-7726 [hereinafter cited as HOUSE REPORT]; S. REP. NO. 1408, 93d Cong., 2d Sess. 23-29, *reprinted in* [1974] U.S. CODE CONG. & AD. NEWS 7755, 7755-7761 [hereinafter cited as CONFERENCE REPORT].

3. For a listing of the rulemaking proceedings, see Kestenbaum, *Rulemaking Beyond APA: Criteria for Trial-Type Procedures and the FTC Improvement Act,* 44 GEO. WASH. L. REV. 679, 680 n.4 (1976). For a description of all rulemaking activities immediately preceding and subsequent to Magnuson-Moss, see [1979] 4 TRADE REG. REP. (CCH) ¶ 38,001.

4. The trade regulation rule was entitled Proprietary Vocational and Home Study Schools, 16 C.F.R. pt. 438 (1980) [hereinafter cited as Vocational School Rule]. The first rule to be enacted totally under the Magnuson-Moss procedures was the Commission's Eyeglass Rule, Advertising of Ophthalmic Goods and Services, 16 C.F.R. pt. 456 (1980). That rule was struck down in part in American Optometric Ass'n v. FTC, 626 F.2d 896 (D.C. Cir. 1980).

The Commission's rule regulating franchises, Disclosure Requirements and Prohibitions Concerning Franchising and Business Opportunity Ventures, 16 C.F.R. pt. 436 (1980), was begun prior to Magnuson-Moss and was therefore not considered by the Commission to be a Magnuson-Moss rule.

purported to preempt any state law which frustrated the purpose of the rule.[5] Twelve petitioners challenged the rule, claiming it was beyond the Commission's authority to promulgate.[6] In *Katharine Gibbs School v. FTC,* the United States Court of Appeals for the Second Circuit held that the Vocational School Rule was procedurally defective as a whole and substantively defective in part.[7] The entire rule was remanded to the Commission for further consideration.[8]

Katharine Gibbs presented the first opportunity for the judiciary to construe the scope of the FTC's rulemaking power under the Magnuson-Moss Act.[9] The rule was ideally suited for this first review. In response to findings of unfair and deceptive practices in the vocational school industry, the Commission enacted a comprehensive rule containing several distinct remedial provisions. The Second Circuit was therefore able to provide a series of holdings, each addressing a specific action by the Commission and each thus defining a permissible exercise of the FTC's rulemaking power.

As one of only two cases construing a Magnuson-Moss rule, *Katharine Gibbs* will undoubtedly influence the conduct of further FTC rulemaking. The Vocational School Rule constituted a deep foray into an area already regulated in part by other federal agencies, the states and private accrediting associations.[10] Although it is reasonable to conclude that the Commission's activism was justified, it is possible that, in light of *Katharine Gibbs,* future rulemaking will be less ambitious.

How the courts will construe the Magnuson-Moss standards of judicial review, and thus influence the scope of final rules, is more difficult to discern. Magnuson-Moss required that (1) the public have generous input into the rulemaking process; (2) that the Commission define an act or practice as unfair or deceptive only after finding

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5. 16 C.F.R. § 438.9 (1980).

6. School petitioners were Katharine Gibbs School; Computer Processing Institute; The Berkely School of Westchester, Inc.; Albany Business College, Inc.; Katharine Gibbs School-Huntington, Inc.; McGraw-Hill, Inc.; Control Data Corp.; and Cleveland Institute of Electronics, Inc.

Association petitioners were National Home Study Council (NHSC), Association of Independent Colleges and Schools (AICS), National Association of Trade and Technical Schools (NATTS), and National Association of Cosmetology Schools (NACS). The four accrediting associations joined in one brief [hereinafter Joint Brief for Petitioners]. The parties also submitted supplemental briefs. Amicus briefs were filed by the Counsel on Post-secondary Accreditation, Accredited Proprietary and Occupational Schools of Connecticut and National Association of State Administrators and Supervisors of Private Schools.

7. 612 F.2d 658, 662 (2d Cir. 1979), *rehearing denied,* 628 F.2d 755 (1980).

8. *Id.* The Commission has published a Semiannual Regulatory Agenda in which it proposed that the rule will be republished in February and subject to final Commission action in August, 1981. Improving Government Regulations; Semiannual Regulatory Agenda, 46 Fed. Reg. 10502, 10504 (1981).

9. *See* Katharine Gibbs School v. FTC, 628 F.2d 755, 755 (2d Cir. 1980) (Oakes, Mansfield & Newman, JJ., dissenting from denial of rehearing en banc).

10. *See* notes 210-13, 265-67 *infra.*

substantial evidence to support the existence of the act, and (3) that any ultimate conclusions and remedies not be arbitrary and capricious. The different ways in which the majority and dissenting opinion in *Katharine Gibbs* addressed these areas illustrates the need for further case law to create a clearer understanding of the Magnuson-Moss Act.

This Comment discusses how the Second Circuit has begun the process of defining the Commission's rulemaking authority. Section I describes FTC rulemaking prior to 1974 and then explains the content of the Magnuson-Moss Act.[11] Section II is a statement of the case, including a history of the rule.[12] Section III analyzes the court's treatment of each rule provision. This discussion includes issues raised by the petitioners but not addressed in the court's opinion.[13] Section IV focuses on the conclusions most likely to be drawn from *Katharine Gibbs.*[14] Section V deals with a few of the Commission's recent rulemaking endeavors and briefly discusses the Federal Trade Commission Improvements Act of 1980.[15] Implications of *Katharine Gibbs* and the 1980 Act are related to the newer rules.

Unfortunately, the Second Circuit was not clear in explaining exactly why certain rule provisions were acceptable and others could not stand. In one view, the Commission could cure its rule by minor procedural adjustments. In another view, the rejected provisions were substantially flawed — they were too intrusive, reaching further than congress had ever intended when it enacted Magnuson-Moss. The result was an unclear picture of exactly what showing the Commission must make in order to survive judicial scrutiny in future rulemaking challenges. It seems the court may have rejected parts of the rule because they were broader than previous Commission rulemaking efforts. Such an approach is not very helpful in understanding the Magnuson-Moss mechanism or in allowing the FTC flexibility to respond to new situations.

I. THE MAGNUSON-MOSS WARRANTY-FEDERAL TRADE COMMISSION IMPROVEMENT ACT

A. Rulemaking Prior to Magnuson-Moss

The Federal Trade Commission Act (FTC Act) delegated to the Commission the task of preventing unfair methods of competition and unfair or deceptive acts or practices in commerce.[16] The Commission's

11. *See* notes 16-102 and accompanying text *infra.*
12. *See* notes 108-42 and accompanying text *infra.*
13. *See* notes 143-259 and accompanying text *infra.*
14. *See* notes 260-84 and accompanying text *infra.*
15. *See* notes 285-300 and accompanying text *infra.*
16. The original FTC Act of 1914 stated: "Unfair methods of competition in commerce are hereby declared unlawful." Ch. 311, § 5, 38 Stat. 717 (1914) (current version at 15 U.S.C. § 45(a)

primary means of enforcing its congressional mandate was to issue a complaint, conduct a hearing, make findings of fact and issue a cease and desist order — basically, to proceed on a case-by-case basis through adjudication.[17] The case-by-case approach, however, was often heavily criticized for being costly and time-consuming.[18] Furthermore, issuing an order against one company did not effectively halt unfair or deceptive practices which were pervasive throughout an industry.

As another potential enforcement tool, the Commission was given rulemaking authority in section 6g of the FTC Act. It was never certain, however, whether the FTC possessed the authority to promulgate substantive rules as opposed to purely procedural and interpretive rules.[20] The Commission at various times had issued industry-wide standards, none of which purported to carry the force of substantive law.[21] It was not until 1962 that the Commission invoked section 6g to issue narrowly drawn substantive trade regulation rules.[22]

After 1970, the Commission asserted an even broader scope for its rulemaking authority. Two such examples, which figured prominently

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(1976)). The Wheeler-Lea Act of 1934 extended FTC jurisdiction to "unfair or deceptive acts or practices" in commerce, thus leaving the Commission with the power to regulate both anti-competitive and anti-consumer practices. 52 Stat. 111 (1938) (current version at 15 U.S.C. § 45(a)(1) (1976)). This dual responsibility is reflected in two major divisions of the Commission, the Bureau of Consumer Protection and the Bureau of Competition.

17. 15 U.S.C. § 45 (1976).

18. *See* HOUSE REPORT, *supra* note 2, at 31-32, *reprinted in* [1974] U.S. CODE CONG. & AD. NEWS at 7713-14. *See also* Wright, *The Courts and the Rulemaking Process: The Limits of Judicial Review,* 59 CORNELL L. REV. 375, 376-77 (1974), for a discussion of the criticisms of the adjudicative mode of regulation.

19. 15 U.S.C. § 46 (1976). The section states that the Commission may "[f]rom time to time classify corporations and . . . make rules and regulations for the purpose of carrying out the provisions of [sections 41 to 46 and 47 to 58 of this title]."

20. *See* HOUSE REPORT, *supra* note 2, at 33, *reprinted in* [1974] U.S. CODE CONG. & AD. NEWS at 7715.

21. *Id.* Before 1962, these standards were issued as Trade Practice Rules or Trade Practice Conference Rules. HOUSE REPORT, *supra* note 2, at 32, *reprinted in* [1974] U.S. CODE CONG. & AD. NEWS at 7714-15.

In Pacific Gas & Electric Co. v. Federal Power Comm'n, 506 F.2d 33 (D.C. Cir. 1974), Judge MacKinnon described the difference between a substantive rule and a general statement of policy in terms of their effect in a court proceeding. A substantive rule establishes a standard of conduct having the force of law. A general statement of policy, however, is not finally determinitive of the issues or rights to which it is addressed. *Id.* at 38.

22. The Commission conducted thirty-five rulemaking proceedings between 1963 and 1974, the year of Magnuson-Moss. The Commission did not attempt to issue substantive rules until the 1960's. ADMINISTRATIVE CONFERENCE OF THE UNITED STATES [hereinafter ACUS], RECOMMENDATION 79-1, HYBRID RULEMAKING PROCEDURES OF THE FEDERAL TRADE COMMISSION, RECOMMENDATIONS AND REPORTS 39 (1979). One commentator described these early rules as "narrow in scope and interpretive in nature, so that the issue of the Commission's authority remained in the background." Rosch, *Rulemaking Under the Federal Trade Commission Improvement Act,* 44 ANTITRUST L.J. 515, 516 (1975).

in the *Katharine Gibbs* case, were the Octane Rule[23] and the Door-to-Door Sales Rule.[24] The Door-to-Door Rule provided that any customer who signs a sales contract as a result of a door-to-door solicitation must be allowed a three day cooling-off period during which time the contract could be cancelled without liability. The Octane Rule declared that failure to post octane ratings on gas pumps was an unfair and deceptive practice. The rule required that the ratings, computed by a formula prescribed by the Commission, be conspicuously posted on all pumps. Instead of merely defining unfair or deceptive practices, both rules went a step further than previous FTC efforts by prescribing affirmative requirements to prevent reoccurrence of the practices.

The Octane Rule provoked a challenge to the Commission's substantive rulemaking power. In *National Petroleum Refiners Ass'n v. FTC,*[25] the United States District Court for the District of Columbia ruled that the Commission had enacted a substantive rule beyond the scope of its statutory authority; on appeal, however, the United States Court of Appeals for the District of Columbia reversed.[26] For the first time in the FTC's history, the judiciary had interpreted section 6g of the FTC Act as conferring substantive rulemaking authority.

Writing for the D.C. Circuit Court, Judge J. Skelly Wright held that Congress had intended to give the FTC a broad grant of rulemaking power. He explained that an agency's power depended upon what Congress said it can do, not upon "the judges' contemporary notions what is wise policy."[27] He found that grant in the legislative history of the FTC Act and congressional action since that time.[28] Although the FTC's rulemaking powers were not clearly defined, "they are indeed expansive."[29] As to limits on that power, he stated that "any fears ... of oppressive or unreasonable regulation seem exaggerated in view of the court's general practice in reviewing rules to scrutinize their statement of basis and purpose to see whether the major issues were given sufficient consideration."[30] Still, it was the court's obligation to "interpret liberally broad grants of rulemaking authority"[31] and to recognize the

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23. Posting of Minimum Octane Numbers on Gasoline Dispensing Pumps, 16 C.F.R. pt. 422 (1971), *revoked,* 43 Fed. Reg. 43022 (1978).

24. Cooling-Off Period for Door-to-Door Sales, 16 C.F.R. pt. 429 (1980).

25. 340 F. Supp. 1343 (D.D.C. 1972).

26. National Petroleum Refiners Ass'n v. FTC, 482 F.2d 672 (D.C. Cir. 1973), *cert. denied,* 415 U.S. 951 (1974).

27. *Id.* at 674.

28. *Id.* at 686-90.

29. *Id.* at 685.

30. *Id.* at 692.

31. *Id.* at 680.

principle that "an agency's interpretation of its own statute requires deference."[32]

B. *The Magnuson-Moss Act*

1. Scope of the Rulemaking Authority

Legislation which would define the FTC's rulemaking power had been proposed in the years immediately prior to the enactment of Magnuson-Moss.[33] After the decision in *National Petroleum,* and after the Supreme Court had declined review,[34] the debate in Congress shifted from whether the FTC should be permitted to promulgate substantive rules to the question of what form such rulemaking should assume.[35] In Magnuson-Moss, Congress acknowledged the substantive rulemaking power affirmed in *National Petroleum,*[36] qualified by the prescription that the Commission could enact "rules which define with specificity acts or practices which are unfair or deceptive acts or practices in or affecting commerce. . . ."[37] Such rules "may include requirements prescribed for the purpose of preventing such acts or practices."[38]

By allowing the Commission to prescribe requirements to prevent unfairness and deception in or affecting commerce, Congress gave the Commission a powerful tool which matched the breadth of the commerce clause.[39] Almost every industry was placed within the Commission's reach, provided that the Commission first found unfair or deceptive practices. Through the enactment of substantive rules, the Commission could decrease the use of ponderous and costly case-by-case adjudication. The Commission could police an entire industry by enacting an affirmative requirement. Instead of evaluating separately and

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32. *Id.* at 693.

33. For a discussion of the legislative history prior to 1975, see Rosch, *supra* note 22, at 517-20 (1975); Note, *FTC Substantive Rulemaking: An Evaluation of Past Practice and Proposed Legislation,* 48 N.Y.U.L. REV. 136 (1973).

34. 482 F.2d 672 (D.C. Cir. 1973), *cert. denied,* 415 U.S. 951 (1974).

35. RECOMMENDATION 79-1, *supra* note 22, at 40.

36. HOUSE REPORT, *supra* note 2, at 33, *reprinted in* [1974] U.S. CODE CONG. & AD. NEWS at 7715.

37. 15 U.S.C. § 57a(a)(1)(B) (1976).

38. *Id.*

39. The Magnuson-Moss Act changed the words "in commerce" to read "in or affecting commerce." Pub. L. No. 93-637, § 201, 88 Stat. 2183 (1975) (codified at 15 U.S.C. §§ 45, 46, 52 (1976)). Because the Supreme Court had refused to read "in commerce" as conferring upon the Commission as great a jurisdiction as Congress possessed over commerce, it was necessary to add the additional words so that the Commission could exercise its power consistent with the full sweep of the commerce clause. Congress felt that business could escape the Commission's reach by carefully organizing branches with no interstate connections. *See* HOUSE REPORT, *supra* note 2, at 31, *reprinted in* [1974] U.S. CODE CONG. & AD. NEWS at 7713.

challenging all suspected unfair practices, violation of the rule would in itself constitute an unfair act.[40] Rulemaking could be fairer to industry as well — if the Commission were forced to issue a cease and desist order to each company individually, others in the industry could continue to engage in unfair practices similar to that conduct being proscribed and enjoined at ongoing hearings.[41]

The fact that affirmative requirements were permitted did not, however, resolve the question of how expansive the requirements could be. No firm substantive limits were really established. The legislative history of Magnuson-Moss noted the prior history of FTC rulemaking, which consisted of only a handful of truly substantive rules and the opinion in *National Petroleum*.[42] The Act itself said only that affirmative requirements must be linked to specific unfair or deceptive practices.[43] Seemingly it contemplates two steps. First, declare an act or practice to be deceptive or unfair. Second, if necessary, promulgate an affirmative requirement to help prevent its reoccurrence. As the link becomes more tenuous, so presumably would the Commission's authority to enact such a rule. Congress could at that time have defined the Commission's range of action more precisely by writing a grant of authority less sweeping than "unfair acts or practices in or affecting commerce."[44] Instead, it primarily addressed the problem of limits pro-

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40. The FTC was often criticized for overjudicialization, a term "associated with protracted delay, inefficiency, confusion, and diversion of agency resources from the forthright articulation of policy and programs." Kestenbaum, *supra* note 3, at 684.

The courts have not hesitated to point out the advantages of agency rulemaking over adjudication. In Short Haul Survival Comm. v. United States, 572 F.2d 240 (9th Cir. 1978), the ICC had used rulemaking to change its commercial zone formula. Truckers who operated solely within a zone would be exempt from ICC jurisdiction. Without rulemaking, the court said, the agency would have to undertake the laborious task of deciding on each zone in the nation individually. *Id.*

In the Octane Rating case, National Petroleum Refiners Ass'n v. FTC, 482 F.2d 672 (D.C. Cir. 1973), the Commission would have been forced to separately evaluate each gas station's rating system to determine if it were fair, had not the rule been upheld. Having a rule, the Commission would still have to issue a complaint against each violator, but the only question would be whether the rule had been violated. *See* Association of Nat'l Advertisers, Inc. v. FTC, 627 F.2d 1151, 1166 n.33 (D.C. Cir. 1979).

41. National Petroleum Refiners Ass'n v. FTC, 482 F.2d at 684.

Rulemaking, by declaring law prospectively, puts all parties on notice at the same time. Also, it allows broad participation in the decision-making process. *See* Verkuil, *Judicial Review of Informal Rulemaking*, 60 VA. L. REV. 185, 189 (1974). *See also* Association of Nat'l Advertisers v. FTC, 627 F.2d 1151, 1166-67 (D.C. Cir. 1979).

42. *See* HOUSE REPORT, *supra* note 2, at 32-33, *reprinted in* [1974] U.S. CODE CONG. & AD. NEWS at 7714-15.

43. 15 U.S.C. § 57a(a)(1)(B) (1976).

44. In the Federal Trade Commission Improvements Act of 1980, Pub. L. No. 96-252, 94 Stat. 374 (1980) (to be codified in scattered sections of 15 U.S.C.), Congress has temporarily cut back on the Commission's power in regard to unfairness in advertising and certain industries which were the subject of FTC rulemaking or investigation. *See* notes 290-92 and accompanying text *infra*.

cedurally,[45] by trying to insure that all interested parties would have freer access to the rulemaking process.

2. Magnuson-Moss Procedure

Unless Congress provides otherwise, federal administrative agencies are governed by the Administrative Procedure Act (APA).[46] The APA provides that administrative rulemaking shall conform to one of two models: informal or formal on-the-record.[47] Using informal rulemaking procedures, an agency publishes a notice in the Federal Register which describes the general scope of the proposed rule, solicits comments from interested parties and, if deemed appropriate, publishes a final rule containing a Statement of Basis and Purpose (SBP).[48] However, if Congress has required the agency to conduct rulemaking on-the-record, the agency must hold formal evidentiary hearings during which interested parties are entitled to cross-exam witnesses. The final rule is published as would be under informal procedures.[49]

In piecing together a rulemaking procedure for the FTC, Congress chose a middle course — a hybrid model, which incorporated features from both APA rulemaking models. Magnuson-Moss said that the Commission must first publish a Notice of Proposed Rulemaking "stating with particularity the reason for the proposed rule."[50] The Commission then must conduct hearings at which time interested parties may present oral or written testimony and have a right to cross-exam witnesses. This right is restricted, however, based on the Commission's determination whether there are disputed issues of material fact which cross-examination would aid in resolving.[51] The Commission may designate a group spokesman for parties with similar interests, but

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45. The House Report read: "Because of the potentially pervasive and deep effect of rules defining what constitutes unfair or deceptive acts or practices and the broad standards which are set by the words 'unfair or deceptive acts or practices,' the committee believes greater *procedural* safeguards are necessary." HOUSE REPORT, *supra* note 2, at 45, *reprinted in* [1974] U.S. CODE CONG. & AD. NEWS at 7727 (emphasis added).

46. 5 U.S.C. §§ 551-559, 701-706 (1976).

47. 5 U.S.C. §§ 553, 556, 557 (1976).

48. *Id.* § 553.

49. *Id.* §§ 556,557.

50. 15 U.S.C. § 57a(b)(1) (1976). The APA requirements are much more general:

> General notice of proposed rule making shall . . . include —
> (1) a statement of the time, place, and nature of public rule making proceedings;
> (2) reference to the legal authority under which the rule is proposed; and
> (3) either the terms or substance of the proposed rule or a description of the subjects and issues involved.

5 U.S.C. § 553(b) (1976). The 1980 Act prescribed even more stringent procedural requirements than Magnuson-Moss, *see* Pub. L. No. 96-252, § 15, 94 Stat. 374 (1980) (to be codified at 15 U.S.C. § 57(b-3), although the Commission had already voluntarily adopted many of the new provisions. *See* notes 107-10, 295 *infra.*

51. 15 U.S.C. § 57a(c) (1976). The informal procedures of the APA put no restrictions on the Commission's discretion to allow cross-examination. *See* 5 U.S.C. § 553 (1976). The definition of "material facts" is discussed at note 95 *infra.*

if any single party feels that its interests will not be presented adequately, that party may be heard individually upon a showing that it made a good faith effort to agree to group representation, and that there are substantial and relevant issues it wishes to raise.[52] After examining the rulemaking record, the Commission may issue a final rule. The rule must be accompanied by a SBP which describes the prevalence of the unfair or deceptive acts or practices, the manner in which they are unfair or deceptive, and a statement of the economic impact of the new rule, including its effect on small businesses.[53]

Hybrid rulemaking procedures similar to Magnuson-Moss had been enacted for other agencies.[54] These procedures were identified as a new model towards which all agency rulemaking would eventually drift.[55] Still, because of the inclusion of a right to cross-examination and review under the substantial evidence test, it was common to hear much argument over whether the proceedings should be characterized as quasi-legislative or quasi-judicial, depending on whether the proponent wished to place the locus of control over the proceedings with the agency or the judiciary.[56] The debate was not at all aided by the fact that Congress had taken terms developed in a adjudicatory context and applied them to a rulemaking proceeding.[57]

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52. 15 U.S.C. § 57a(c)(3) (1976). The Commission relied heavily on this section to cope with the 7000 schools which were the target of the Vocational School Rule. *See* note 107 *infra*.

53. 15 U.S.C. § 57a(d)(1) (1976). The similar APA provision merely stated that "the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose." 5 U.S.C. § 553(c) (1976).

The House Report said that the purpose of the SBP was to

> [permit] a better understanding of the terms of the rule and the reasons for the rule on the part of the public. The statement is not intended to be a summary of all the legal findings which might be necessary to support the rule. In particular, the requirement that the statement include statements as to the economic impact of the rule does not require the Commission to undertake a full scale economic investigation prior to promulgation of the rule. . . . [The Commission should] summarize its best estimate of [the economic impact]. Obviously, a full evaluation of the economic impact of the rule would have to await its implementation.

HOUSE REPORT, *supra* note 2, at 47, *reprinted in* [1974] U.S. CODE CONG. & AD. NEWS at 7729.

54. For a description of other hybrid procedures and their operation, *see* Williams, *"Hybrid Rulemaking" Under the Administrative Procedure Act: A Legal and Empirical Analysis,* 42 U.CHI. L. REV. 401 (1975); Kestenbaum, *supra* note 3, at 686.

Compare Magnuson-Moss *with* Procedures for Rulemaking Under Section 6 of the Toxic Substances Control Act, 40 C.F.R. pt.750 (1980). The latter procedures require a comprehensive Notice of Proposed Rulemaking. *Id.* § 750.2. The agency conducts an informal hearing, *id.* § 750.6, at which parties may have a right of cross-examination on disputed issues of material fact, *id.* § 750.8.

55. *See* Rosch, *supra* note 22.

56. *See* Industrial Union Dep't, AFL-CIO v. Hodgson, 499 F.2d 467, 475 (D.C. Cir 1974). *Compare* Association of Nat'l Advertisers, Inc. v. FTC, 627 F.2d 1151 (D.C. Cir. 1980) *with id.* at 1181-1198 (MacKinnon, J., dissenting). *Compare* Brief for Petitioner Katharine Gibbs School at 19-23 *with* Brief for Respondent FTC at 50-56. *See also* Mobil Oil Corp. v. Federal Power Comm'n, 483 F.2d 1238, 1252 (D.C. Cir. 1973), *citing* City of Chicago v. Federal Power Comm'n, 458 F.2d 731, 739 (D.C. Cir. 1971).

57. *See, e.g.*, note 77, *infra*. *See generally* Verkuil, *supra* note 41. He discussed the changing meanings of such terms as hearing, order and rulemaking record.

The legislative history of Magnuson-Moss made clear that the addition of procedural requirements to the basic informal rulemaking of the APA was not intended to convert those proceedings into an adjudication.[58] If anything, the Senate sponsors of the bill were fearful that the concessions to cross-examination might be abused by the parties testifying and would need to be reconsidered. It is significant that Congress left the Commission to use its discretion in all phases of the process. The Commission decides whether there are disputed issues of material fact, whether cross-examination is appropriate, what its scope shall be, whether to prescribe special rules or procedures for a hearing to avoid unnecessary cost or delay, and who shall have the right to cross-examination.[60] All these decisions are ultimately reviewable by the court, yet it appears that Congress lodged considerably more trust in the FTC than the fact of review might suggest.

The combination of notice and comment procedures with trial-type hearings may properly be called a hybrid proceeding; still, it may fairly be said that the main thrust of Magnuson-Moss was to establish a rulemaking procedure with a concomitant exercise of legislative judgment, not merely an adjudicatory model.[61] The fact that regulations with the force of law are being promulgated does not obscure the fact

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58. The Magnuson-Moss bill was explained on the floor of the Senate as follows: "These procedures will assure that rulemaking conducted by the Commission will be a far cry from the formal trial-type procedures under sections 554 and 556 of the Administrative Procedure Act which have hamstrung other agencies. . . ." 120 CONG. REC. 40711 (1974) (remarks of Sen. Moss).

59. *Id.* at 40713.

60. *See* notes 50-53 and accompanying text *supra.*

61. In Association of Nat'l Advertisers, Inc. v FTC, 627 F.2d 1151 (D.C. Cir. 1980), the court explained:

> The district court's characterization of section 18 rulemaking [15 U.S.C. § 57a] as a "hybrid" or quasi-adjudicative proceeding . . . ignores the clear scheme of the APA. Administrative action pursuant to the APA is either adjudication or rulemaking. The two processes differ fundamentally in purpose and focus:
>
> The object of the rulemaking proceeding is the implementation or prescription of law or policy for the future, rather than the evaluation of a respondent's past conduct. . . . Conversely, adjudication is concerned with the determination of past and present rights and liabilities. . . .
>
> . . . . The presence of procedures not mandated by section 553 . . . does not, as the appellees urge, convert rulemaking into quasi-adjudication. The appellees err by focusing on the details of the administrative process rather than the nature of the administrative action.

Id. at 1160-61 (citation omitted).

In dissent, Judge MacKinnon insisted that it was impossible to look at Magnuson-Moss as anything other than a hybrid blend of rulemaking and adjudicative functions. *Id.* at 1182. He cited the substantial evidence test and the right to cross-examination as proof of the strong adjudicative character of the procedure. Furthermore, he quoted Senator Taft, who commented at the Senate hearings:

> *When we are dealing with the FTC . . . we are not dealing with what we usually consider to be a rulemaking power of a Government agency.*
>
> We are dealing with an agency where, under the antitrust laws, rules are often made that relate to very specific cases, particularly specific industries.

that the agency can act only within its grant of power, but as was seen in *National Petroleum*,[62] that grant was indeed very wide.

3. Magnuson-Moss Act — The Scope of Judicial Review

Congress specifically provided for judicial review of rules promulgated under Magnuson-Moss procedures. The standards of review chosen were every bit as hybrid as the rulemaking procedures themselves. Just as Magnuson-Moss incorporated the informal rulemaking procedures of the APA, it likewise adopted the APA review standards from section 706 that courts apply to informal rulemaking; that a rule shall be set aside if found too arbitrary and capricious, an abuse of discretion, in excess of statutory authority or procedurally defective.[64]

> ... In other words, the actual rights of individuals and business concerns are involved here.
>
> So we are really dealing not merely with the rulemaking proceedings, but in many cases, for all practical purposes with an *adversary proceeding.*

Id. at 1183-84, *citing* 120 CONG. REC. 40723-24 (1974) (remarks of Sen. Taft) (emphasis added by court).

In *Katharine Gibbs,* the petitioners forwarded similar arguments. They claimed that the rulemaking proceeding was so permeated with incidents of adjudication that the Commission's action merited strict scrutiny. Brief for Petitioner Katharine Gibbs School at 19-23. They also characterized the proceedings as adversarial, because, they claimed, the staff was inalterably biased and conducted the hearings in an adversarial manner. *Id. passim.*

The dissent of Judge MacKinnon and the arguments of the petitioners in *Katharine Gibbs* did not take proper cognizance of the language which appears through the congressional reports and debates, indicating that the purpose of Magnuson-Moss was to *expand* the Commission's *rulemaking* powers, *see* notes 39-45 and accompanying text *supra,* and that the adjudicative characteristics of the Act were to be limited in all respects. *See* notes 51-53 and accompanying text *infra.*

The reliance on Senator Taft's remarks is misdirected. Senator Taft spoke to the antitrust function of the FTC which, by the very nature of antitrust, often involves a small number of companies. But Magnuson-Moss rulemaking procedures specifically did not apply at all to the regulation of competition. *See* CONFERENCE REPORT, *supra* note 2, at 32, *reprinted in* [1974] U.S. CODE CONG. & AD. NEWS at 7764. Rather, Magnuson-Moss expanded the Commission's power to prevent unfair or deceptive practices - the consumer protection function - which does not by nature deal with a limited number of parties. The Door-to-Door Sales Rule, The Octane Rating Rule, and the Vocational School Rule illustrate this point, since they regulated thousands of salesmen, gas stations and schools, respectively.

62. 482 F.2d 672 (D.C. Cir. 1973), *cert. denied,* 415 U.S. 951 (1974). *See* notes 27-32 and accompanying text *supra.*

63. 15 U.S.C. § 57a(e) (1976).

64. Magnuson-Moss states: "The court shall hold unlawful and set aside the rule on any ground specified in subparagraphs (A), (B), (C) or (D) of section 706(2) of title 5, United States Code (taking due account of the rule of prejudicial error). . . ." *Id.*

The applicable parts of section 706(A) of the APA read that agency action shall be set aside if found to be —

> (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
> (B) contrary to constitutional right, power, privilege, or immunity;
> (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

The court was instructed to respect the rule of prejudicial error, whereby the court ignores harmless errors.[65]

The United States Supreme Court in *Citizens to Preserve Overton Park, Inc. v. Volpe*[66] defined the functioning of the arbitrary and capricious standard: "[T]he court must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment."[67] Often the test is said to be equivalent to the standard of rationality or reasonableness applicable to all official action —[68] that there must be a "rational connection between the facts and the choice made."[69] The arbitrary and capricious standard has also been phrased in other words which imply a more forceful judicial interjection into the administrative process, such as that the court must insure that the agency has taken a "hard look at the problems" or that the reviewing court is to engage in a "substantial

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(D) without observance of procedure required by law. . . .
5 U.S.C. § 706(2) (1976).

Although the statute uses the word "action," and no provision of the APA expresses the exact standard to use for informal rulemaking, courts have accepted section 706(2)(A), the arbitrary and capricious standard, as the applicable test. *See* Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 416(1971); Verkuil, *supra* note 41, at 206.

65. *Compare* 15 U.S.C. § 57a(e)(3) (1976) *with* 5 U.S.C. § 706(2) (1976). The Conference Report explained the harmless error rule as providing that "errors having no substantial effect on the ultimate rights of the parties will be disregarded." CONFERENCE REPORT, *supra* note 2, at 34, *reprinted in* [1974] U.S. CODE CONG. & AD. NEWS at 7766.

66. 401 U.S. 402 (1971).

67. *Id.* at 416. In Ethyl Corp. v. EPA, 541 F.2d 1 (D.C. Cir. 1976), the court noted that the words "clear error in judgment" were close to the standard "clearly erroneous." The latter standard is used when an appeals court is reviewing findings of fact made by a judge sitting without a jury. Under the clearly erroneous standard, the reviewing court may substitute their judgment on the findings of fact below. It is highly doubtful that the Supreme Court meant for such an interpretation in *Overton Park*. *Id.* at 34, 35 n.74.

68. Gifford, *Rulemaking and Rulemaking Review: Struggling Towards a New Paradigm*, 32 AD. L. REV. 577, 582 (1980) (rationality is the standard applied to all agency action); Breyer, Vermont Yankee *and the Courts Role in the Nuclear Energy Controversy*, 91 HARV. L. REV. 1833, 1834 n.6 (1978) ("reasonableness" roughly encompasses the standard of arbitrary, capricious, an abuse of discretion).

69. Burlington Truck Lines, Inc. v. United States, 371 U.S. 156, 168 (1962). In Automobile Parts & Accessories Ass'n v. Boyd, 407 F.2d 330 (D.C. Cir. 1968) it was said: "The paramount objective is to see whether the agency, given an essentially legislative task to perform, has carried it out in a manner calculated to negate the dangers of arbitrariness and irrationality in the formulation of rules for general application in the future." *Id.* at 338. The Supreme Court has added further to the definition: "While we may not supply a reasoned basis for the agency's action that the agency itself has not given . . . we will uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned." Bowman Transp., Inc. v. Arkansas-Best Freight Sys., Inc., 419 U.S. 281, 285-86 (1974) (citation omitted).

Cf. Short Haul Survival Comm. v. United States, 572 F. 2d 240, 244 (9th Cir. 1978) (the arbitrary and capricious standard is a highly deferential standard of review which presumes agency action to be valid).

70. Aqua Slide 'N' Dive Corp. v. Consumer Prod. Safety Comm'n, 569 F.2d 831, 844 (5th Cir. 1978); Greater Boston Television Corp. v. FCC, 444 F. 2d 841, 851 (D.C. Cir. 1970), *cert. denied*, 403 U.S. 923 (1971).

inquiry. . . . [:] a thorough, probing, in-depth review."[71] Nonetheless *Overton Park* makes it clear that "the ultimate standard of review is a narrow one. The court is not empowered to substitute its judgment for that of the agency."[72] The "hard look" interpretation has also been qualified in language that gives deference to the agency on those ultimate questions of fact or policy.[73]

Magnuson-Moss created a hybrid review standard by requiring that a rule be supported by "substantial evidence in the rulemaking record . . . taken as a whole. . . ."[74] The substantial evidence test is normally used to review only on-the-record formal rulemaking or adjudicative proceedings.[75] Substantial evidence is "more than a mere scintilla." It means "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. . . . The substantiality of evidence must take into account whatever in the record fairly detracts from its weight."[76]

For purposes of review over FTC rulemaking, the test was qualified in an important respect from its operation within the APA. A court reviewing a Commission rule was not limited to the four corners of the hearing transcript but was instructed to look at all the material included within Magnuson-Moss' expansive definition of the rulemaking record which stated that, for purposes of judicial review, the rulemaking record is defined as "the rule, its statement of basis and purpose, the transcript required by subsection (C)(4), any written submissions, and any other information which the Commission considers relevant to such rule."[77]

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71. Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. at 415.

72. *Id.* at 416.

73. The court in Greater Boston Television Corp. v. FCC, 444 F.2d 841 (D.C. Cir. 1970), expressed an ultimately narrow scope of review for the test:

> The function of the court is to assure that the agency has given reasoned consideration to all the material facts and issues. This calls for insistance that the agency articulate with reasonable clarity its reasons for decision, and identify the significance of the crucial facts.
>
> . . . If the agency has not shirked this fundamental task [of taking a "hard look"], however, the court exercises restraint and affirms the agency's action even though the court would on its own account have made different findings or adopted different standards.

Id. at 851.

74. 15 U.S.C. § 57a(e)(3) (1976). Since Magnuson-Moss allowed for an informal hearing, it also provided for judicial review of how the Commission conducts those hearings. Review of the right to cross-examination, however, exists only in regard to instances where a party was denied that right on a disputed issue of material fact. *Id.*

75. *See* 5 U.S.C. § 706(2)(E) (1976) which provides for substantial evidence review "in a case subject to sections 556 and 557 of [the APA] or otherwise reviewed on the record of an agency hearing provided by statute."

76. Universal Camera Corp. v. NLRB, 340 U.S. 474, 477, 488 (1951), *citing* Consolidated Edison Co. v. NLRB, 305 U.S. 197, 229 (1938).

77. 15 U.S.C. § 57a(e)(1)(B) (1976). In contrast, the rulemaking record for formal rulemaking under section 556 of the APA is very limited: "The transcript of testimony and exhibits,

The above formulations of the judicial review standards have led many to accept Judge Friendly's observation that he could not see how the results of the case would differ whether the arbitrary and capricious standard or the substantial evidence test were employed.[78] He questioned how a rule could be rational if not based on substantial evidence or a decision based on substantial evidence be declared arbitrary.[79] Even if the Congress intended that the standards describe different degrees of scrutiny, the courts have often gone their own way in reviewing agency rules. Courts have expressed the arbitrary and capricious standard to resemble the stricter test.[80] Courts have required agencies to adopt new procedures to insure the agency has considered all the relevant material,[81] although this practice has now been criticized by the Supreme Court.[82] The court may ask the agency to find more facts, using any procedures the agency might wish, so that the court can determine if there is a reasoned basis for the rule.[83] Another approach is to tailor the review according to the difficulty and importance of the rule.[84]

It has been suggested that the purpose of the substantial evidence test is to limit the material that the agency can use to justify its rules to the confines of the formal record.[85] With a hybrid model, however, this ra-

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together with all papers and requests filed in the proceeding, constitutes the exclusive record for decision in accordance with section 557 of this title. . . ." 5 U.S.C. § 556(e) (1976).

78. Associated Indus. of N.Y. State, Inc. v. United States Dep't of Labor, 487 F.2d 342, 349-50 (2d Cir. 1973).

79. *Id.*

80. National Nutritional Foods Ass'n v. Weinberger, 512 F.2d 688, 705 (2d Cir. 1975) (Lombard, J., concurring); Bunny Bear, Inc. v. Peterson, 473 F.2d 1002, 1005-06 (1st Cir. 1973). *See* notes 70, 71 *supra*. *See generally* Verkuil, *supra* note 41.

81. *See, e.g.*, International Harvester Co. v. Ruckelshaus, 478 F.2d 615, 631, 649 (D.C. Cir. 1973); Mobil Oil Co. v. Federal Power Comm'n, 483 F.2d 1238, 1252 (D.C. Cir. 1973); O'Donnell v. Shaffer, 491 F.2d 59, 62 (D.C. Cir. 1974) (considerations of fairness may dictate procedural requirements not mandated by Congress).

82. Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519, 545-48 (1978).

83. *See* Gifford, *supra* note 68, at 606-20. He advocates that the agency be given the discretion to fashion procedures upon remand of a rule.

84. Beneficial Corp. v. FTC, 542 F.2d 611, 618-19 (3d Cir. 1976) (challenge to cease and desist order) (courts should defer to exercise of Commission's informed discretion, but first amendment issues require more searching review); Ethyl Corp. v. EPA, 541 F.2d 1, 36 (D.C. Cir. 1976) (the more technical the material, the more intense effort is needed to understand the rule, but only for the purpose of judging its rationality); O'Donnell v. Shaffer, 491 F.2d 59 (D.C. Cir. 1974) "The goal is rather to insure that administrators provide a 'framework for principled decision-making' — a framework that is appropriate for the issues at hand." *Id.* at 62, *citing* Environmental Defense Fund, Inc. v. Ruckelshaus, 439 F.2d 584, 598 (D.C. Cir. 1971) (footnote omitted).

One commentator noted that "in practice, the reviewing standards courts apply often reflect unarticulated assumptions about, or attitudes towards, the substantive aspects of the subject matter being reviewed." Breyer, *supra* note 68, at 1833. *See also* Verkuil, *supra* note 41, at 209; Kestenbaum, *supra* note 3, at 688-89.

85. City of Chicago v. Federal Power Comm'n, 458 F.2d 731, 741-45 (D.C. Cir. 1971); Scalia

tionale collapses, since the record is open to an infinite number of submissions.[86] In fact, it is difficult to imagine how a judge can be expected to pour through over one hundred thousand pages of record material and determine if there is substantial evidence according to the test in *Universal Camera Corp. v. NLRB.*[87] One suggested answer, at least in the case of the Vocational School Rule proceedings, is that the court could narrow its focus to the two rulemaking reports and the SBP which accompanied the rule.

Perhaps the best reconciliation of the arbitrary and capricious standard and the substantial evidence test within a hybrid model was suggested by Judge Wright in a comparison of the two standards:

> Simple logic . . . suggests a rough answer. If weightings on conflicting evidence need be only "reasonable" to pass the substantial evidence test, it follows that they can be less than reasonable and still survive the "arbitrary, capricious" test. If this is so, the latter standard subjects a rulemaker to only the most rudimentary command of rationality. In drawing empirical conclusions, he must give actual, good faith consideration to all relevant evidentiary factors. If he has in fact given serious attention to a factor, the weight which he assigns to it in his final judgments is of virtually no concern to the reviewing court.[88]

If "evidentiary factors," "findings of fact" as reported by the Presiding Officer in the Vocational School Rule hearings,[89] and "material facts" and "findings" as expressed in the Magnuson-Moss Conference Report[90] can be roughly equated, then perhaps Judge

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& Goodman, *Procedural Aspects of the Consumer Product Safety Act,* 20 U.C.L.A. L. REV. 899, 935 n.139 (1973).

86. *See* note 77 and accompanying text *supra.*

87. 340 U.S. 474 (1951). This problem was raised in Aqua Slide 'N' Dive Corp. v. Consumer Prod. Safety Comm'n, 569 F.2d 831 (5th Cir. 1978). The court said: "The record in this case is a jumble of letters, advertisements, comments, drafts, reports and publications which runs for almost 2,000 pages. It has no index. A reviewing court must either 'scour the four corners of the record to find [the] evidence for itself,' . . . or rely exclusively on citations provided by counsel." *Id.* at 837 (citations omitted).

The record of the Vocational School Rule proceeding contained over 100,000 pages. An index was provided, although some complained it was too little, too late. *See* note 147 *infra.*

See generally Pedersen, *Formal Records and Informal Rulemaking,* 85 YALE L. J. 38 (1975).

88. Wright, *supra* note 18, at 392. Compare Wright's formulation with Consolo v. Federal Maritime Comm'n, 383 U.S. 607, 620-21 (1966) ("Congress was very deliberate in adopting [the substantial evidence standard] of review. It frees the court of the time-consuming and difficult task of weighing the evidence. . . .").

See also Saginaw Broadcasting Co. v. FCC, 96 F.2d 554 (D.C. Cir. 1938). The court identified four stages in the decision-making process: presentation and weighing of the evidence, determination of basic facts, an ultimate conclusion, usually in the words of the statute, and application of the statutory criterion. *Id.* at 559-60.

89. *See* note 109 *infra.*

90. CONFERENCE REPORT, *supra* note 2, at 34, *reprinted in* [1974] U.S. CODE CONG. & AD. NEWS at 7766-67.

Wright's recognition of different levels of scrutiny for the two standards is a good explanation of the type of review Congress expected under Magnuson-Moss. Those terms would refer to a stage of the logical process somewhere short of a final conclusion that the actions of the parties constituted unfairness or deception meriting Commission intervention. The court first examines the weight that the agency gave each evidentiary factor to determine if the findings of fact were justified. For example, the court might give more credence to a disinterested, well-controlled study by an academician than to the solitary statement of a school lobbyist or a disgruntled student. In a 100,000-page record, the court obviously could not weigh the testimony of each rulemaking participant. The search perhaps could be narrowed by focusing on the rulemaking reports and the facts presented by the parties.

At some point, an ultimate conclusion emerges that a situation exists which is unfair or deceptive and which requires a particular remedy. The court must be satisfied that the agency has listened to all the arguments, perhaps in terms of taking a "hard look." Furthermore, the agency must have responded to the competing arguments, giving "some reasoned explanation" for its own choices. The explanation may incorporate the agency's expertise, such as experience with past adjudications or with voluntary guidelines which were ignored. In the end, if the agency has listened well and responded reasonably, the court would uphold the rule. The court would not weigh all the reasons supporting and opposing the agency's action. Rather, the court only would insure that *the agency* did indeed perform this function. The necessity of a substantial evidence review on evidentiary facts definitely would not indicate that the court was to heighten its scrutiny of the agency's exercise of its legislative function of shaping remedies, nor would it accommodate the idea that the arbitrary and capricious standard is a strict standard of review.[91] Equating the two standards would only encourage the courts to begin questioning the policy decisions of the agency, rather than testing for rationality.[92]

This view makes sense when one looks at the compromise Congress formulated in Magnuson-Moss. The Senate bill had no procedures for FTC rulemaking beyond those provided by the informal procedures of the APA; the House, on the other hand, proposed a formal rulemaking model and review under the substantial evidence test.[93] Although the

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91. *See* notes 80-84 *supra*.

92. *See* Verkuil, *supra* note 41, at 209-10.

93. *Compare* S. 356, 93d Cong., 2d Sess. (1973) *with* H.R. 7917, 93d Cong., 2d Sess. (1973). A similar compromise was formulated for the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-78 (1976 & Supp. III 1979). In Industrial Union Dep't, AFL-CIO v. Hodgson, 499 F.2d 467 (D.C. Cir. 1974), the court observed the same sequence of events as for Magnuson-

final bill incorporated most of the House language, the Conference Report made clear that the substantial evidence test would apply only to material facts.[94] While the precise definition of "material facts" causes some difficulty, nonetheless it was believed that findings of material fact could be sufficiently isolated and reviewed separately. On the other hand, the Commission's policy judgment was to be reviewed less rigorously under the aribtrary and capricious standard.[95]

Moss. The Senate bill called for informal rulemaking; the House bill called for formal rulemaking and substantial evidence review. *Id.* at 473. *See also* Automobile Parts & Accessories Ass'n v. Boyd, 407 F.2d 330, 335 (D.C. Cir. 1968) (discussing the legislative history of the National Traffic and Motor Vehicle Safety Act of 1966, 15 U.S.C. §§ 1381-1431 (1976 & Supp. III 1979)).

94. CONFERENCE REPORT, *supra* note 2, at 34, *reprinted in* [1974] U.S. CODE CONG. & AD. NEWS at 7766-67.

95. The House Report said that the rulemaking procedures and scope of judicial review may be inadequate where certain fundamental factual premises of a rule are at issue. HOUSE REPORT, *supra* note 2, at 33, *reprinted in* [1974] U.S. CODE CONG. & AD. NEWS at 7727. To this end, it explained that cross-examination is available only to disputed issues of material fact. "Material" was said to have the same meaning as under the common law rules of evidence. "Issues of fact" do not, on the other hand, refer to "matters of law or policy or matters whose determination has been primarily vested by Congress in the Federal Trade Commission." *Id.* at 46-47.

The Conference Report stated: "The only disputed issues of material fact to be determined for resolution by the Commission are those issues characterized as issues of specific fact in contrast to legislative fact." CONFERENCE REPORT, *supra* note 2, at 33, *reprinted in* [1974] U.S. CODE CONG. & AD. NEWS at 7765.

According to the D.C. Circuit Court in Association of Nat'l Advertisers, Inc. v. FTC, 627 F.2d 1151 (1979), the phrase "specific fact" was derived from a Recommendation by the ACUS, as clarified by Chairman Scalia:

> There may arise occasionally in such rulemaking proceedings factual issues which, though not adjudicative, nevertheless justify exploration in a trial-type format — because they are sufficiently narrow in focus and sufficiently material to the outcome of the proceeding to make it reasonable and useful for the agency to resort to trial-type procedure to resolve them.

Id. at 1164. *See id.* at nn.27 & 29.

In referring to judicial review, however, the Conference Report said the court should set aside a rule "if it found that the findings and conclusions of the Commission with regard to disputed issues of material fact on which the rule is based are not supported by substantial evidence. . . . Of course, this test would not apply to findings or determinations of legislative fact." CONFERENCE REPORT, *supra* note 2, at 34, *reprinted in* [1974] U.S. CODE CONG. & AD. NEWS at 7767.

A concurrent resolution corrected the Conference Report, saying that "disputed issues of material fact" was meant to modify only "findings," not "conclusions." Senator Moss stated his understanding that "the substantial evidence test does not have relevancy to conclusions." 120 CONG. REC. 40725 (1974) (remarks of Sen. Moss).

Cf. Associated Indus. of N.Y. State, Inc. v. United States Dep't of Labor, 487 F.2d 342 (2d Cir. 1973), where Judge Friendly said the substantial evidence test applies to the overall policy decision to promulgate the rule, *based on the wording of the statute. Id.* at 348. In Magnuson-Moss, the wording was changed to *exclude* policy determinations from substantial evidence review.

To complete the background, legislative fact is often used in contrast to adjudicative fact. The original formulation of the legislative-adjudicative fact distinction was first developed by Professor Davis, adjudicative facts being the facts of the case while legislative facts being general facts, not concerning the immediate parties, which help decide questions of policy. 2 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 15.03 (1958).

Commentators have criticized the legislative-adjudicative fact dichotomy as being artificial

Further support for an interpretation of lessened scrutiny of the Commission's judgment on policy matters comes from the expression of deference to be given the Commission. The Conference Report stated: "The judicial review standards established by the bill are not intended to alter the established principle pursuant to which courts give weight to interpretations by expert agencies of the laws such agencies were created to administer and enforce."[96] Although the court is the final word on the interpretation of law,[97] as a practical matter courts generally do defer to agencies.[98] In accepting the agency's interpretation of its own statute, some considerations are the accuracy of the agency's

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and unworkable in practice. It is said that all policy issues necessarily contain factual predicates which could be the subject of trial-type hearings. Kestenbaum, *supra* note 3, at 691. In Association of Nat'l Advertisers, Inc. v. FTC, 627 F.2d 1151 (D.C. Cir. 1979), the court acknowledged that "the factual component of generalized rulemaking cannot be served from the pure policy aspects of the rule." *Id.* at 1162 (footnote omitted).

From the above discussion, it is evident that Congress used various words with different shades of meaning to describe those facts subject to cross-examination and those facts subject to review under the substantial evidence test. The class of facts appropriate for cross-examination seems larger than those facts which should be reviewed for substantial evidence, since "specific fact," as defined by the ACUS, includes "narrow legislative facts." The FTC rules of procedure contradict this assumption, however, since they contrast "specific fact" from "legislative fact," 16 C.F.R. § 1.13(d)(5)(i) (1976), *see* Kestenbaum, *supra* note 3, at 695, thereby implicitly equating specific and adjudicative facts. In any event, the categorization proved to be unworkable at the Vocational School Rule hearings. Instead, the Presiding Officer allowed unrestricted questioning in regard to subject matter but kept the questioning within strict time limits. PRESIDING OFFICER'S REPORT, PROPOSED TRADE REGULATION RULE: ADVERTISING, DISCLOSURE, COOLING-OFF AND REFUND REQUIREMENTS FOR PROPRIETARY VOCATIONAL AND HOME STUDY SCHOOLS, 3-5 (Sept. 10, 1976) [hereinafter cited as PRESIDING OFFICER'S REPORT]. Others have criticized the use of the legislative-adjudicative fact distinction as a way to control access to cross-examination. Kestenbaum, *supra* note 3, at 691-701.

The application of the distinction in the area of judicial review is another matter. The judiciary has routinely evaluated "adjudicative" or "evidentiary" facts to see if they constitute substantial evidence which supports a finding of fact. *See, e.g.*, Aqua Slide 'N' Dive Corp. v. Consumer Prod. Safety Comm'n, 569 F.2d 831 (5th Cir. 1978); Industrial Union Dep't, AFL-CIO v. Hodgson, 499 F.2d 467 (D.C. Cir. 1974). Of course, just because the court has labeled a fact as "adjudicative" does not mean that the labeling process is free from ambiguity. As the D.C. Circuit Court recognized in *Industrial Union*, the agency's task "contains 'elements of both a legislative policy determination and an adjudicative resolution of disputed facts'. . . ." *Id.* at 474. Yet, the court concluded: "Although in practice these elements may so intertwine as to be virtually inseparable, they are conceptually distinct and can only be regarded as such by a reviewing court." *Id.*

Congress meant for the two categories to be conceptually distinct. The legislative-adjudicative fact distinction was employed to control the limits of substantial evidence review. Until such time as Congress formulates a unified model of administrative review, the courts should adjust to the different kinds of scrutiny that Congress formed for each agency and work within those bounds.

96. CONFERENCE REPORT, *supra* note 2, at 35, *reprinted in* [1974] U.S. CODE CONG. & AD. NEWS at 7767.

97. Volkswagenwerk Aktiengesellschaft v. Federal Maritime Comm'n, 390 U.S. 261, 272 (1968), *cited in* Katharine Gibbs School v. FTC, 612 F.2d at 664.

98. FCC v. National Citizen's Comm. for Broadcasting, 436 U.S. 775 (1978) (the Commission is entitled to rely on its judgment, based on experience, that it is unrealistic to expect true diversity from a commonly-owned station and newspaper combination); Board of Governors of the Federal Reserve System v. First Lincolnwood Corp., 439 U.S. 234, 248 (1978) (an agency's

interpretation in the past, the extent to which Congress has entrusted the agency with policy decisions, the agency's expertise and experience with respect to problems of a similar nature, and the fairness of the agency's interpretation.[99]

Sometimes the concept of deference is construed very narrowly, especially if the matter does not require technical or scientific expertise,[100] or if the grant of power to the agency is so broad that the agency cannot be said to be an expert in any one industry.[101] By specifically stating that deference should be shown, and expanding the power of the FTC to reach all interstate commerce, Congress did not manifest an intent that deference should be given grudgingly.[102]

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long-standing construction of its statutory mandate is entitled to great respect, "especially when Congress has refused to alter the administrative construction.")

See also Aqua Slide 'N' Dive Corp. v. Consumer Prod. Safety Comm'n, 569 F.2d 831, 838 (1978) (court defers to agency's fact-finding expertise only when they have made an actual judgment concerning the significance of the evidence); Ethyl Corp. v. EPA, 541 F.2d 1, 34 (D.C. Cir. 1974). Ruling on a challenge to a cease and desist order, the Third Circuit Court of Appeals stated: "We acknowledge, of course, that we are ordinarily obliged to defer broadly to the Commission's exercise of informed discretion in framing remedial orders that bear some rational relationship to the removal or prevention of an established violation." Beneficial Corp. v. FTC, 542 F.2d 611, 618 (3d Cir. 1976).

99. *See* 5 B. MEZINES, J. STEIN & J. GRUFF, ADMINISTRATIVE LAW § 51 (1980).

The Supreme Court has explained the rationale of deference to agency expertise as follows:

> [I]n cases raising issues of fact not within the conventional experience of judges or cases requiring the exercise of administrative discretion, agencies created by Congress for regulating the subject matter should not be passed over. This is so even though the facts after they have been appraised by specialized competence serve as a premise for legal consequences to be judicially defined. Uniformity and consistency in the regulation of business entrusted to a particular agency are secured, and the limited functions of review by the judiciary are more rationally exercised, by preliminary resort for ascertaining and interpreting the circumstances underlying legal issues to agencies that are better equipped than courts by specialization, by insight gained through experience, and by more flexible procedure.

Weinberger v. Bentex Pharmaceuticals, 412 U.S. 645, 654 (1973), *citing* Far E. Conference v. United States, 342 U.S. 570, 574-75 (1951).

100. *See* ADMINISTRATIVE CONFERENCE OF THE UNITED STATES, RECOMMENDATION 79-6, ELIMINATION OF THE PRESUMPTION OF VALIDITY OF AGENCY RULES AND REGULATIONS IN JUDICIAL REVIEW, AS EXEMPLIFIED BY THE BUMPERS AMENDMENT, RECOMMENDATIONS AND REPORTS, 66 (1979).

101. *See* Kestenbaum, *supra* note 3, at 689.

102. In the legislative reports accompanying Magnuson-Moss, the "deference" to be given the FTC was in regard to the agency's interpretation of its own statute. CONFERENCE REPORT, *supra* note 2, at 35, *reprinted in* [1974] U.S. CODE CONG. & AD. NEWS at 7767. One application of this concept in *Katharine Gibbs* could have been the court giving deference to the Commission's contention that it has the authority to promulgate broad, indirect remedies such as the pro rata refund. Deference, however, may also refer to related but distinct concepts; mainly, whether agency rules carry a presumption of validity and whether the agency has the burden of proof at trial to prove that its rule is rational.

One commentator has traced these concepts from the Supreme Court decision in Pacific States Box & Basket Co. v. White, 296 U.S. 176 (1935), to the present. Gifford, *supra* note 68. In *Pacific Box*, the Court expressed its willingness to uphold agency action if any set of facts could be postulated that would support the agency's conclusions. Agency action was presumed to be valid; the challenger would have to prove the action was irrational. 296 U.S. at 186.

Although *Pacific Box* has not been overruled, its highly deferential attitude has been

It appears that the judicial review standards sought to promote a rulemaking scheme whereby the quantity and quality of the input into the rulemaking process would be controlled by the court through its review of access to cross-examination and scrutiny of the material facts in the record to see if they constituted substantial evidence. Having assured itself that the Commission has received and considered this input, the output, in the form of a rule which reflects the Commission's judgment on matters of policy, is measured under the less demanding arbitrary and capricious standard. In *Katharine Gibbs*, the court failed to explore the nature of this balance and consequently did not construe Magnuson-Moss in harmony with the legislative intent underlying it.

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repudiated in Associated Indus. of N.Y. State, Inc. v. United States Dept. of Labor, 487 F.2d 342, 354 (2d Cir. 1973) and in a number of other cases. *See* Annot., 46 A.L.R. FED. 780, 784 (1980). Gifford says that when a rule is challenged, the agency carries an initial burden to show that the rule is rational; at this point, there is no presumption of validity, or as he would more accurately describe it, no presumption of rationality. Once that initial showing is made, however, the presumption of rationality does attach and the challenger has the affirmative burden of proving it to be irrational. Gifford, *supra* note 68, at 594 n.84. The strength of the presumption might depend upon factors such as are enumerated in the text accompanying note 99 *supra*.

Magnuson-Moss does not assign a burden of proof, nor does it speak to presumptions of validity, except as that concept may relate to the agency's interpretation of its statute. Panel Discussion, 45 ANTITRUST L.J. 96, 108-09 (1976) (remarks of O. Hobbs). A Recommendation by the ACUS did address the presumption of validity in general. The Recommendation concerned the Bumpers Amendment, 125 CONG. REC. S.12145 (daily ed. Sept. 7, 1979), a proposed addition to S.1477, the Federal Courts Improvement Act of 1979, which would have eliminated any presumption attaching to an agency rule and would have shifted to the agency the burden of proof in a court challenge to the rule. The ACUS felt that the amendment's inflexible language would cause too many problems; it stated, however: "In actuality, no presumption of validity today shields a rule or regulation from the close scrutiny to which judicial review now subjects agency action. Courts may properly give weight to agency expertise in some circumstances, as, for example, where complex scientific or technical issues are involved." RECOMMENDATION 79-6, *supra* note 100, at 66.

Upon a rule challenge, agencies must be expected now to come forward with some evidence that the rule is valid. *See* Aqua Slide 'N' Dive Corp. v. Consumer Prod. Safety Comm'n, 569 F.2d 831, 840 (5th Cir. 1978); Gifford, *supra* note 68, at 593. The ACUS interpretation of "weight" to agency expertise, however, is too limited. Despite the use of scientific or technical issues as an "example," the Recommendation implies that the court will defer to the agency only when it deals with those areas which are beyond the comprehension of the average person. Yet the Congress which enacted Magnuson-Moss was well aware that the FTC's area of expertise did not primarily involve technical-scientific knowledge, but rather expertise in deception and monopolistic practices. It was an expert at identifying unfair and deceptive business practices which show a common pattern across industries, *see* Trade Regulation Rules Embodying Case Law Principles, 41 Fed. Reg. 3322 (1976), as well as an expert in certain industries which were the subject of repeated cease and desist orders.

Reading together the Magnuson-Moss legislative reports and the article by Gifford, *supra* note 68, it may be said that, in regard to the FTC in its rulemaking capacity, the agency must make some showing that its regulations are rational. Once this showing is made, the court should allow a *presumption* that the rule is valid (or rational); furthermore, it should give weight to the agency's interpretation of the scope and procedure of its own statute when weighing petitioners' challenges to the rule.

II. STATEMENT OF THE CASE

Prior to 1970, the Commission had proceeded against numerous individual schools.[103] In 1972, the Commission published Guides for Private, Vocational and Home Study Schools to give schools notice of what conduct the Commission considered unfair or deceptive.[104] Guides, however, are voluntary standards. Any attempt to compel industry-wide enforcement of the Guides requires individual adjudication on the issues of whether the practices defined in the Guides are in fact unfair or deceptive under the law and whether the practices of the business were unfair or deceptive. After 1972, the Commission found it necessary to issue numerous complaints against schools whom it was felt had violated the provisions of the 1972 Guides.[105] In the Commission's judgment, conditions indicated that a more pervasive remedy was needed.

The Vocational School Rule was originally issued in a Notice of Proposed Rulemaking pursuant to the APA.[106] After Congress enacted the Magnuson-Moss Act, the rule was republished and hearings were held in a number of cities.[107] In 1976, the Presiding Officer submitted a

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103. *See* [1964-67 TRANSFER BINDER] TRADE REG. REP. (CCH) ¶¶ 17,254; 14,429; [1967-70 TRANSFER BINDER] TRADE REG. REP. (CCH) ¶¶ 17,942; 18,261; 18,315; 18,359; 18,467; 18,576; 18,592; 18,593; 18,645; 18,774; 18,802; 18,838; 18,852; 18,857; 18,924; 19,029; 19,086; 19,088; 19,141; 19,143; 19,182; 19,192; 19,241; 19,247; 19,259.

104. 16 C.F.R. pt. 254 (1972). The Guides dealt, in a general way, with misrepresentations of the school's accreditation, the facilities, services and faculty and enrollment qualifications and limitations. The Guides also warned against deception in the areas of sales practices, pricing of courses, and collection and credit practices. *Id.* One affirmative disclosure section was included; the section requested that the school disclose to the prospective student, before the enrollment contract is signed, standards which the student must meet to be considered making satisfactory progress, a description of the facilities, an explicit description of the placement service and "any other material facts." Violation of a substantive rule would likewise require a case-by-case adjudication. Since Guides were only voluntary standards, the Commission was forced to relitigate the issue of whether an action contrary to a Guide was deceptive or unfair. The advantage of rulemaking was evident — the Commission need only show that the rule was violated. The fact of the rule provisions expressing an unfair or deceptive act would be conclusive.

105. *See* [1973-76 TRANSFER BINDER] TRADE REG. REP. (CCH) ¶¶ 20,014; 20,376; 20,456; 20,487; 20,499; 20,526; 20,561; 20,576; 20,603; 20,691; 20,749; 20,755; 20,756; 20,883; 20,898; 20,938; 20,970; 20,983; 21,016; 21,028; 21,039; 21,043; 21,085; 21,130.

106. 39 Fed. Reg. 29385 (1974) (codified at 16 C.F.R. pt. 438 (1974)).
The initial research and presentation of the rule was performed by the staff of the Bureau of Consumer Protection. The hearings were conducted by the Assistant Director for Rulemaking, Paul R. Dixon, who served as Presiding Officer. Under the Federal Trade Commission Improvement Act of 1980, the Presiding Officer is assigned from an independent department of the Commission to preclude any conflict of interest. Pub. L. No. 96-252, § 9, 94 Stat. 374 (1980) (to be codified at 15 U.S.C. § 57a(c)). The impartiality of Dixon was not questioned.

107. 40 Fed. Reg. 21048 (1975). The Commission also amended its rules of procedure to comply with the new Act. 16 C.F.R. §§ 1.11-1.20 (1975).
The new draft of the rule contained a request for interested parties to submit disputed issues

report which addressed previously designated disputed issues of material fact;[108] a more comprehensive staff report followed soon after.[109] Parties to the proceedings were allowed a period to submit rebuttals to the reports and were also given the opportunity to make direct presentations to the Commissioners.[110] Based on all the hearings, reports, and submissions, the Commission voted to promulgate a trade regulation rule entitled Proprietary Vocational and Home Study Schools. The final rule was issued December 28, 1978, effective one year later.[111]

The Vocational School Rule was prefaced by a SBP which detailed the findings and rationale underlying the rule.[112] The Commission had found a number of unfair and deceptive practices existing industry-wide.[113] It claimed that, for the most part, those practices were directed

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of material fact for discussion during the informal hearings. The issues submitted were narrowed to twenty-nine by the Presiding Officer and published in a Final Notice of Proposed Rulemaking. 40 Fed. Reg. 44582 (1975). Acting on a petition by several parties, the number of disputed issues was further reduced to twenty. *See* PRESIDING OFFICER'S REPORT, *supra* note 95, at 1-2.

The Presiding Officer appointed spokesmen for the four main categories of interested parties: home study schools, trade and technical schools, business schools and students. Cosmetology schools were also represented by their major accrediting association. *See* note 6 *supra*. Only six parties out of approximately 7000 schools felt the need to appear individually and only one of those parties made an extensive use of cross-examination. PRESIDING OFFICER'S REPORT, *supra* note 95, at 2-6. The actual hearings consumed twenty-eight days, in addition to the sixteen days of hearings conducted prior to the enactment of Magnuson-Moss. *Id.* at 3-4.

The initial phase of the proceeding was criticized in Kestenbaum, *supra* note 3, at 697-701. He felt that the Commission should have placed more evidentiary material at the disposal of the parties at the outset so that evidentiary conflicts could have been better anticipated. *Id.* at 697. He characterized the Presiding Officer's selection of issues which were appropriate for trial-type procedures as a hopeless task, concluding that the issues chosen showed no clear rationale why some were picked and others discarded. *Id.* at 678-79. The ACUS has expressed similar criticism; *see* RECOMMENDATION 79-1, *supra* note 22, at 45-49.

108. PRESIDING OFFICER'S REPORT, *supra* note 95.

109. BUREAU OF CONSUMER PROTECTION, FINAL REPORT TO THE FEDERAL TRADE COMMISSION AND PROPOSED TRADE REGULATION RULE, PROPRIETARY, VOCATIONAL AND HOME STUDY SCHOOLS (Dec. 10, 1976) [hereinafter cited as STAFF REPORT].

The Staff Report was intended to be a comprehensive analysis of the entire rulemaking record. The purpose of the Presiding Officer's Report was to resolve the disputed issues of material fact. PRESIDING OFFICER'S REPORT, *supra* note 95, at 9. The order of the reports was reversed for future rulemaking proceedings so that the Presiding Officer can prepare a shorter report which focuses on the differences from the analysis done by the staff. H.R. REP. NO. 181, 96th Cong., 1st Sess. 23 (1979) (Statement of Michael Pertschuk, Chairman, Federal Trade Commission).

110. 43 Fed. Reg. at 60,796. Neither the two reports, the post-report comment period or the direct submissions were required by Magnuson-Moss; rather, the Commission used these devices as a means to further narrow the issues and give the public a fair opportunity to have input before the final rule was published. *Id.*

111. Proprietary Vocational and Home Study Schools, 16 C.F.R. pt. 438 (1980).

112. 43 Fed. Reg. at 60,796-817. The SBP was divided into three main sections: an Introduction, which described how the rule was promulgated; a Summary of the Evidence; and the Legal Basis for the Rule. *Id.*

113. *Id.* at 60,796-802. The Commission determined that many vocational schools make a variety of false and misleading claims in their advertising and sales presentations. The most

at a group of consumers who were ill-equipped to make an informed choice about the educational product they were contemplating.[114] The Commission admitted that it was perhaps impossible to document to what extent each unfair or deceptive practice existed in the industry; nonetheless, it was felt enough evidence existed to justify the exercise of the Commission's Magnuson-Moss rulemaking power.[115]

The rule itself contained specific affirmative requirements which

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prevalent claims concerned jobs and earnings. Schools would make explicit guarantees of jobs, which the Commission said was almost always deceptive, since it would be almost impossible to be sure that a student would be placed. Some schools ads were worded to seem like a job offer. Others would misrepresent the fact that their training qualified a person for entry into a field, when in reality there were additional prerequisites such as a four-year college degree. Also in this category were false and deceptive claims about graduation rates, job placement rates and promises of job placement. The Commission found too that schools would make references to general employment statistics from sources such as the U.S. Dept. of Labor Occupational Outlook Handbook and imply that those general predictions accurately represented the job prospects for the particular student at the particular school. *Id.* at 60,798-99.

In the category of non-career-related claims, the Commission found that schools would use deceptive claims about the attributes or policies of the school or would foster deception by omitting material information about the school's claims. False claims were made about the school's equipment and facilities, quality of instruction, refund policies, accreditation and government approval of courses. *Id.*

Schools misrepresented the selectivity of their admissions process. The Commission stated: "In fact, the record demonstrates that few proprietary vocational schools apply any minimum admissions criteria aside from the student's age and that many schools randomly recruit and admit all enrollees who are willing to sign a contract." *Id.* Schools failed to disclose graduation and placement rates. The lack of this information was misleading; the Commission gave an example of how disclosure of a 90% placement rate would be deceptive by omission of the fact that only 20% of enrollees actually graduated. *Id.*

Perhaps the most egregious abuses occurred in connection with the use of commissioned sales representatives. Salesmen as a rule were trained to sell courses and rarely had knowledge of the substance of the courses or the attributes of the school. The fact that salesmen were paid on commission "encouraged the enrollment of every prospect who can be induced to sign a contract. . . . Because salesmen are rewarded for merely obtaining downpayments and contract signatures, they have no incentive to screen out unqualified prospects and minimize potential dropouts." *Id.* The Commission found that these practices were prevalent, particularly among the major nationwide schools which enroll a large proportion of all proprietary students. *Id.* at 60,800.

It was found that the Federally Insured Student Loan program (FISL) and veterans benefits facilitated unfair practices, since students could be induced to enroll by the promise of a loan or grant. The Commission said: "The result of this infusion of federal monies has been to accelerate the indiscriminate enrollment of consumers who are unlikely to complete their course and find employment. . . ." *Id.* Schools on occasion implied that the federal agency granting the loan had endorsed the school programs. In actuality, the government did not endorse any course of study; rather, the job of accrediting schools to participate in the federal loan programs was delegated to the states and private accrediting agencies, including the petitioners in the present case.

The Commission found that drop-out rates for all schools was over 70% according to several studies and that a major cause of drop-outs was the use of unfair and deceptive practices. Refund and cancellation procedures were found to be reasonable. However, they were generally unstandardized and enforcement of those policies by the appropriate federal agencies and accrediting associations were frequently ineffective. The Commission cited a United States Office of Education study which revealed extensive violations of industry accrediting standards. *Id.* at 60,801.

114. *Id.* at 60,797-98. "The record evidence shows that most students make their enrollment decisions without adequate information or employment counseling." *Id.* at 60,797.

115. *Id.* at 60,803.

every vocational school was required to follow in connection with the enrollment of a student. At the time the school accepted a student's contract, it had to provide notice to the student of the fourteen day cooling-off period during which time the student could cancel his contract with the school without incurring any financial obligations.[116] After the contract was accepted, the school had to mail the student a notice entitled "How to Cancel Your Contract." The school had to enclose in the same envelope a disclosure of the school's graduation rate and, if the school had made specific claims about job placement, the job placement rate.[117] Both disclosures had to be computed by strict formulas and could not be accompanied by any other information.[118]

Once the student was enrolled beyond the fourteen day cooling-off period, he could cancel the contract by written notification or by constructive cancellation, based on a failure to attend classes or, in the case of a home study course, the failure to mail in lessons.[119] The school

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116. 16 C.F.R. § 438.2 (1980). The Commission designated different notices for the various types of schools. The cooling-off period would begin on the day the disclosure provisions were mailed, not the date the contract was signed. *Id.* at § 438.5.

117. *Id.* at § 438.3.

118. *Id.* The formula varied according to the type of school. To take one example, residence schools with fixed class schedules, the school would have to provide, based on its most recent graduating class, the number and percentage of students who graduated, the number of students and the percentage of students who failed to complete.

The following explanatory paragraph could be placed after the disclosure: "In evaluating these figures, you should know that students may drop out of a course for a variety of reasons. These range from dissatisfaction with the course to inability to do the work. Other students drop out of school for personal reasons." *Id.*

The placement rate disclosure for residence courses with fixed class schedules was to be presented as follows:

> (i) The number and percentage of graduates who obtained employment in jobs for which the course prepared them within four months of leaving the course;
> (ii) the number and percentage of these graduates by their yearly gross salary, in increments of two thousand dollars ($2,000);
> (iii) the number and percentage of these graduates who refused to provide salary information.

Id.

The placement disclosure could likewise be followed by an explanatory paragraph, at the option of the school:

> In evaluating our record, remember not all of our students took this course to get a job in the field of [school to insert area of training]. Also, we were unable to reach some of our graduates to see if they got jobs. So, our placement percentage might be understated.

Id.

119. 16 C.F.R. at § 438.4. Constructive notice of intention to withdraw from the course was calculated by three basic standards:

> (1) For residence courses with fixed class schedules or the equivalent portion of a combination course, by failing to attend residence instructional facilities for a period of five consecutive days on which that class meets;
> (2) For residence courses without fixed class schedules, or the equivalent portion of a combination course, by failing to attend residence classes or failing to utilize residence instructional facilities for a period of sixty (60) consecutive days;

could retain only the pro rata portion of the total contract price, plus a registration fee.[120] If the student returned equipment supplied by the school, the cost of the equipment, if separately billed, would be prorated along with the tuition costs. The return of damaged and undamaged equipment were treated alike. If the equipment was not returned within twenty-one days, the school could retain the entire equipment charge.[121]

Certain disclaimers were required to accompany any media advertisements or written claims concerning job or earning potential. These disclaimers stated, in essence, that the school does not guarantee the student a job. Furthermore, the same notice would also inform the student that he would be provided with job placement information.[122] The school was not permitted to waive any rights or obligations created by the rule.[123] Finally, the rule explicitly preempted state law which was inconsistent with or frustrated the purpose of the rule.[124]

The rule was immediately challenged by a group of vocational schools and accrediting organizations.[125] Pursuant to Magnuson-Moss, petitioners sought direct review of the final rule in the United States court of appeals.[126] The petitioners claimed that the Commission had exceeded its statutory authority by promulgating the rule.

Specifically, it was asserted that the rule was procedurally defective in that the Commission had failed to include within the rule itself the specific acts and practices deemed to be unfair or deceptive.[127] Most of

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(3) For correspondence courses of instruction, or the equivalent portion of combination course, by failing to submit a lesson for a period of 120 consecutive days.

Id. § 438.1(n).

120. *Id.* § 438.4(c). The registration fee would be the greater of $25.00 or 10% of the contract price, not to exceed $75.00. For a school without a separate equipment charge, they would calculate the number of hours, classes or lessons completed, divided by the number required to complete the course, multiplied by the contract price.

121. *Id.* § 438.4(c)(2).

122. *Id.* § 438.7.

123. *Id.* § 438.8.

124. *Id.* § 438.9. The provision read:

> This trade regulation rule preempts any provision of any state law, rule, or regulation which is inconsistent with or otherwise frustrates the purpose of the provisions of this trade regulation rule, except where the Commission has exempted such a state or local law, rule or regulation. If, upon, [sic] application of any appropriate state or local governmental agency, the Commission determines that the state statutory or regulatory provision affords greater protection to students than the comparable provision of the Commission's rule then the state requirement will be applicable to the extent specified in the Commission's determination on the exemption application.

Id.

125. *See* note 6 *supra*.

126. Katharine Gibbs School v. FTC, 612 F.2d 658 (2d Cir. 1979). Review was sought pursuant to 15 U.S.C. § 57a(e)(1) (1976) which permits any interested party to file a petition in the United States court of appeals, no later than sixty days after the rule is promulgated, for judicial review of a Magnuson-Moss rule.

127. 612 F.2d at 662.

the affirmative provisions were attacked as being arbitrary and capricious or irrational.[128] The Commission was accused of overstepping its sphere of authority in the wording of the preemption provision.[129] Cosmetology and flight schools felt that their particular category of vocational school did not engage in the unfair practices described in the SBP and should therefore be exempted from the rule.[130] One school, Control Data, felt that a number of their courses lasting only a few hours were not within the rule's definition of a course and should likewise be exempted.[131] Objection was made to purported ex parte communications between the Commission and staff.[132] Also, the SBP was labeled inadequate.[133]

The Second Circuit held that the rule was defective on both procedural and substantive grounds. The court stated that the rule was procedurally defective in that it did not define any deceptive acts or practices; it merely stated that any violation of the Commission's affirmative requirements would be considered unfair.[134] Substantively, the court struck down three provisions. The pro rata refund was thought to show no rational relation between the facts found and the choices made.[135] The job placement statistic was held to be arbitrary and capricious; the court found an example where the Commission had calculated a 5.8% placement rate while the school had recorded a 54% rate using a different but purportedly equally valid formula.[136] The preemption provision was declared to be overboard.[137] All other challenges were upheld; the rule was remanded to the Commission, however, for reconsideration.[138]

Judge Newman wrote a comprehensive dissent in which he supported the rule in its entirety.[139] He felt the majority had given an unduly narrow construction to the procedural requirements of Magnuson-Moss as well as a restrictive view of the Commission's ability to fashion remedies for the purpose of preventing unfair practices. Although he was concerned by the Commission's choice of words in some parts of the rule,[140] in general he felt the Commission had acted within its statutorily delegated powers.

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128. *Id.* at 662-66.
129. *Id.* at 666-68.
130. *Id.* at 668-69.
131. *Id.*
132. *Id.* at 670.
133. *Id.*
134. *Id.* at 662.
135. *Id.* at 664.
136. *Id.* at 664-65.
137. *Id.* at 666-67.
138. *Id.* at 670.
139. *Id.* at 670-83.
140. Judge Newman was a bit skeptical of the Commission's claim that it wished to influence the schools to admit only students with "a genuine interest in the course." *Id.* at 679. He also

The Commission's petition for rehearing en banc was summarily denied, although Judge Oakes did file a dissent in which Judges Newman and Mansfield joined.[141] Judge Oakes protested the full court's refusal even to consider the first case which examined the scope of the Commission's Magnuson-Moss rulemaking powers, especially in light of the Second Circuit's leadership in other administrative law decisions. He reinforced many of the arguments brought forth by Judge Newman's dissent in the main case and concluded that the panel majority was "usurping the function of another branch of government" by allowing to stand an opinion which so severely cut back on the Commission's rulemaking powers.[142]

III. Issues Presented by Katharine Gibbs

A. Procedural Defects

The court held that the Vocational School Rule was procedurally defective because it did not state with specificity acts or practices which are unfair or deceptive.[143] Technically, the court was correct. The rule merely stated the understood fact that violation of the affirmative requirements would constitute an unfair or deceptive act.[144] Magnuson-Moss asked more, however; it required that the Commission define with specificity those unfair and deceptive practices which justified the Commission's intervention through its rulemaking power. Nowhere in the rule itself did the Commission specify a deceptive practice by vocational schools.

That is not to say that no such instances could be found. The Commission found a great number of specific unfair and deceptive practices which it presented in the SBP.[145] For example, advertisements falsely implied that high paying jobs were available to the school's graduates; salesmen misrepresented the nature of the course or implied that federal loans were grants; persons who had little education were signed up for courses they could not hope to complete.[146] These allegations of unfairness were liberally referenced to the voluminous rulemaking record

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questioned the Commission's prohibition on any material to accompany the job placement disclosure. *Id.* at 681.

141. Katharine Gibbs School v. FTC., 628 F.2d 755 (2d Cir. 1979).

142. *Id.* at 758.

143. 612 F.2d at 662.

144. Magnuson-Moss stated: "When any rule under subsection (a)(1)(B) takes effect a subsequent violation thereof shall constitute an unfair or deceptive act or practice in violation of . . . [15 U.S.C. § 45(a)(1)], unless the Commission otherwise expressly provides in such rule." 15 U.S.C. § 57a(d)(3) (1976).

145. *See* note 113 *supra.*

146. *Id.*

as well as to the more manageable Staff Report and Presiding Officer's Report.[147]

The court's rejection of five years of rulemaking effort on procedural grounds should cause a bit of discomfort. First, if the court's only concern was that the specific unfair and deceptive practices in the SBP did not appear in the rule itself, then this is an easily curable defect. In essence, the court asked the Commission to shift the enumeration of unfair practices from the rulemaking record into the text of the rule. The troubling aspect of this interpretation is that the procedural defect is so easily cured that it should rise to the level of harmless error which, under Magnuson-Moss, the reviewing court should ignore.[148] In addition, the court would be requiring that a five page rule balloon into a twenty-five page litany of unfair practices.[149] This would hardly be a desirable result from either a compliance or enforcement standpoint,

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147. The entire record of the rulemaking proceeding ran over 110,000 pages. The Presiding Officer's Report was 211 pages; the Staff Report was 522 pages.

The Commission put out an index to the documents contained in the full record. Some petitioners protested that the submissions of the schools opposing the rule were lumped into one undifferentiated category within the record, while comments favorable to the rule or against the schools were carefully indexed by topic. *See* Brief for Petitioner Katharine Gibbs School at 45-48.

148. 15 U.S.C. § 57a(e)(3) (1976). In a pre-Magnuson-Moss case involving one of the narrow FTC rules, the Second Circuit had said:

> Regulations so promulgated will not be declared void merely because of a purely technical flaw in failing to include *within the Rules themselves* a "concise general statement" of basis and purpose. . . . Both the basis and purpose are obvious from the specific governing legislation and the entire trade was fairly apprised of them by the procedure followed.

Hoving Corp. v. FTC, 290 F.2d 803, 807 (2d Cir. 1961) (footnote and citations omitted). *See also* Office of Communication of the United Church of Christ v. FCC, 560 F.2d 529, 532 (2d Cir. 1977) (the court will uphold a decision if the agency's reasoning may reasonably be discerned).

In Shell Oil Co. v. Federal Energy Administration, 574 F.2d 512 (Temp. Em. Ct. App. 1978), the court held: "Admittedly, where the defects in the compliance with procedural requirements do not defeat the rulemaking process, many courts are unwilling to invalidate the resulting rule. . . . However, the deficiencies in the rulemaking procedures in the instant case were more than technical; they defeated the process." *Id.* at 516 (citations omitted). In *Shell Oil*, an interim price regulation to govern no-lead gasoline was struck down because the gas industry had no effective notice that a previously agreed upon pricing formula was going to be changed. The industry had no opportunity to comment on the change. *Id.* Compare that result to the unfolding of the vocational school rule, where the proprietary school industry had input for at least a three-year period before a final rule was issued.

149. *See* 612 F.2d at 675 (Newman, J., dissenting). Some provisions would prove easy to cure. For example, the Commission made a finding of fact that schools either misrepresent their graduation rates or do not disclose them at all. It made a further finding, perhaps of legislative fact, that graduation rates are essential in order to evaluate placement rates. 43 Fed. Reg. at 60,805. In a revised rule, the Commission would present the failure to disclose the graduation rate as the unfair practice. The remedy would be the requirement that the school disclose the statistic according to its specific formula.

Judge Newman's argument stressed the point that the majority's procedural holding would necessitate a redundancy. Although Magnuson-Moss contemplates a two-step approach of defining the practice and remedying it, "the terms of the statute do not require that the definition and the remedy always be independently stated. Such a requirement would be an empty formalism in the many situations where the definitional and remedial aspects of a deceptive practice coincide." 612 F.2d at 671.

especially for an agency which has prided itself on its efforts towards reducing the number of regulations it puts forth.[150]

On the other hand, the court may have had more serious objections to the rule: mainly, that the Commission did not document any unfair or deceptive practices, or that it failed to link those practices to the rule's affirmative requirements. This would not be a procedural objection, but rather would constitute a substantive attack. The Commission's authority is broad, but still it must invoke unfair or deceptive practices if it is to act in conformity with its congressional mandate. Yet it is difficult to see how this interpretation can stand. The court did uphold certain rule provisions; it could not have done so unless it was able to perceive unfair or deceptive practices which were reasonably linked to the Commission's remedy. As for the provisions which were struck down, notably the pro rata refund, it can not be stated with any confidence that the court ruled on the basis of finding no unfair or deceptive predicate.[151]

One more possible interpretation can be offered. The court may have believed that the unfair practices documented by the Commission were not supported by substantial evidence. Although the Presiding Officer, staff and the Commission all found substantial evidence for the abuses alleged in the SBP,[152] the court did not really address this finding in its procedural holding nor in its discussion of the rule provisions. This failure to test for substantial evidence was a major weakness in the court's analysis. Some petitioners vigorously challenged the Commission's assertion that unfair practices were widespread. Petitioner Katharine Gibbs School presented statistics which purported to show that the number of school complaints, expressed as a percentage of the total vocational school population, was less than one percent.[153] Ad-

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150. *See* H.R. REP. NO. 181, 96th Cong., 1st Sess. 22 (1979) (Statement of Michael Pertschuk, Chairman, Federal Trade Commission). He stated:

> The Commission has completed its review of 152 pre-Magnuson-Moss trade practice rules (each affecting a major manufacturing or retailing industry) and has rescinded 145 of them. I think this makes us unique among regulatory agencies in that we have actually reduced the number of pages our regulations take up in the Code of Federal Regulations.

Id.

151. *See* notes 165-70 and accompanying text *infra*.

152. STAFF REPORT, *supra* note 109, at 5; PRESIDING OFFICER'S REPORT, *supra* note 95, at 21; 43 Fed. Reg. at 60,803. The Presiding Officer concluded:

> It should convince an objective listener that vocational schools as a whole are not the massive fraud some would have us believe they are. If they were, one would certainly expect the number of complaints to escalate beyond count. However . . . [i]f you take fifty here, one hundred there, and sixteen hundred elsewhere and keep adding them together over the entire country the sum total is a picture crying out for attention. Vocational schools do present a grave problem of consumer protection for the record clearly shows a substantially large number of students all over the country who are being victimized by many vocational schools which fall considerably below the ideal established by others.

PRESIDING OFFICER'S REPORT, *supra* note 95, at 21.

153. Brief for Petitioner Katharine Gibbs at 60-64.

vocates for the rule contended that the number of reported complaints was only a fraction of the total.[154] That position relied on what might be called a legislative fact — a way of thinking about the facts of the case — that only a fraction of the true number of abuses are ever revealed in a regulatory investigation. The Presiding Officer summed up the two positions: the Commission claimed the evidence showed only the tip of the iceberg while the schools asserted that the evidence was the whole iceberg.[155] If the substantiality of the evidence was a concern of the court, it did not say so.

Perhaps the most confusing aspect of the court's procedural holding was its treatment of the SBP. Magnuson-Moss calls for a fairly detailed SBP compared to the SBP required under the APA informal procedures.[156] The Commission was generally responsive to the more rigorous format. The SBP accompanying the Vocational School Rule is eighteen pages and is supported by over three hundred footnotes. It talks about previous attempts at regulation by the Commission, the federal government and the states; why the particular affirmative requirements of the rule were necessary to prevent unfair and deceptive practices and why other possible solutions would not be as desirable.[157]

Unfortunately, Magnuson-Moss created a dilemma on how a court should use the SBP. The Act says: "The contents and adequacy of [the SBP] shall not be subject to judicial review in any respect."[158] Under the substantial evidence test, however, a rule shall be set aside if not supported by substantial evidence in the rulemaking record taken as a whole — which includes the SBP.[159] The D.C. Circuit Court, in reviewing the first rule to be completed entirely under Magnuson-Moss procedures, made a reasonable accommodation to the dilemma by consulting the SBP when it was helpful to an understanding of the rule but otherwise ignoring it.[160]

The *Katharine Gibbs* court did not elucidate the strategy by which it dealt with the conflicting commands of Magnuson-Moss. Such a determination is essential because the SBP is the one place where the court could determine the reasoning of the Commission and the facts it relied on, as opposed to the reasoning of the staff or Presiding Officer. In its procedural holding, the court treated the SBP as having little bearing on the rationale behind the rule. Elsewhere, it made reference to the SBP to support a particular provision that the court found reasonable.[161]

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154. PRESIDING OFFICER'S REPORT, *supra* note 95, at 21-22.
155. *Id.*
156. *See* note 53 and accompanying text *supra.*
157. *See* notes 112 & 113 and accompanying text *supra.*
158. 15 U.S.C. § 57a(e)(5)(C) (1976).
159. *See* note 77 and accompanying text *supra.*
160. American Optometric Ass'n v. FTC, 626 F.2d 896, 905-06 (D.C. Cir. 1980).
161. 612 F.2d at 665-66.

The court could have explained its position on the SBP when it addressed the petitioner's claim that the SBP was inadequate; instead, the court stated that the adequacy of the SBP was beyond the scope of the court's review powers.[162]

By not giving the SBP a consistent treatment, the court's review of the entire rule was thrown into confusion. The SBP contained the types of facts needed for a substantial evidence test. It presented the logical bridge between fact and conclusion and a discussion of rejected alternatives to aid review under the arbitrary and capricious standard. The resolution of these tests turned upon whether the SBP is to be considered in the review process. Selective inclusion of the SBP in the review process can only lead to a feeling that the court was ruling on the wisdom of the rule rather than on how well it satisfied Magnuson-Moss requirements. The procedural defect should have at most fallen among those errors deemed harmless. The court's holding put the Commission's rulemaking process in an unnecessary procedural strait jacket.

B. The Pro Rata Refund Provision

The Commission found that existing vocational school refund procedures were governed by state and federal law and not in themselves unfair. The purpose of the pro rata refund provision was to change the incentive structure of the school so that it would be unprofitable to use unfair practices to lure students who later would drop out once the false claims were realized. The court was not comfortable with this reasoning, but for purposes of analysis assumed that the Commission did have the authority to alter a school's incentive structure. Instead of upholding the provision, however, it held that there was no rational connection between the facts found and the choice made.[163]

The pro rata refund was the centerpiece of the Commission's rule. It would allow the student to escape the harsh financial consequences of deception. More than any other part of the Vocational School Rule, it asserted the furthest reach of the Commission's rulemaking power.

It appears that the court's holding was: "[W]e find no rational connection between the Commission's universally applicable refund requirements and the prevention of specifically described unfair and deceptive enrollment practices."[164] Exactly what the court objected to, however, is open to question. Its holding could imply that there was no predicate of unfair practices underlying the provision, that the remedy

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162. *Id.* at 670. A 1979 House bill did in fact make it clear that Congress understood the problem with construing the SBP. It included a provision that would have told the judiciary that it could consult the SBP in reviewing the rule. *See* H.R. REP. No. 1557, 95th Cong., 2d Sess. 19-20 (1978).

163. 612 F.2d at 663-64.

164. *Id.* at 664.

was overbroad and an abuse of discretion, or that the remedy was not linked to any unfair practices. It was also possible that the court struck down the pro rata refund because no unfair practices were listed in the rule itself. These alternative explanations will now be examined.

Magnuson-Moss judicial review requires the court first to scrutinize the factual predicate upon which the Commission's action was based.[165] In the SPB, the Commission explained that its factual basis for the pro rata refund constituted numerous deceptive practices which had been outlined earlier in the SBP.[166] The Presiding Officer had found that students drop out for a number of reasons besides dissatisfaction with the course and that it would be difficult if not impossible to attach a percentage to each reason.[167] Nonetheless, the Commission found that a substantial number of students enrolled because of deceptive practices on the part of the school. Furthermore, it found that an enormous number of students drop out from vocational school courses, with drop-out rates for some home study courses at eighty to ninety percent.[168]

These factors were appropriate material facts to which the court should have applied the substantial evidence test in order to determine if there was support for the Commission's findings that students drop out in great numbers because of the deception which motivated their enrollment. The petitioners proffered evidence that the incidence of deception was low. In addition, they claimed that the use of commissioned salesmen, the area of the most flagrant abuses, had been effectively curtailed.[169] The court did not examine these competing claims. The court noted the existence of the substantial evidence test, cited the Commission's opposition to it during the Magnuson-Moss hearings, but did not apply it.[170]

The second step in the review involves a determination on whether the Commission's action was arbitrary and capricious. The court would want to examine the ultimate conclusions of the Commission and the remedies selected. The Commission made an ultimate conclusion that nothing short of a pro rata refund would effectively remedy the wide range of deceptive practices employed by a substantial number of schools on a substantial number of students.[171] The Commission

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165. *See* notes 74-76 and accompanying text *supra*.

166. 43 Fed. Reg. at 60,809.

167. PRESIDING OFFICER'S REPORT, *supra* note 95, at 123-46. Some reasons were illness, nonpayment of tuition, disciplinary reasons, excessive absence, and unsatisfactory progress. *Id.* at 124. A high drop-out rate may indicate the school is of very high quality and very rigorous, or it could indicate that the school is of poor quality, with inferior courses and equipment. *Id.* at 127.

168. *See* STAFF REPORT, *supra* note 109, at 168-75.

169. Brief for National Home Study Council at 3.

170. *See* 612 F.2d at 661, 663-64.

171. The Commission's justification for this conclusion appeared in the SBP: "Students drop out for a variety of reasons, many of which are unrelated to the quality or sales practices of

reasoned that, absent a stringent refund policy, it would need to prohibit dozens of unfair practices and perhaps design a remedy for each practice. The rule would become unwieldy, unenforceable, and more burdensome to schools than a single refund requirement.[172]

The court said that the agency's decision is entitled to deference by the court only when its actions are "consistent with the congressional purpose" and "when there are no 'compelling indications that it is wrong;'" the agency must show "a rational connection with the facts found and the choice made."[173] Although the court stated the applicable standards of judicial review, it did not clearly apply them. It would have been helpful if the court did indeed speak to its conception of the congressional purpose in defining the scope of FTC rulemaking in Magnuson-Moss. As seen in both *National Petroleum* and the legislative history of Magnuson-Moss, the most important check on the Commission's rulemaking power was a procedure which, in conjunction with substantial evidence review, insured that the Commission listened to all arguments, considered them, and gave a reasoned explanation for its final decision.[174]

Petitioners raised many objections to the pro rata refund. A major argument dealt with the contention that a large portion of the school's costs were fixed. As students dropped out and received refunds, the school would not be able to meet its fixed costs without raising its tuition, perhaps to a point ruinous to entering students and to the school because of declining enrollments.[175]

The Commission did not present direct evidence on this point; a study to examine the issue of fixed costs had been interrupted early in the rulemaking proceedings.[176] The Commission did however counter that if a rise in tuition was necessary, it would reflect the true cost of educating a student and would constitute "drop-out insurance" for the student. Furthermore, it was determined that a high percentage of fixed

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the schools. However, the record contains substantial evidence that a major cause of noncompletion is the industry's enrollment policies, coupled with the unfair and deceptive sales practices described above." 43 Fed. Reg. at 60,800 (footnotes omitted).

172. 43 Fed. Reg. at 60,809.

173. 612 F.2d at 664 (citations omitted).

174. *See* notes 89-102 and accompanying text *supra*.

175. Joint Brief for Petitioners at 32-34; *See* 43 Fed. Reg. at 60,809.

176. The Commission explained that the reason the study was not completed was because the office which was preparing the study had its functions transferred to another section; in the process, the study was discontinued. Brief for Respondent FTC at 67. The explanation does seem a bit strained. Nonetheless, the Commission was not required in the economic statement to "justify the impact of the rule upon small schools" as petitioners asserted. Joint Brief for Petitioners at 34. The economic impact statement required as part of the SBP is only required to "include any anticipated cost or benefits the rule is expected to have for small businesses or consumers." CONFERENCE REPORT, *supra* note 2, at 32, *reprinted in* [1974] U.S. CODE CONG. & AD. NEWS at 7764. It need not be detailed. *Id.* Finally, the adequacy of the statement is not subject to judicial review. 15 U.S.C. § 57a(e)(5)(C) (1976).

costs relate to recruitment, precisely the area in which deceptive practices were found.[177] The Staff Report asserted that schools which now were required in some sectors to give a pro rata refund did not appear to be suffering the dire consequences predicted by the petitioners.[178] Finally, as Judge Newman noted, the refund would not even make the student whole, since he would have lost time and money on an uncompleted course.[179]

Schools advanced the empty chair argument; that when a student drops out, his seat remains empty and the tuition allocable to that space in the class is lost to the school.[180] The Commission contended that its experience with the vocational school industry revealed that, generally, vocational schools do not turn away students. Also, the situation would not even be applicable to home study schools.[181] Another issue revolved around equipment supplied to the student. Under the rule, a student who returned equipment within twenty-one days would receive a pro rata refund upon its return, regardless of whether the student had damaged the equipment. The Commission, noting the staff finding, stated that its policy in this regard was no different from that of many states and two leading accrediting associations.[182]

Again, the court did not work through the analysis. The Commission did listen to the petitioners' arguments. It might even be said that the arguments were given a "hard look." The Commission acknowledged, for example, the severity of the refund provision but nonetheless felt it was the only feasible remedy. Whether the Commission gave a reasoned explanation for its actions, and whether the remedy was irrational, is more difficult to answer.

The Commission explicitly stated that it had not made a finding that current refund policies were unfair.[183] Therefore, the Commission altered a refund policy not declared to be legally unfair and turned it into a remedial provision which related only indirectly to unfair and deceptive acts. The court's holding cast doubt on whether indirect

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177. 43 Fed. Reg. at 60,809-10.

178. STAFF REPORT, *supra* note 109, at 478. The factual basis for this statement, if supported by substantial evidence, would effectively counter petitioner's arguments about the severe financial losses which would follow if the rule was enforced. Under the substantial evidence test, the court should have addressed this claim.

179. 612 F.2d at 678 (Newman, J., dissenting). Usually students could not transfer credits from vocational schools to other schools and would essentially lose their investment in the education. STAFF REPORT, *supra* note 109, at 523.

180. 43 Fed. Reg. at 60,809-10; STAFF REPORT, *supra* note 109, at 190-95.

181. 43 Fed. Reg. at 60,810. The Presiding Officer noted the argument of home study schools that they have an "intangible" empty seat, the logic of which he said was difficult to grasp. PRESIDING OFFICER'S REPORT, *supra* note 95, at 191.

182. 43 Fed. Reg. at 60,810.

183. *Id.* at 60,809.

remedies are permissible and whether nonobjectionable conduct can be altered to serve as a remedy.

It seems clear that the Commission's rulemaking authority was never limited to direct remedies. Judge Newman very succinctly explained what the Commission sought to accomplish by this indirect remedy. He distinguished two types of rules. In the first type, it is declared to be an unfair practice not to use a specific designation in order to combat the use of a misleading one. A classic example is the Octane Rule. It is unfair not to reveal the octane rating of gasoline. The misleading nature of this practice is explained in the SBP. The rule contains the remedy of mandatory disclosure of the ratings, according to the Commission's formula.[184]

A second type of rule "combat[s] misleading statements by identifying as an unfair practice the failure to provide consumers with a means of avoiding the consequences of the deception."[185] The Door-to-Door Sales Rule is of this type. The cooling-off period allows the customer to avoid the consequences of deception on the part of the salesman. Failure to allow the cooling-off period is an unfair practice. This type describes the operation of the pro rata refund. For example, if a student was told by the salesman that the course requires little high school education, but upon enrollment the student discovers the material is of college-level difficulty, he can withdraw without suffering an inordinate financial loss. After enough such situations have occurred, the school presumably will have an incentive to disclose the true difficulty of their course.

Congress was aware of the Commission's Door-to-Door Sales Rule when it enacted Magnuson-Moss. It was aware of the Vocational School Rule at the beginning stages of the rulemaking proceedings.[186] The scope of Magnuson-Moss should be construed to allow indirect incentive remedies. The separate question of to what extent fair practices can be altered to serve as remedies can not really be answered within the

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184. *See* 612 F.2d at 673.

185. *Id.* at 673.The SBP stated:

> The rule avoids the burdens and deficiencies of any attempt at detailed policing of the practices described. Instead, it minimizes the extent of regulation while at the same time effectively curtailing practices violative of Section 5 of the FTC Act. The Commission's rule on door-to-door sales, 16 CFR Part 429, similarly seeks to eliminate undue pressure and unfair sales practices through an indirect remedy rather than proscribing all of the possible objectionable conduct.

43 Fed. Reg. at 60,809.

In United States v. Allegheny-Ludlum Steel Corp., 406 U.S. 742 (1972), the Court approved a similar type of incentive rule. It found existing practices tended to destroy incentives to return railroad cars to their point of origin, resulting in nationwide shortages. Rules would return this incentive even though the short-term effects would be economically burdensome. *Id.* at 754.

186. *See* 120 CONG. REC. 34934-38 (1974).

context of one rulemaking proceeding. A wide range of remedies could serve to prohibit unfair or deceptive practices. Some would clearly range beyond the Commission's authority: it could not, for example, close down all proprietary schools in order to prevent unfair and deceptive practices. Petitioners' claimed essentially that the pro rata refund constituted a similarly unauthorized assertion of the Commission's Magnuson-Moss powers. Yet considering that refund provisions had been part of previous cease and desist orders and that pro rata refund policies already existed in some schools, the selection of a refund policy to serve as a remedy does not seem to be such an egregious intrusion as the petitioners contended.

Probably the aspect of the pro rata refund most troubling to the petitioners and the court was that a school which did not engage in deceptive practices would still be required to give a refund to a student who dropped out for reasons unrelated to any school complaint. The Commission was well aware of this circumstance. It countered that an agency may reason from the particular to the general.[187] Any rule will bring within its ambit people and practices which did not motivate the rule's enactment. To say that the rule covered too many inappropriate parties is one thing, but, according to the Commission's reasoning, the mere fact that parties who were not malefactors would be included is no reason to invalidate the rule.

Although the Commission analogized the above principle of law to its pro rata refund, the court should have analogized the facts of other broad rulemaking efforts which underwent judicial scrutiny in order to clarify its holding. One group of cases concerned a rule promulgated by the Interstate Commerce Commission which required a railroad to pay for each day that another railroad's car remained on its tracks.[188] The purpose of the rule was to give railroads an incentive to return railroad cars to their point of origin. If a railroad returned cars promptly, it would incur little or no liability.[189]

In some other often-cited rulemaking cases, the agency first made a finding that any condition below or above a certain standard was in-

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187. *See* FTC Brief for Rehearing at 6, 10. In United States v. Allegheny-Ludlum Steel Corp., 406 U.S. 742 (1972), the Supreme Court stated:

> In the case at bar, the function exercised by the Commission is wholly legislative. Its authority to legislate is limited to establishing a reasonable rule. But in establishing a rule of general application, it is not a condition of its validity that there be adduced evidence of its appropriateness in respect to every railroad to which it will be applicable. In this connection, the Commission, like other legislators, may reason from the particular to the general.

Id. at 749, *citing* Assigned Car Cases, 274 U.S. 564, 583 (1927).

188. United States v. Allegheny-Ludlum Steel Corp., 406 U.S. 742 (1972); United States v. Florida E. Coast Ry., 410 U.S. 224 (1973).

189. *See* note 185 *supra.*

jurious to the health or safety of individuals. For example, in *Associated Industries of N.Y. State, Inc.* v. *United States Dept. of Labor*,[190] the court reviewed a rule promulgated by the Occupational Health and Safety Administration (OSHA) that every factory have a minimum number of lavatories per employee. The agency made a finding that factories which did not currently meet the standard were creating an unhealthy situation. The court objected that the agency failed to give any explanation why it chose the strictest standard for every business, regardless of the working conditions in that business. In *Industrial Union Dep't, AFL-CIO v. Hodgson*,[191] the court reviewed an OSHA rule which set maximum levels for certain pollutants in the workplace. Any higher level was declared unhealthy.

The nature of the economic burden caused by regulations of other agencies likewise differed from the burden imposed by the FTC refund. Most often the regulations would necessitate capital expenditures, as when the industry would be required to install anti-pollution equipment.[192] In cases where the expense was continuing, such as a regulation which required that seatbelts be installed in all American cars,[193] the expense could, to a certain extent, be passed along to consumers.

A comparison of those expenses with the pro rata refund reveals some important distinctions. The strictest standard was selected for the refund provision. Likewise, the strictest standard was selected in *Associated Industries.* The FTC, however, did give an explanation for picking its standard.[194] The refund provision was promulgated without a finding that less stringent standards were per se injurious to consumers. Innocent parties would have to pay the same pro rata refund as would schools which were guilty of unfair practices. The economic burden on the schools was not a one-time expenditure. It was an ongoing expense which would be passed on to consumers who were not being subjected to unfair practices. The Commission characterized this burden on remaining students as "drop-out insurance" and as a reflec-

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190. 487 F.2d 342 (D.C. Cir. 1973).

191. 499 F.2d 467 (D.C. Cir. 1974).

192. *See, e.g.*, Portland Cement Ass'n v. Ruckelshaus, 486 F.2d 375 (D.C. Cir. 1973); International Harvester Co. v. Ruckelshaus, 478 F.2d 615 (D.C. Cir. 1973).

193. *See* Automotive Parts & Accessories Ass'n v. Boyd, 407 F.2d 330 (D.C. Cir. 1968). *See also* Aqua Slide 'N' Dive Corp. v. Consumer Prod. Safety Comm'n, 569 F.2d 831 (5th Cir. 1978).

In Ethyl Corp. v. EPA, 541 F.2d 1 (D.C. Cir. 1976), EPA required annual reductions of lead in gasoline. The company would incur capital expenses in development of the process and then continuing costs in processing the lead-free gasoline.

194. *Cf.* Associated Indus. of N.Y. State, Inc. v. United States Dept. of Labor, 487 F.2d 342, 351 (2d Cir. 1978) (no affirmative testimony at all presented to support agency's choice of the strictest standard); Burlington Truck Lines, Inc. v. United States, 371 U.S. 156 (1962) (ICC grant of certification was invalid because the agency made no attempt to explain why the remedy of rulemaking was superior to issuing a cease and desist order); Jacob Siegel Co. v. FTC, 327 U.S. 608 (1946) (cease and desist order) (the Commission did not even consider alternate remedies).

tion of the true cost of educating the student.[195] Finally, unlike the other regulations discussed, the pro rata refund required industry to return money; it is debatable whether capital costs should be distinguished from direct refund costs.

Perhaps the Presiding Officer summed up the situation best when he asked, "Where do the equities lie?"[196] The choice was between burdening the school financially or allowing the student who was deceived to lose his investment. The Presiding Officer felt the Commission should accept existing refund policies, but was willing to concede that the Commission could enact a pro rata refund.[197]

If the refund were applied only to those students subject to deception, the rule would require a full-blown case-by-case adjudication on the issue of deception and would render the rulemaking procedure useless. Yet, the Commission did not find existing refund policies unfair, and for a very pragmatic reason — Congress had promulgated minimum refund policies for the Office of Education and Veteran's Administration loan programs which fell far short of a pro rata policy.[198] If the Commission had decided that any standard less than pro rata was unfair, it would have been accusing Congress of promoting unfairness.

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195. 43 Fed. Reg. at 60,910.

196. The presiding officer stated:

> Where do the equities lie? The record is not silent on this point. All of the independent authorities cited above are firmly of the view that they lie with the student who drops out. This includes both the witnesses speaking only with respect to this rule as well as those addressing themselves to the question of future service contracts in general. Anyone reading this record with an objective eye would have to concede that compelling arguments support their point of view. When students drop out and do not receive a full pro rata refund they are being compelled to pay for services never to be received. Further, to that extent, they are being compelled to subsidize the students who stay in who get their total education at a price lower than it would otherwise be. You could further argue that they are getting it at a price lower than it really *ought* to be, since they are getting whatever benefits attached to the completed course partly because they were partially subsidized by others who did not receive such benefits. On this line of reasoning, the equities fall squarely on the side of the drop out and, since, as we have seen, the number of drop outs are so large, the amounts of money involved are staggering. We play here for big stakes.
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> On the other hand, one thing seems fairly clear. In balancing the equities, there has to be something to balance against and here the proponents of the Rule seem to be concentrating solely on what is fair to the drop out, perhaps with one eye peeled on punishing bad schools. But we cannot look at this solely from the standpoint of bad schools and we have to recognize that there are three parties involved not one. First, there is the drop out, second, there is the "stay-in" and, third, there is the school. What is fair to all? Viewed in that light, a simple problem becomes not so simple at all, for now equities begin to conflict and overlap.
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> From this vantage point, the student who stays in is subsidizing the drop out, for it is he who will have to pay the extra cost — either he or the school and it will rarely be the latter. Thus you have the anamolous [sic] situation of protecting one group of consumers at the expense of another.

PRESIDING OFFICER'S REPORT, *supra* note 95, at 205 (footnote omitted).

197. *Id.* at 209. The Presiding Officer stated: "[U]nless [the Commission] is fully prepared to decide that the equities demand pro rata refunds without regard to the costs, it should not do so." *Id.*

198. *See* STAFF REPORT, *supra* note 109, at 190-93.

Yet to justify the application of the pro rata refund to innocent parties, it perhaps is necessary to assume that, implicitly, the Commission was making a finding that refund policies less than pro rata were in themselves unfair.

The Second Circuit did not analogize the pro rata refund to other similarly intrusive rules. Neither did it discuss the weight to be given the agency's interpretation of its Magnuson-Moss powers or the deference to be given the Commission's accumulated expertise in unfair practices in the vocational school industry, evidenced by the numerous cease and desist orders it was compelled to issue.[199] Because the court would come down on the school side of the equity equation posited by the Presiding Officer should not mean that the Commission had overstepped its statutory authority; rather it shows a court questioning the wisdom of the regulation. The Supreme Court has admonished against this practice.[200] Perhaps the court felt that the Commission's action was clearly erroneous. Considering that the court split in both the original case and the petition for rehearing, that drastic conclusion seems dubious.

One final interpretation of the court's holding might be that the rule itself did not enumerate any deceptive practices. Under this view, the court merely restated its holding on the procedural adequacy of the rule. Although the court placed great emphasis on its belief that the pro rata provision was overbroad, its holding on that provision[201] suggests that the Commission could cure the provision by listing specific unfair practices within the rule. But instead of remanding the provision, the court could have looked within the SBP or to other parts of the rulemaking record to find the specific unfair or deceptive practices which the Commission intended to curb through use of the pro rata refund. The court did not hesitate in citing the Presiding Officer's Report when affirming the cooling-off provision.[202] Neither did that provision contain any unfair practices listed within the rule.

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199. *See* notes 103-05 and accompanying text *supra*.

200. Recently, the Supreme Court in Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519 (1978) stated this principle: "[The appointed function of the judiciary] is to insure a fully-informed and well-considered decision, not necessarily a decision of the judges of the Court of Appeals or of this Court would have reached had they been members of the decision-making unit of the agency." *Id.* at 558.

Again, in United States v. Allegheny-Ludlum Steel Corp., 406 U.S. 742 (1972), the court said: "We do not weigh the evidence introduced before the Commission; we do not inquire into the wisdom of the regulations that the Commission promulgates, and we inquire into the soundness of the reasoning by which the Commission reaches its conclusions only to ascertain that the latter are rationally supported." *Id.* at 749 (review of rulemaking conducted under informal procedures).

See also Arkansas Pharmacists Ass'n v. Harris, 627 F.2d 867, 870 (8th Cir. 1980) (the court will strike down regulations unauthorized or illegally promulgated but will not attempt to substitute their judgment for the administrative agency); Greater Boston Television Corp. v. FCC, 444 F.2d 841 (D.C. Cir 1970) (*see* note 73 *supra*); Wright, *supra* note 18, at 391.

201. 612 F.2d at 664.

202. *Id.* at 666.

The acrimonious debate over whether the Commission could and should enact a pro rata refund perhaps obscured the existence of an intermediate position which would preserve the pro rata refund yet better meet the objections of the petitioners, especially in regard to the overbreadth argument. An alternative would be for the Commission to apply the provision only to those schools which could best shoulder a loss attributed to fixed costs. Schools would be selected on the basis of gross income or number of students enrolled. Larger schools, of course, would object that this measure would place them at an unfair competitive advantage; the Commission would want to meet this argument with data from the rulemaking proceeding. This approach would perhaps encompass the greatest number of incidents of unfair practices while minimizing the economic burden on the industry.

The pro rata refund raised the fiercest opposition from the petitioners. Some found it infuriating that the Commission sought to change existing refund policies in pursuit of allegedly ill-conceived objectives. A common view was that the Commission had strayed beyond any reasonable view of the power it had been delegated by Congress.[203] If the pro rata refund was within the contemplation of Congress, according to the petitioners it would constitute an unlawful delegation of power.[204]

Perhaps the strict pro rata refund was not as radical as the petitioners asserted. One could draw a continuum of refund policies from a fixed price structure with no refund to the Commission's 100% pro rata refund. Current refund policies fell at various points along the continuum, with many vocational schools adopting the policy of allowing

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203. Joint Brief for Petitioners, at 21-26. Petitioners cited Heater v. FTC, 503 F.2d 321 (9th Cir. 1974), for the proposition that the Commission's remedial powers were very narrow. But in that case, the Ninth Circuit said that the Commission could not prescribe a penalty because it had not declared the conduct unfair until the hearing had occurred. The limitation on the Commission's power was that it must first declare what is prohibited. *Id.* at 322-24. This was the whole point of the rulemaking proceeding for the Vocational School Rule; to determine that there was substantial evidence of unfair practices and *then* fashion a remedy to prevent *future* unfair acts.

Petitioners' position derives from the characterization of the pro rata refund as a "penalty." While some refund provisions would clearly be a penalty, *e.g.*, requiring the school to return more than the pro rata share, the Commission's provision arguably is remedial. The student is being asked to pay for services received.

204. Joint Brief for Petitioners at 26-27. Petitioners claimed: "If [the Congress] were considered to authorize a rule like the present, permiting the Commission to prescribe affirmative provisions which are not clearly and proximately directed to specific practices violative of Section 5(a), it would present an instance of 'delegation running riot'... Schechter Poultry Corp. v. United States, 295 U.S. 495, 551 (1935). . . ."

The court did not address this argument. In any event, the petitioner's contention rests upon the meaning of "clearly and proximately." If petitioners meant it in the sense of the rule being rationally related to the facts found, they merely restate the arbitrary and capricious test. More likely, they used those words to protest the use of indirect "inducement remedies" which the Supreme Court has permitted. See note 185 *supra*.

the student a 25% refund when one quarter of the course was completed and a 50% refund after half the course was through.[205] One accrediting organization prescribed a refund point at 10% as well.[206] It is an interesting source of speculation how the court would have reacted to a rule which required a refund at 15% intervals up to 75% of the course or a pro rata refund from 25%-75% of the course. In the end, it is a policy judgment.

That matter of policy decision-making was an important motivation to the enactment of Magnuson-Moss. The Commission was delegated a wider scope of rulemaking authority than practically any other government agency. The legislative history shows a deep concern with adequately protecting consumers from unfair practices.[207] Congress expressed its satisfaction with the Octane Rule and was aware of the Door-to-Door Sales Rule, the latter altering the incentive of door-to-door salesmen to use deceptive practices. The scope of the Federal Trade Commission Improvement Act was expanded to reach those acts in or affecting commerce, enabling the Commission to reach those entities which no one state could adequately oversee.[208]

One very prominent reason for the Commission to enter this rulemaking proceeding was that many of the larger schools which constituted a disproportionately large section of the vocational school industry operated interstate and were beyond the authority of any one state to curb.[209] The petitioners alleged, however, that federal agencies such as the Office of Education and the Veterans Administration had set reasonable policies to control the vocational school industry on a nationwide basis.[210] A look at those policies, however, reveals that those agencies basically deferred to the policies of the accrediting associations

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205. STAFF REPORT, *supra* note 109, at 185-86. Refund policies depended upon the state requirements, whether the school was accredited and whether it participated in the student loan programs. *Id.* at 184-200.

206. *Id.* at 189. NATTS and AICS allowed a 90% refund after the first week of the course, AICS added an additional refund level at the third week of 80%, but retained 45% if the student dropped out during the first quarter. *Id.* at 189 n.58.

207. The House Report noted: "Many frauds occur in large cities where concentrations of the poor and of the poorly educated make them easy targets for dishonest operators. At the present time these are largely beyond the Commission's reach." HOUSE REPORT, *supra* note 2, at 45, *reprinted in* [1974] U.S. CODE CONG. & AD. NEWS at 7726.

208. *See* note 39 *supra*.

209. The Commission reported the finding of the staff that:

> School licensing officials and consumer protection personnel representing numerous States testified that they have neither the manpower nor the budget resources to cope effectively with the abuses engaged in by schools within their jurisdictions. . . .
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> . . . [E]ven improved State enforcement capabilities could not cure the significant portion of industry abuses which are interstate in character. The operations of large multi-State schools are beyond the capacity of the individual States to control.

43 Fed. Reg. at 60,802.

210. Joint Brief for Petitioners at 20. The petitioners argued that the federal loan programs require schools to adhere to minimum refund policies.

and had little control over those schools who were not participants in the student loan programs.[211] As for the accrediting agencies, they wore two hats. On the one hand, they set standards for membership and conducted periodic inspections.[212] On the other hand, they were advocates for the industry as was evident in *Katharine Gibbs*. The small number of schools whose accreditation was revoked compared to the large number of student complaints which were unearthed during the rulemaking proceedings sheds doubt on how effectively the accrediting agencies could perform an adequate regulatory function.[213]

The pro rata rule was strong medicine to cure many ills which others had failed to remedy. Perhaps the court should have allowed the Commission time to see how its remedy worked.

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211. The refund policy for the Guaranteed Student Loan Program (GSLP) reveals that the government only requires that the refund policy be "fair and equitable," even though it does list items for the school to consider when formulating the policy. 45 C.F.R. § 177.608 (1980).

The Department of Education has just released a new standard for refund policies:

> A school's refund policy is fair and equitable if that policy conforms with —
> (1) The requirements of applicable State law; and
> (2)(i) Specific refund standards set by the school's nationally recognized accrediting agency and approved by the Secretary;
> (ii) If no such standards exist, other specific refund policy standards, either contained in Appendix A to this Part or set by another association of institutions of postsecondary education and approved by the Secretary.

46 Fed. Reg. 3866, 3872 (1981).

The backround to the new regulation states: "The Committee believes that the setting of the specific elements on an institutional refund policy is primarily the prerogative of the educational institution." *Id.* at 3871. It concludes that this shift in policy will not deprive borrowers in the student loan program of protection against unfair refund practices.

It is contended that the Department of Education has failed to learn its lesson with the enormous default rates of the GSLP program. Greater reliance on schools to set equitable refund policies is an error in judgment. Once the student loan goes into default, the Department of Education, through the Office of Student Financial Assistance (OSFA), is primarily interested in collecting the loan, not in probing the student's complaint about the school's refund policy. *See* STAFF REPORT, *supra* note 109, at 304. Even when OSFA does decide to investigate, it is seriously hampered by lack of in-house auditors. The OSFA Regional Administrator has remarked: "Right now, the Boston Regional Office is working on a ratio of one field investigator for every 150 to 200 schools. We have to monitor how the school handles all the Title IV programs — NDSL, BEOG and the like — as well as the FISL program. Besides which, we have schools closing down at a very brisk rate which drains a great amount of our time. If some student claims he didn't get a fair refund, we can't deal with it. Our job is to collect the money." Conversation with William T. Logan, Jr., Regional Administrator, OSFA, at Boston Regional Office (Feb. 9, 1981).

The decision to place more reliance on the schools for handling their refund policies may be more a reflection of the upsurge in deregulation and an increased reliance on local control than of a principled consideration of the history of the student loan programs.

212. Joint Brief for Petitioners at 19-20.

213. The SBP asserted the following:

> By their own admission, the accrediting organizations are neither designed nor equipped for regulatory or enforcement functions in consumer protection matters. Because their primary function is to achieve long-range improvement in educational performance among accredited schools, they cannot effectively police the industry's business practices or enforce compliance with consumer protection standards.

43 Fed. Reg. at 60,802. (footnotes omitted).

C. *The Job Placement Disclosure*

The job placement disclosure was based on the familiar principle, often invoked by the Commission, that any time a claim is made through the media, that claim must be substantiated by evidence.[214] The Commission found that many schools did not keep job placement statistics or else did so haphazardly. Because those schools made specific job claims in their advertising, the Commission reasonably concluded that nondisclosure of placement information was an unfair and deceptive practice.[215] The real question before the court concerned the scope of the remedy.

Again, the Commission was presented with a range of possible affirmative remedies. At the most lenient end, the Commission could have allowed schools to disclose placement information in whatever format they desired, based on any information they might choose, so long as it was not unfair or deceptive. At the other extreme was the option the Commission did choose — a placement statistic computed by a strict formula, presented with no other accompanying information.[216]

The Commission adopted the industry's position that any placement figure should be based, at the very least, on the number of graduates, not the number of enrollees.[217] The Presiding Officer and Staff split, however, on the issues of whether only those graduates actively looking for work should be counted and whether three months was an adequate time in which to measure if the graduate had obtained work. Although the Presiding Officer argued that it would be unfair to include those students not seeking work, the Commission adopted the Staff Recommendation that all graduates be included in the calculation regardless of their professed intentions in regard to employment.[218] The time in which the graduate was deemed to have found work was extended to four months in the final rule, well short of the Presiding Officer's recommendation of at least nine months to a year.[219]

The court was quite persuaded by the presentation of petitioner McGraw-Hill which showed that a wide range of final placement figures could be produced from the same data by manipulating the categories

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214. 43 Fed. Reg. at 60,806, *citing* Pfizer, Inc., 81 F.T.C. 23 (1972).

215. *See* STAFF REPORT, *supra* note 109, at 418.

216. *See* note 118 *supra.*

217. The original rule would have had the schools base their placement rate on the number of enrollees. *See* PRESIDING OFFICER'S REPORT, *supra* note 95, at 97-101.

218. *Compare id.* at 102-07 *with* STAFF REPORT, *supra* note 109, at 436-37. *See also* 43 Fed. Reg. at 60807. The Commission argued that "unavailable for employment" was difficult to define and would create enforcement problems. The definitional problems should not be an obstacle: if the student says he or she is not available for employment, that should suffice.

219. *See* PRESIDING OFFICER'S REPORT, *supra* note 95, at 121.

of students included in the calculation. Relying on the McGraw-Hill example,[220] the court commented that although the Commission's disclosure would have shown a 5.8% rate by the Commission's figuring, the "true" placement rate would actually be 54%.[221] As pointed out by Judge Newman in dissent, this argument begged the point. McGraw-Hill's example clearly showed that there was no true placement rate, only different ways of presenting the placement situation.[222]

It was to this kind of policy judgment that Magnuson-Moss intended the arbitrary and capricious standard be applied. The court's inquiry is whether the Commission considered all the different possibilities and whether it gave some reasoned explanation for accepting one and rejecting the others. The Commission explained that it wanted one statistical format for every school so that the student could effectively comparison shop.[223] In addition, the Commission pointed out that the school could avoid the requirement completely by not making any job claims in its advertising.[224] In his dissent, Judge Newman found the Commission's choice perhaps even more reasonable than any other alternative, since it was based on the reliable statistic of the number of graduates known to have jobs, rather than on the less reliable number of professed job seekers known to be employed.[225]

Perhaps even the final placement disclosure would have been palatable to the petitioners but for the additional requirement that no other information could accompany the disclosure.[226] Judge Newman was willing to uphold the placement statistic with the understanding

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220. Brief for Petitioner McGraw-Hill, Inc. at 8-11.

McGraw-Hill conducted a survey of 2,270 graduates. The results were as follows:

Graduates	2,270
Number responding to inquiry	929
Number who sought work, full-or part-time jobs	244
Number who obtained work, full-or part-time jobs	132
[Full-time jobs, 87; part-time jobs, 45]	
Percentage of job seekers who obtained jobs to number of graduates who sought jobs (132 out of 244)	54%

The Commission rule would have calculated the placement rate as 5.8%. *Id.*

221. 612 F.2d at 665.

222. *Id.* at 679-81.

223. 43 Fed. Reg. at 60,807.

224. *Id.* The Commission said the following examples would not express job claims and would not therefore trigger the placement disclosure: "We train accountants"; "Be a truck driver"; "Our training is recognized nationwide"; "We offer expert training for draftsmen and accountants".

The following statements *would* constitute express job claims: "Graduates of our school can earn as much as $20,000 a year"; "We will train you for a job in the computer programming field"; "Be a truck driver. Earn big money." *Id.*

225. 612 F.2d at 680.

226. *Id.* at 664-65. The Commission did permit a disclaimer, *see* note 118 *supra,* which the court labeled "anemic." 612 F.2d at 664.

that the school could include within the envelope any truthful information which would help explain the data. Under that view, a school perhaps could present a more expanded statistical analysis similar to that outlined in the McGraw-Hill brief.[227] Most likely, Judge Newman asserted a condition to which the Commission would not assent. The Commission purposely disallowed any other information in the envelope so that the school could not bury the placement disclosure in a mass of confusing literature and statistics.[228]

The Commission was not arbitrary and capricious in selecting one method of calculation. It rejected other formulas because it felt they were too easily subject to manipulation by the school. It gave a reasoned explanation why it required one single formula; *i.e.*, to facilitate comparison shopping. Yet by picking a formula which presented the lowest percentage of any other format plus forbidding any explanatory material other than its caveat, the Commission abused its discretion. The reason is that other formulas would have satisfied the Commission's desire for uniformity while not forcing the schools into such a self-demeaning posture.[229] For example, the Commission could have adopted a strategy of comparing placements to respondents.[230] Testimony showed that respondents differed from non-respondents only in the fact that the latter do not like to answer questionnaires.[231] This formula would have shown a higher placement rate without any loss of protection for the student. Perhaps the Commission felt it could

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227. 612. F.2d at 679-81 (Newman, J. dissenting). *See* note 220 *supra.*

228. *See* STAFF REPORT, *supra* note 109, at 423.

229. *Cf.* National Comm'n on Egg Nutrition v. FTC, 570 F.2d 157 (7th Cir. 1977). In that case, an egg manufacturer's association made claims that there was no evidence linking cholesterol with an increased risk of heart disease. The FTC entered a final order preventing the association from making that representation; furthermore, they were required to include in future advertisements a paragraph which stated that doctors *have found* that increased cholesterol consumption causes increased risks of heart disease. The court said that, although violators must expect some fencing in by broad remedies, the first amendment does not permit a broader remedy than is necessary to prevent the deception. The court felt the Commission could require that their statement be used only when the association makes a representation as to the available evidence on the issue. *Id.* at 164.

In one respect, the Commission's position on the placement disclosure was consistent with the holding in *Egg Nutrition;* placement disclosures were required only when the school made a representation about the availability of jobs. On the other hand, the Commission did not allow the schools to argue their side of the presentation within the disclosure package. Although the Commission said that the school was free to give the student any other information at any other time, the fact that every school would be providing this same package would tend to make the student key in on this disclosure.

230. *See* PRESIDING OFFICER'S REPORT, *supra* note 95, at 89-91. The enforcement problem might occur if schools discarded unfavorable responses. Under the Commission's formula, a low response rate would adversely affect the final placement figure. Still, under the Presiding Officer's formula, the school could be required to meet a certain response rate; furthermore, an audit of the school could perform a random check of those students who did not respond.

231. *Id.* at 89.

live with an alternative formula; it did not challenge the court's holding on the placement statistic in the Commission's Brief for Rehearing.

D. The Graduation Statistic Disclosure

The graduation disclosure required that the school show the number and percentage of enrollees who graduated.[232] Although quite similar to the placement statistic in that it gave the student a better picture of the track record of the school, the graduation disclosure received the court's approval with hardly any misgivings. The court said it was a reasonable means to prevent unfair practices.[233] Petitioners' main challenge was that the prohibition against placing any other information in the envelope which contained the disclosure would violate their first amendment right to freedom of speech.[234] The court did not dispute the seriousness of this challenge but nonetheless rebutted it by citing *Young v. American Mini-Theaters* which said that "regulatory commissions may prohibit businessmen from making statements which, though literally true, are potentially deceptive."[235] The court concluded that the Commission was reasonable in prescribing a modest one-time ban on the furnishing of diluted factual information within the envelope containing the disclosure.[236]

The troubling aspect of this holding is that for the first time, the court invoked the concept of deference to agency action and implied that there were specific unfair and deceptive practices which the Commission sought to remedy. By invoking the concept of deference only for those remedies with which they found favor, the court turned that concept into a post hoc rationalization, rather than using it as a way to balance the spheres of agency policy-making and judicial review. The crucial test of the concept of deference is when the court thinks the policy is unwise or considers another proposal more compelling yet accepts the agency's choice. For the most part, the battle over the Vocational School Rule was fought on the question of remedies. The arbitrary and capricious test as well as the notion of giving weight to the agency's interpretation of its statute were appropriate standards to ap-

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232. *See* note 118 *supra*.

233. 612 F.2d at 666.

234. Joint Brief for Petitioners at 39-41.

235. 427 U.S. 50,68 (1976). The court also cited Friedman v. Rogers, 440 U.S. 1, 10 (1979) (commercial speech "is . . . less likely than other forms of speech to be inhibited by proper regulation").

236. 612 F.2d at 666. In Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748 (1976), the court said that the greater objectivity and hardiness of commercial speech made is less necessary to tolerate inaccurate statements for fear of silencing the speaker. The court affirmed the ability of an agency to require commercial information to appear in a certain form, or include such additional information, warnings, or disclaimers as are necessary to prevent it from being deceptive. *Id.* at 771-72 n.24.

ply for each rule provision. That concept of weight should have been discussed for the sweeping pro rata refund as well as for the "modest" graduation disclosure.

In its discussion of the graduation disclosure, the court acknowledged what it seemed to know all along — that the Commission had found specific unfair practices and had enacted these rules individually and in concert to prevent those practices. The court stated that "the Commission found that the disclosure of graduation rate information is essential for a proper evaluation of claims concerning placement success."[237] Presumably, then, failure to permit evaluation of placement success was an unfair practice, enumerated in the SBP. Since the court tacitly admitted that all the requirements for a Magnuson-Moss rule were present, it seems anomalous to remand the rule to correct what was only a technical deficiency.

Many similarities could be drawn between the rejected placement statistic and the graduation disclosure. Neither allowed other information to accompany the disclosure. The absence of explanatory data for the graduation disclosure could make it just as misleading as the lack of explanation for the strict placement formula; students drop out for a number of reasons which may have no bearing on the quality of the course. Both disclosures only permitted a fairly weak caveat.[238] Such figures typically had not been disclosed to prospective students and would be difficult for the individual to collect and analyze. The court hit upon the crucial difference. Graduation statistics could be determined with precision.[239] Determining placement success was an imprecise figure involving many variables. The distinction was such that it was reasonable to reject one strict disclosure form and accept the other.

E. The Cooling-Off and Constructive Cancellation Provisions

The cooling-off provision allowed the student to disaffirm his school contract within fourteen days without any financial obligation,[240] while the constructive cancellation provision stated that the failure of a student to attend resident classes for five days or submit home study lessons for 120 days would work an automatic cancellation of the contract.[241] The court said that the petitioners did not object to the concept of a cooling-off period, but rather preferred a reaffirmation procedure whereby the contract would be cancelled automatically unless the stu-

237. 612 F.2d at 665.
238. *See* note 118 *supra.*
239. 612 F.2d at 666.
240. *See* note 116 and accompanying text *supra.*
241. *See* note 119 and accompanying text *supra.*

dent reaffirms it within a certain number of days.[242] The constructive cancellation provision was found to be reasonable since it would remedy unfair practices found by the Commission and Presiding Officer.[243]

It is true that the petitioners did not object to the concept of a cooling-off period; neither did they object to the concept of a refund. All parties concerned therefore implicitly accepted the type of rule characterized in Newman's dissent as a rule which indirectly remedies unfair or deceptive practices. The major objection was the degree of regulation, coupled with the fact that the change flowed from an agency rule, rather, than Congress. Petitioners felt that a fourteen-day cooling-off period was too long and a pro rata refund was too expensive.[244] Yet the court accepted the Commission's judgment on policy in one instance but not in the other.

It is likely that an unarticulated balancing occurred. A fourteen-day cooling-off period would not produce such severe financial consequences as would a pro rata refund. It is unlikely, though, that Magnuson-Moss intended the court to be involved so closely in this weighing of equities, once the factual basis of the matter in question was substantially established. Rather, a constant concern of the Act was to insure that the Commission was given freedom to do the weighing. It was for the court to determine if the agency considered various lengths for the cooling-off period and whether it gave a reasoned explanation for rejecting them. The pro rata refund should have received similar scrutiny.

The treatment of the constructive cancellation provision echoed the same question raised by the court's treatment of the graduation statistic; it acknowledges that the Commission found specific abuses upon which it predicated the rule, the path of the Commission's reasoning was clearly discerned, yet the court still found no inconsistency in holding the rule procedurally defective.

F. The Preemption Provision

The rule contained a preemption clause which purported to preempt any state law inconsistent with or which frustrated the purpose of the Commission's rule. A state could apply for exemption upon a showing that its provision afforded greater protection to students.[245]

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242. The court appears to have misstated the petitioners contention. Throughout the hearings, the petitioners *opposed* a reaffirmation procedure. PRESIDING OFFICER'S REPORT, *supra* note 95, at 147-58. A reaffirmation provision was contained in the original rule, 39 Fed. Reg. 29385, 29387-88 (1974), but was not incorporated in the final rule.

243. 612 F.2d at 666.

244. Joint Brief for Petitioners at 29-34.

245. 16 C.F.R. § 438.9 (1980). *See* note 124 *supra* for text of provision.

The court held that the provision was overbroad. Because the entire rule did not state with specificity unfair or deceptive practices, said the court, an indefinite number of state laws might be swept within its reach. The court questioned "what state regulations might be said to frustrate the purpose of the refund provisions, designed as they are to create structural disincentives to indiscriminate enrollment."[246] The court felt that preemption would flow naturally from repugnancy between an explicitly formulated federal statute or regulation and state law; therefore, there was no need for the Commission to assert this proposition.

The court's rejection of the preemption provision gives rise to a disturbing implication: mainly that an affirmative requirement which indirectly provides a remedy cannot preempt a state law which frustrates its purpose of providing that remedy. The court read "frustrates the purpose" as referring to the underlying unfair acts and practices, but by not discussing the preemption concept in terms of frustrating the affirmative remedy, the court implied an unduly narrow interpretation of that concept.[247]

Actually, the court resolved a crucial preemption issue in the Commission's favor. Although validly enacted federal regulations preempt inconsistent state law under the supremacy clause,[248] the Supreme Court has implied that there must be clear congressional intent before agency regulations will be said to have preemptive effect.[249] Magnuson-Moss contained no preemption provision. The legislative history of the Act reveals, however, a congressional intent that the Commission should not intrude where the states were doing an adequate job of

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246. 612 F.2d at 668. The court rejected the Commission's claim that the preemption provision objection was not ripe for review. The court said that the question of whether the phrase "frustrates the purpose" properly expressed the scope of preemption was purely a legal question which was an appropriate subject for review under 5 U.S.C. §§ 706(2)(A) & (C). *Id.*

247. Judge Newman asserted that "frustrates the purpose" was quite a proper phrase to express the preemption concept of the majority. 612 F.2d at 682.

248. U.S. CONST. art. VI, § 2. *See* Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 141 (1963).

249. Parker v. Brown, 317 U.S. 341 (1943). The Supreme Court said: "In a dual system of government in which, under the Constitution, the states are sovereign, save only as Congress may constitutionally subtract from their authority, an unexpressed purpose to nullify a state's control over its officers and agents is not lightly to be attributed to Congress." *Id.* at 350-51.

In *Parker*, the Supreme Court held that Congress did not intend the Sherman Act to apply to state agents acting in furtherance of state policies or to private parties acting under the direction of state law. *See* Note, *The State Action Exemption and AntiTrust Enforcement Under the Federal Trade Commission Act*, 89 HARV. L. REV. 715 (1976). Although some commentators feel that FTC rules lie outside the state action exemption, and thus need not be independently justified as to their preemptive force, others have used the *Parker* doctrine to determine whether the legislative history of an act showed clear Congressional intent to delegate preemptive power to an agency. Verkuil, *Preemption of State Law by the Federal Trade Commission*, 1976 DUKE L.J. 225.

regulation.[250] Where the Commission found inadequate regulation, by implication it could preempt inconsistent state regulatory efforts by enacting regulations pursuant to its grant of power.[251] Because this was one of the first Magnuson-Moss rules, the Commission might have felt it was important to assert its intention to exercise its preemption power.

G. *The Remaining Issues*

The remaining contentions of the petitioners were dismissed, although with some reservations. Cosmetology schools claimed they should be exempted from the rule because, as a group, they were not

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250. *See* HOUSE REPORT, *supra* note 2, at 45, *reprinted in* [1974] U.S. CODE CONG. & AD. NEWS at 7726. Magnuson-Moss expanded the FTC's jurisdiction from "in commerce" to "in or affecting commerce." As a caveat, however, Congress noted:

> The expansion of the FTC's jurisdiction made by this section 201 is not intended to occupy the field or in any way preempt state or local agencies from carrying out consumer protection or other activities within their jurisdiction which are also within the expanded jurisdiction of the Commission.
>
> When cases of consumer fraud of a local nature which affect commerce are being effectively dealt with by State or local government agencies, it is the Committee's intent that the FTC should not intrude.

Id. See note 39 *supra.*

251. Verkuil referred to the warranty provision of Magnuson-Moss, 15 U.S.C. § 2311(c)(2) (1976), which leaves undisturbed those state laws that afford "greater" protection to consumers and are "effectively enforced." He concludes:

> The net effect of the warranty provisions is to postulate a cooperative relationship between state and federal authorities that negates federal intent to occupy the field of regulation so long as states aspire to similar regulatory goals. This is an approach similar to that undertaken by the Commission in its earlier door-to-door sales rule. . . . While it is fraught with difficult definitional judgments, the approach appears, in theory, to respect notions of cooperative federalism.

Verkuil, *Preemption of State Law by the Federal Trade Commission,* 1976 DUKE L.J. 225, 235-36 n.61.

The rulemaking proceeding revealed that despite state and federal regulatory mechanisms, unfair and deceptive practices continued to flourish in the vocational school industry. From that standpoint, the court perhaps should have shown deference to the agency's ability to fairly balance the states' interests in conformity with Professor Verkuil's conception of a "cooperative relationship."

One trend that may affect future evaluation of the Commission's preemption power is the rebirth of the tenth amendment as a check on the federal government. Professor Verkuil intimated that the Supreme Court's decision in Fry v. United States, 421 U.S. 542 (1975), might usher in a revival of the tenth amendment as a restriction on federal regulatory power. Verkuil, *supra,* at 232-33. In National League of Cities v. Usery, 426 U.S. 833 (1976), the Court affirmed the statement in *Fry* that "the [Tenth] Amendment expressly declares the Constitutional policy that Congress may not exercise power in a fashion that impairs the States' integrity or their ability to function effectively in a federal system." *Id.* at 843. Courts now may be increasingly vigilant in guarding against an encroachment of state regulation, especially by a federal regulatory agency in a field traditionally monitored at the state level. *See* L. TRIBE, AMERICAN CONSTITUTIONAL LAW 308-18 (1978).

Future preemption considerations about FTC rules must also take into account the decision in American Optometric Ass'n v. FTC, 626 F.2d 896 (D.C. Cir. 1980). In that case, the D.C. Circuit Court remanded part of the Commission's Eyeglass Rule which prohibited restrictions on advertising for ophthalmic goods and services. The court reasoned that since the Supreme Court had effectively prohibited such restraints in Bates v. State Bar of Ariz., 433 U.S. 350 (1977), the Commission should wait and see how the states adapt to the ruling. Interestingly, no state raised objections to the Vocational School Rule or the preemption provision.

guilty of the unfair practices found by the Commission.[252] Control Data felt that their short courses were not within the rule's definition of a course.[253] The court expressed concern with these claims, but left the outcome to be resolved by the parties. Magnuson-Moss contained an exemption clause; cosmetology schools were urged to pursue their claims under that provision. Since the rule was being remanded, the court felt the Commission could reconsider its definition of "course" at that time.[254]

Perhaps the court should have taken a closer look at the claims of the cosmetology schools. In its separate brief, the National Association of Cosmetology Schools (NACS) made a strong argument that the abuses plaguing the vocational school industry were virtually nonexistent in cosmetology schools.[255] The FTC did not meet this contention very forcefully. Application of the substantial evidence test at this point would have been quite appropriate. The court could have addressed the narrow factual issue of whether complaints against cosmetology schools constituted a significant percentage of all complaints brought forth at the rulemaking proceedings. A negative answer to that inquiry could be grounds for eliminating that group of schools from the universe of schools affected by the rule. Perhaps the court felt that it could defer to the Commission on this issue because the exemption mechanism of Magnuson-Moss might make judicial interference unnecessary. Still, if no substantial evidence was found, the court would be acting well within the scope of its authority in finding that the Commission did not meet its burden of proof in regard to the cosmetology schools.

Two remaining contentions were summarily dismissed. Petitioners protested that FTC staff members had made ex parte communications to the Commission during the course of the rulemaking proceedings, while such contacts between the Commission and private parties were prohibited.[256] Magnuson-Moss had no provisions in regard to ex parte contacts. Since Congress had not seen fit to deal with the issue of ex parte communications, it was properly held that further clarification should flow from Congress.[257] Petitioners further challenged the ade-

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252. 612 F.2d at 668-69.

253. *Id.* at 669-70.

254. *Id.* at 669. The Presiding Officer recommended that the Commission give careful consideration to this claim. PRESIDING OFFICER'S REPORT, *supra* note 95, at 10-11.

255. Brief for Petitioner NACS at 2. The association contended that:

> With respect to cosmetology schools, the FTC must concede that the record in the proceeding below does not establish any abuses. On the contrary, the undisputed evidence established that the small local nature of most cosmetology schools and the regulation by state licensing authorities have seemed to provide more than adequate consumer protection.

Id.

256. 612 F.2d at 670.

257. *Id.* at 676. Congress did indeed act in the 1980 FTC Improvements Act. All ex parte contacts involving the Presiding Officer of a rulemaking proceeding, including contacts with FTC

quacy of the SBP. The court merely cited the relevant portion of Magnuson-Moss that the adequacy of the SBP shall not be subject to judicial review.[258]

Although six out of nine challenged provisions were upheld, the court remanded the entire rule for reconsideration. In view that the pro rata refund lay at the heart of the rule, it was perhaps best that the entire rule was remanded, although the court could have remanded only those portions it found to be defective.[259]

IV. CONCLUSIONS FROM KATHARINE GIBBS

The purpose of Magnuson-Moss was to expand the Commission's ability to deal with industry-wide unfair and deceptive acts and practices, controlling that power through a procedural format more extensive than that required under the APA's informal rulemaking and through review of material facts under the substantial evidence test. Many commentators had predicted that likely problems with hybrid rulemaking authority would crop up in the procedural area, especially concerning the right of cross-examination.[260] Instead, in the first Magnuson-Moss rule subjected to judicial review, the court attacked the substantive reach of the rule, an area which did not generate nearly as much controversy during the Magnuson-Moss hearings.

A more satisfying opinion would have resulted if the court had articulated a consistent approach to its review of the various provisions. The court should have stated clearly how it intended to treat the SBP; this alone would have created a better precedent for future Magnuson-Moss review. The unfair and deceptive practices which the Commission documented could have been brought to the foreground in the court's discussion of each rule provision. Those practices could then have been defined as to whether they constituted substantial evidence.[261] In balancing the equities of protecting students from deception against economic hardship on the schools, the court should have systematically discussed how the FTC considered each objection to its rule, whether the reason met the minimum test of rationality, and to what extent the

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staff, must be made available to all parties. Pub. L. No. 96-252, § 12, 94 Stat. 374 (1980) (to be codified at 15 U.S.C. § 57a(j)&(k)). The new rules of procedure promulgated pursuant to the 1980 Act will appear at 16 C.F.R. §§ 1.13 & 1.18.

258. 612 F.2d at 670.

259. 15 U.S.C. § 57a(e)(4) (1976). In American Optometric Ass'n v. FTC, 626 F.2d 896 (D.C. Cir. 1980), the court set aside only part of the Commission's Eyeglass Rule, *see* note 4 *supra*.

260. *See* Kestenbaum, *supra* note 3, at 690-709; Rosch, *supra* note 22; RECOMMENDATION 79-1, *supra* note 22, at 45-50.

261. Compare how the court applied the substantial evidence test in Aqua Slide 'N' Dive Corp. v. Consumer Prod. Safety Comm'n, 596 F.2d 831 (5th Cir. 1978).

court gave weight to the agency's interpretation of its Magnuson-Moss powers.

Instead, it seems the court struck down provisions because they went beyond the court's notion of a proper regulation. The objections to the pro rata refund ostensibly constituted a holding that the Commission had exceeded the scope of its statutory authority. Yet, tangled in a web of procedural objections, the holdings of the court appeared to be based more on misgivings about the wisdom of the regulations. In that regard, the judiciary exceeded the scope of its authority. The Commission was sent a message not to deviate too much from prior regulations, and not to try to burden industry too much. The review should have tracked closely the requirements of Magnuson-Moss: review of material facts under the substantial evidence test, review of policy and choice of remedies under the arbitrary and capricious standard, weight given to the agency's interpretation of its own statute, and deference to the Commission's expertise in preventing deception in the vocational school industry.

Petitioners accused the FTC of trying to promulgate a code for industry.[262] The court in *National Petroleum* had warned against the FTC trying to write "its own code of consumer protection."[263] In fact, the FTC did assert that its provisions were designed to work in harmony so that the student would have broad-based protection against unfair and deceptive practices by the schools.[264] The cooling-off provision protected the student before classes had begun. The constructive cancellation and pro rata refund would allow students relief once classes had commenced by limiting their liability to education actually received. The disclosure provisions would offer protection by informing the student of the situation facing him after the course was over. The preemption provision would insure that students in some states would not suffer because of inadequate state enforcement.

Despite the involvement of the United States Office of Education, the Veterans Administration, the states and the accrediting associations, the abuses continued to occur. The theory that somehow all these independent bodies would take care of the regulatory burden did not materialize.[265] The other federal agencies could only act in relation to

262. Joint Brief for Petitioners at 21. This charge was forwarded in 1976 at a panel discussion of the Antitrust division of the American Bar Association. One commentator remarked: "The Commission seems to be parlaying its essentially negative definitional power to define and proscribe unfair and deceptive practices into an affirmative power to prescribe a particularized and mandatory code of fair conduct for an entire industry." Panel Discussion, 45 ANTITRUST L.J. 96, 105 (1975) (remarks of O. Hobbs).

263. National Petroleum Refiners Ass'n v. FTC, 482 F.2d 672, 693 (D.C. Cir. 1973).

264. *See* STAFF REPORT, *supra* note 109, at 379.

265. *Id.* at 315.

the student and veterans loan programs.[266] Testimony from state officials indicated that state enforcement mechanisms were often weak or nonexistent.[267]

The Commission did overstep its authority in enacting the placement statistic disclosure. Perhaps the refund provision should have been modified as well. Petitioners felt that the Commission, and especially the staff, had likewise overstepped the bounds of propriety by their biased attitude throughout the proceedings. A major portion of the brief for petitioners Katharine Gibbs Schools dealt with allegations about improper ex parte contacts between the staff and Commission, as well as the manner in which industry comments were placed in an obscure part of the huge rulemaking record.[268] It is not difficult to conclude that the Presiding Officer's Report offered a fairer balance in its presentation of the issues, even if some of its conclusions were debatable. At least one court has intimated that the staff plays more than just a passive role in rulemaking proceedings; that it is quite proper for a staff to bring to the proceedings a certain point of view about the subject matter under consideration.[269] The new prohibition on ex parte contacts between the Commission and staff should help cure excesses in this area.

To say that the Commission acted in a lawful way, within the scope of its delegated rulemaking authority, is not to say that it necessarily acted in the wisest way. A staff suggestion[270] that small schools be excluded from compliance with the rule was not adopted by the Commission,[271] yet that qualification might have made all the difference in the industry's perception of the FTC action. Because a disproportionate number of students attended a small number of large schools, the Commission could have still reached a significant portion of the school population while minimizing the economic burden on smaller schools and the regulatory burden on itself.[272] The economic effects of com-

266. *See id.* at 276-315.

267. *See id.* at 264-75.

268. Brief for Petitioner Katharine Gibbs School at 47, 54-55.

269. *See* Association of Nat'l Advertisers, Inc. v. FTC, 627 F.2d 1151, 1169 n.39 (D.C. Cir. 1979).

270. STAFF REPORT, *supra* note 109, at 498.

271. 43 Fed. Reg. at 60812. The Commission felt that exemption for small schools would not be fair to those schools which would be covered by the rule. Also, it was felt that the record showed significant unfair and deceptive practices in all sizes of schools.

272. *See* STAFF REPORT, *supra* note 109, at 14-17. The staff found that sixty-six percent of all proprietary school students enrolled in accredited schools. *Id.* at 14. The ten largest home study schools enrolled seventy-five percent of students attending accredited schools of that type. The residential school sector was not so heavily imbalanced; still, both sectors showed a tendency for a small percentage of schools to have a large percentage of enrollees. Furthermore, major corporations often operated groups or chains of schools. *Id.* at 17.

A study had identified twenty major corporations owning chains of schools. A significant

pliance with the Commission's rule would have rested on those larger schools which could best shoulder it.[273] If too many complaints from smaller schools still surfaced, the rule could be expanded. Perhaps, however, the Commission might have found it had mastered the bulk of the problem.

There are many vocational schools which offer quality education. It may have struck the court as being unfair to subject all schools to this stringent set of requirements; indeed, the court articulated this concern of overbreadth in its discussion of the pro rata refund. But the court should have noted that while these many abuses were occurring, the same industry accrediting groups which so vociferously opposed the rule were quite subdued. The accrediting groups testified that they are not primarily policing organizations but rather they attempt to assist the industry in pursuit of common goals.[274] Yet they also testified against the rule with the argument that they were one of the major regulatory forces involved in the industry and that one more regulating body was unnecessary.[275] The accrediting groups cannot play it both ways. If action had been taken against some of the larger schools at an earlier time, the FTC perhaps would not have found the need to intervene.

The scope of agency rulemaking derives from a variety of factors. Foremost are the words of the enabling statute and the legislative history.[276] Even if the law is a legislative compromise, as will often be the case, the court at least will know the areas of the rulemaking process which were of most concern to Congress and which therefore should be given greater emphasis. The past experience of Congress with the agency will often lead to much enlightenment.[277] It should be asked whether the Congress is trying to give the agency more muscle or is attempting to rein it in.

Once the contours of the rulemaking power are discerned, the scope of the agency's power to enact the particular rule in question can then be more sharply defined by looking at the agency's past experience with the industry. One useful measure is the number of cease and desist

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number of those owners had been subject to a Commission cease and desist order for the very same unfair and deceptive practices which justified the need for the Vocational School Rule. *Id.*

273. Compare the situation in Office of Communication of the United Church of Christ v. FCC, 560 F.2d 529 (2d Cir. 1977). The FCC had changed its requirements for reported equal opportunity employment data, so that many smaller stations would be exempted from the requirements. Petitioners objected that smaller stations would not have to reveal their hiring patterns. The Second Circuit insisted that the FCC present reasonable explanations why it felt the need to *change* its criteria. The justification of ease of enforcement was held not to be adequate to justify the change in criteria.

274. 43 Fed. Reg. at 60,802; STAFF REPORT, *supra* note 109, at 315-26.

275. Joint Brief for Petitioners at 19-20.

276. National Petroleum Refiners Ass'n v. FTC, 482 F.2d 672, 674 (D.C. Cir. 1973).

277. *See* Jaffe, *The Illusion of the Ideal Administration*, 86 HARV. L. REV. 1183, 1189 (1973).

orders it was necessary to issue,[278] even though the orders can never relate to more than a small percentage of the total industry, due to limited agency resources. This factor of expertise in dealing with the industry certainly deserves consideration.[279] The past history of rulemaking in regard to related industries would certainly provide useful information as to its efficacy and reasonableness. The subject of the rulemaking is of crucial importance.[280] Is it a matter "on the frontiers of scientific knowledge,"[281] an area difficult to assess, or is it an area in which reliable and understandable data is readily available? Congressional awareness of the rule cannot be construed as congressional assent, but knowledge of a rulemaking process conducted for five years without legislation which interfered with that effort definitely should be added in the consideration of whether the agency acted within the scope of the authority which Congress contemplated.[282]

A third category of factors consists of elaborations on those factors already discussed. The history of the standards of judicial review should be carefully consulted. Courts do give deference to an agency's interpretation of its own statute;[283] it is important to determine just what that deference means and when it is appropriate. Analogies to adjudications and cease and desist orders in giving content to review standards should be made with care; it is important not to lose sight of rulemaking's function of establishing standards for future conduct, not to decide the rights of the parties in past conduct.[284]

Although the *Katharine Gibbs* court raised many of the above factors, it did not satisfactorily resolve them. For example, the Commission had nearly a decade of experience with vocational school regulation, yet the court barely acknowledged this fact. The awareness of Congress concerning the rule was not mentioned. The court did not address the overriding concern of Congress with procedure when enacting Magnuson-Moss, and the fact that the Commission's jurisdiction was expanded to include acts or practices affecting commerce. These considerations make a difference in the final outcome.

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278. *See* S. REP. NO. 500, 96th Cong. 1st Sess. 19-20, *reprinted in* [1980] U.S. CODE CONG. & AD. NEWS 2239, 2287. In the 1980 Act, Congress wanted to make it understood that the Commission would begin a rulemaking proceeding only if it found unfair or deceptive acts to be prevalent. The Senate Report stated: "Rulemaking is appropriate when there have been several cease and desist orders or a pattern of unlawful conduct." *Id.*

279. Consolo v. Federal Maritime Comm'n, 383 U.S. 607, 620-21 (1966).

280. Cases dealing with very technical matters often impel the court to undertake a detailed examination of the facts. *See, e.g.*, Ethyl Corp. v. EPA, 541 F.2d 1 (D.C. Cir. 1976); International Harvester Co. v. Ruckelshaus, 478 F.2d 615 (D.C. Cir. 1973). *See also* note 84 *supra.*

281. Industrial Union Dep't, AFL-CIO v. Hodgson, 499 F.2d 467, 474 (D.C. Cir. 1974).

282. *Cf.* note 288 *supra.*

283. *See* note 98 *supra.*

284. *See* note 61 *supra.*

V. FUTURE DIRECTIONS

Subsequent to the court's ruling in *Katharine Gibbs,* Congress passed the Federal Trade Commission Improvements Act of 1980.[285] Potentially the most significant item in that legislative package is a legislative veto provision by which Congress can veto an FTC rule within ninety days of its submission to Congress by passing a joint resolution.[286] The powerful club of a legislative veto might be used infrequently.[287] A side effect of the veto provision may be that the judiciary will be less willing to overturn Commission rules, since Congress has indicated it intends to take a more forceful role in policing the scope of the Commission's power. The new Act does say that if Congress fails to move on a veto motion, it shall not imply acquiescence to the Commission's rule.[288] In such cases, the courts may feel free to proceed as before.

The new Act also removes certain areas from the Commission's rulemaking jurisdiction and modifies its jurisdiction in other areas. The heavy imprint of industry lobbying is on the face of the Act, and it is very unfortunate that Congress saw fit to interrupt ongoing rulemaking proceedings in response to that pressure.[289] The Commission may no

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285. Pub. L. No. 96-252, 94 Stat. 374 (1980) (to be codified at scattered sections in 15 U.S.C.)

286. *Id.* § 21.

287. There is a very real possibility that the congressional veto could be declared unconstitutional, since it would bypass presidential approval. President Carter thought the provision in the 1980 Act to be unconstitutional, but nonetheless signed the bill so that the FTC would have an appropriations bill to continue operations. [1980] No. 440 TRADE REG. REP. (CCH) p. 3 (June 2, 1980).

It is likely that upon the first attempt to veto an FTC rule, there will be an immediate court challenge to the legality of that action.

288. Pub. L. No. 96-252, § 21(d), 94 Stat. 374 (1980) (to be codified as 15 U.S.C. § 57a-1). The provision reads: "(d) Congressional inaction on, or rejection of, a concurrent resolution of disapproval under this section shall not be construed as an expression of approval of the final rule involved, and shall not be construed to create any presumption of validity with respect to such final rule." *Id.*

As with the preemption provision, *supra* note 124, it is important to read what Congress did *not* say. If no presumption of validity attaches to a rule on which a concurrent resolution did not pass, it may be inferred that Congress has assumed that rules which are not challenged do carry such a presumption. *Cf.* note 102 *supra.*

289. Consider the following remarks made during debate on the 1980 Act:

> [N]either House nor Senate conferees have been willing to defend the FTC against the onslaught of special interests. Opponents of the agency have wielded the expiration of funding as a club in negotiations. The public interest has never been an issue.
>
> Today we will hear all the excuses for a bill that only money could buy. We will hear that it is a reasonable compromise. We will hear that none of the special interests got everything they wanted.
>
> Our colleagues will argue today that the FTC has grown too powerful, and this bill curbs those excesses. They will argue about unnecessary regulation and invalid hearings. They will ignore the questions that hang over this entire debate:
>
> If Congress is given the right to review new rulemakings, why should it interrupt these rulemakings with new conditions and instructions? If a hearing may be invalid, why

longer promulgate rules based on unfair practices in advertising[290] or conduct investigations of the insurance industry.[291] Its rulemaking proceedings in regard to children's advertising, the funeral industry, and standards and certification have all been limited.[292]

The new Act also adds more layers of procedure to the rulemaking proceedings.[293] The new procedures are not subject to judicial review, however, but are intended to better inform the public and Congress about the rulemaking process.[294] A House report admitted that the Commission had voluntarily adopted many of the provisions prior to the bill's enactment.[295]

Pending rulemaking proceedings have responded quickly to the *Katharine Gibbs* decision as well as the requirements of the new Act. A proposed rule for the funeral industry breaks down each provision into two sections under the headings "Unfair and deceptive practices" and "Preventive requirements" — an obvious attempt to avoid a future adverse procedural holding.[296] In an investigation related to its Eyeglass

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not determine that during the procedure created to review that hearing? Why put certain industries beyond the reach of the law?

126 CONG. REC. H3861 (daily ed. May 20, 1980) (remarks of Rep. Ottinger).

290. Pub. L. No. 96-252, § 11, 94 Stat. 374 (1980) (to be codified at 15 U.S.C. § 57a(i)). The Act states:

> (b) The Federal Trade Commission shall not have any authority to . . . [initiate] any new rulemaking proceeding under section 18 [15 U.S.C. § 57a] . . . which is intended to result in, or which may result in, the promulgation of any rule by the Commission which prohibits or otherwise regulates any commercial advertising on the basis of a determination by the Commission that such commercial advertising constitutes an unfair act or practice in or affecting commerce.

Id.

291. *Id.* § 5. The Commission may not investigate the insurance industry except upon the request of a majority of members of the Senate Committee on Commerce, Science and Transportation or the House Committee on Interstate and Foreign Commerce. *Id.* § 5.

The repercussions of this section have already been felt. The Commission is not permitted to release a report which was critical of the marketing of cancer insurance. *See* No. 987 ANTITRUST & TRADE REG. REP. (BNA), p. A-21 -22 (Oct. 30, 1980).

292. Pub. L. No. 96-252, §§ 7, 11, 19, 94 Stat. 374 (1980) (to be codified at 15 U.S.C. § 57a(a)(i)(B); 57a(i) & 57a note). All three of these rulemaking efforts, however, will continue. *See* Improving Government Regulations; Semiannual Regulatory Agenda, 46 Fed. Reg. 10502, 10503, 10507, 10508 (1981).

293. Pub. L. No. 96-252, §§ 8, 15, 94 Stat. 374 (1980) (to be codified at 15 U.S.C. § 57a(b) & 57b-3). As part of the new procedures, the Commission must publish bi-annually a regulatory agenda which describes the proposed rulemaking activities for the year, with estimates for the approximate time each proceeding will consume. *Id.* § 15.

294. Pub. L. No. 96-252, § 15, 94 Stat. 374 (1980) (to be codified at 15 U.S.C. § 57b-3). The only circumstance in which the judiciary may rule on the new procedures is if the Commission fails entirely to adhere to them, *e.g.*, the Commission does not publish a regulatory analysis at all. The judicial review described in this section, *id.*, lends strong support to the notion that Magnuson-Moss' exclusion of the SBP from judicial review did not mean that the judiciary could not consult it in the search for substantial evidence and a rationale for the arbitrary and capricious test. Rather, it indicated that the court could not declare a rule defective because the SBP was inadequate.

295. H.R. REP. NO. 181, 96th Cong., 1st Sess. 10 (1979).

296. Funeral Industry Practices, 46 Fed. Reg. 6976 (1981).

Rule, the Commission has solicited comments on what would be the most effective way to deal with the lack of advertising for ophthalmic goods, rather than announcing it will definitely proceed through rulemaking.[297] Language in the funeral rule, however, makes it clear that the Commission's determination to stem industry-wide abuses has not waned and it may be that a deferential Notice of Proposed Rulemaking may still result in forceful Commission action.[298]

The scope of FTC rulemaking may have been curtailed in certain areas by the 1980 Act, but in essence, its broad mandate remains. The Second Circuit has circumscribed that authority without giving clear indications of what standards of review will be applied to future rule challenges. Surely the Commission will be more careful in the future about expressing its preemptive power. Likewise, it will take a more careful look at strict disclosure provisions which shut out all other information. In regard to the weighing of financial burden to industry against fairness to the consumer, the Commission may wish to articulate its rationale more carefully so that indirect remedies such as the pro rata refund and the cooling-off period will be seen as a legitimate category of Commission action. A common sentiment is that the FTC will now proceed with extreme caution in its rulemaking endeavors,[299] having been chastised by both Congress and the courts.[300] It will come

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297. Eyeglasses II, 45 Fed. Reg. 79823 (1981).

298. In its background to the proposed Funeral Industry Practices Rule, 46 Fed. Reg. 6976, 6976-77 (1981), the Commission said:

> On October 8, 1980, the Commission received Guides from several funeral trade associations that were proposed as an alternative to a final rule. The staff prepared an analysis of the Guides that was forwarded to the Commission for review. At its December 17, 1980 meeting, the Commission considered the Guides and concluded that they did not obviate the need for a continuation of the rulemaking proceeding.

Id.

299. At a meeting sponsored by the American Bar Association Section of Antitrust Law, former FTC Commissioner Miles Kirkpatrick commented: "It would be highly misleading to think [the FTC] will begin operating warily, peering over its shoulder at Congress." *FTC Future Discussed as Lawyer Probe Renews*, 66 A.B.A.J. 1056-57 (1980).

Another former Commissioner, Philip Elman, has suggested, however, that "the Commission is going to clean up its act. It will speak more softly, carrying a stick that does not appear so menacing, so loose, so frightening to so many people." *Id.* At this early date, it is uncertain who may be closer to the mark.

300. The following quote is an example of the virulent comments directed towards the Commission during the period when the 1980 FTC Improvements Act was being considered:

> [I]n my judgment [the bill] does not go nearly far enough in curbing the FTC as it should have. . . .
>
> The FTC is a rogue agency run amok. . . .
>
> . . .
>
> . . . [Our local people] are treated like some kind of criminals by the FTC. Their discussions with FTC [sic] are unfruitful and the letters that they receive from the FTC are arrogant and absurd and ask for insane amounts of information which is difficult to provide.
>
> . . . .
>
> So, I would respectfully request of those people who call themselves friends of the FTC, who are trying to preserve some of the FTC authority, who really believe the FTC

as no surprise, however, if the Commission seeks to define the outer limits of Magnuson-Moss rulemaking.

CONCLUSION

In *Katharine Gibbs,* the Second Circuit narrowly construed the Magnuson-Moss Act and consequently took a restricted view of the FTC's rulemaking power under that statute. The court struck down a number of rule provisions and held the rule procedurally defective as a whole without giving the Commission a clear idea as to the basis of its holding and the manner in which the alleged defects could be remedied.

Magnuson-Moss sought to expand the enforcement capabilities of the FTC by affirming a broad grant of rulemaking power expressed in *National Petroleum.* The Congress intended to control this power by insuring that interested parties would have a voice in the rulemaking proceedings and that the Commission would give careful consideration to the evidence presented. To this end, Congress required that the Commission follow procedures more extensive than those of the APA's informal rulemaking scheme and that material facts be reviewed under a standard of substantial evidence. Still, the reviewing court was instructed to give weight to the agency's interpretation of its own statute.

Future cases will have to pay more attention to these requirements in order for a coherent picture of Magnuson-Moss rulemaking to emerge. The essence of rulemaking is the exercise of a delegated legislative function. Congress delegated rulemaking authority to agencies such as the FTC so that it could develop expertise in a particular area and conduct research for which Congress did not have the time or resources. To be sure, Congress provided for judicial oversight of the agency's work so

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is doing a good job for the consumers of this country, that those friends try to straighten the FTC out. Try to get them to deal with people in a reasonable manner. Try to purge their ranks of people who abuse the public and lay unnecessary costs on consumers. Do this so that we don't have to go through this awful routine year after year after year.

126 CONG. REC. H3861-62 (daily ed. May 20, 1980) (remarks of Rep. Frenzel).

The Congress which enacted the 1980 FTC Act would be amused at the following assessment of the FTC made in 1969:

> The Trade Commission has acquired a constituency of business groups that includes numerous associations of retail dealers, food brokers, wholesale grocers, auto-parts jobbers and others. It promotes their interests, as we have seen, with little regard for the larger social interest in competition and efficiency. This is a pattern one would expect of an arm of Congress, and, rooted as it seems to be in the structure of a governmental system, the exhortations of critics are unlikely to change it.
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> . . . .
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> . . . [I]t is hardly surprising that over the years the FTC has devoted its principle efforts to bringing cases that . . . do not promote any coherent public policy. . . .

Posner, *The Federal Trade Commission,* 37 U. CHI. L. REV. 47, 83, 86-87 (1969).

As long as Congress continually reshapes the authority of the independent administrative agencies in response to the political pressures of the moment, it is difficult to see how any agency can be criticized for failure to develop a coherent policy or for failure to conform to the congressional mandate. *See generally* Jaffe, *supra* note 277.

that the agency would pursue its duties responsibly. But one should not lose sight of the fact that in the final analysis, after sifting through facts and polling the opinions of all the parties concerned, the Commission must make a decision which is always just one of many possible alternatives to a situation. When other types of action do not recommend themselves to a significant savings in time and cost with little loss of equity to the public, the court should accept the agency's prerogative to choose.

RONALD MARSHALL ROSENGARTEN

The Vaughn Index — Enforcing Agency Compliance under the Freedom of Information Act: *Coastal States Gas Corp. v. DOE*

The Freedom of Information Act (FOIA)[1] (section 552 of the Administrative Procedure Act (APA)[2]) represents a congressional recognition that the restriction of public access to government records of federal administrative agencies[3] is deleterious to an efficient functioning of our political process.[4] Therefore, the Freedom of Information

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1. Freedom of Information Act of 1966, Pub. L. No. 89-554, 80 Stat. 383 (codified at 5 U.S.C. § 552 (1976 & Supp. III 1979)).

2. Administrative Procedure Act of 1946, ch. 324, 60 Stat. 237-244 (current version at 5 U.S.C. §§ 551-706 (1976 & Supp. III 1979)).

3. An "agency" is defined by 5 U.S.C. § 551(1) (1976) as:

> (1) "agency" means each authority of the Government of the United States, whether or not it is within or subject to review by another agency, but does not include—
> (A) the Congress;
> (B) the Courts of the United States;
> (C) the governments of the territories or possessions of the United States;
> (D) the government of the District of Columbia; or except as to the requirements of section 552 of this title —
> (E) agencies composed of representatives of the parties or of organizations of the parties to the disputes determined by them. . . .

See note 75 *infra* for an elaboration on the definition of "agency."

4. James Madison wrote:

> A popular Government without popular information, or the means for acquiring it, is but a Prologue to a Farce or a Tragedy; or, perhaps both. Knowledge will forever govern ignorance; And the people who mean to be their own Governers, must arm themselves with the power, which knowledge gives.

Letter from James Madison to E. T. Barry, Aug. 4, 1882, *quoted in* THE COMPLETE MADISON 337 (Padover ed. 1953), *reprinted in* STAFF OF SENATE SUBCOMM. ON ADMIN. PRACTICE AND PROCEDURE, 93d CONG., 2D SESS., FREEDOM OF INFORMATION ACT SOURCE BOOK: LEGISLATIVE MATERIALS, CASES, ARTICLES 6 (Comm. Print 1974) [hereinafter cited as SOURCEBOOK I]. One commentator suggests:

> Congress enacted the Freedom of Information Act as a social decision, increasing our society's scope of knowledge. No government is omniscient, or pure or wise in all respects, and a democratic society needs to have information on which to see where, when, and how the inevitable failings of government will occur.

1 J. O'REILLY, FEDERAL INFORMATION DISCLOSURE, PROCEDURES FORMS AND THE LAW 4-3 (1979). One of the leading proponents of public access to administrative agency information stated that

Act[5] provides to every person a substantive legal right to obtain access

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the central function of the Freedom of Information Act was to "guarantee the right of every citizen to know the facts of his government." *Federal Public Records Law: Hearing on H.R. 5012 Before the Subcomm. of Foreign Operation and Government Information of the House Comm. on Government Operations (Part I)* 89th Cong., 1st Sess. 2 (March 30, 1965) (statement of Rep. John E. Moss).

Thus, the main thrust of FOIA was to promote public oversight of governmental conduct as a means to a reduction of governmental secrecy. *See* S. BREYER & R. STEWART, ADMINISTRATIVE LAW AND REGULATORY POLICY 1059-60 (1979). The Act specifically sought to eliminate arbitrary and self-serving agency behavior and "to subvert the wall of secrecy which otherwise would support arbitrary and unfair administrative action." O'REILLY, *supra,* at 4-9. *See also* W. GELLHORN, C. BYSE, P. STRAUSS, ADMINISTRATIVE LAW CASES AND COMMENTS 579 (7th ed. 1979) [hereinafter cited as GELLHORN], where it is stated:

> As a political process, a decision mechanism which works largely in private, under the control of individuals who are at best remotely responsible to the electorate and who in their daily work primarily confront and respond to other government officials and those whom they are assigned to regulate, raise what many see as large questions of responsiveness and responsibility. . . . Freedom of Information legislation . . . reflect[s] skepticism whether the traditional model of administrative, perhaps more properly regulatory, process has proved sufficient to protect the wide variety of public concerns that may bear on any given administrative controversy.

(footnote omitted).

5. "Freedom of Information" has been defined as "the right and ability of a member of a democratic society to obtain records and information concerning the actions of government. The right is a statutory one, though it has some arguable connection with the Constitution's First Amendment rights of the press." O'REILLY, *supra* note 4, at 4-2. Courts which have considered the issue of whether an individual has a constitutional right to obtain information have held that there is no such constitutional right. In Houchins v. KQED, 438 U.S. 1 (1978), the Supreme Court held that there is no constitutional right of access to particular governmental information. The Court stated, "There is no discernible basis for a constitutional duty to disclose, or for standards governing disclosure of or access to information. . . . [T]he Constitution affords no guidelines. . . . We, therefore, reject the Court of Appeals' conclusory assertion that the public and the media have a First Amendent right to government information. . . ." *Id.* at 14. Similarly, in Central South Carolina Chapter, Society of Professional Journalists v. Martin, it was stated: "[t]here is no constitutional right to have access to particular government information or to require openness from the bureaucracy." 431 F. Supp. 1182, 1187 (D.S.C.), *aff'd,* 556 F.2d 706 (5th Cir. 1977), *cert. denied,* 434 U.S. 1022 (1978), *quoting* Address by Mr. Justice Stewart, Yale Law School Sesquicentennial Convocation (Nov. 2, 1974), *quoted in* United States v. Mitchell, 386 F. Supp. 639, 641 (D. D.C. 1975). *See also* Paine v. Baker, 595 F.2d 197 (4th Cir. 1979) (a prisoner does not have a constitutionally protected right to obtain access to his prison file). *But see* Tennessean Newspapers, Inc. v. Fed. Hous. Admin. 464 F.2d 657, 660 (6th Cir. 1972) ("One of the reasons for the First Amendment, as well as the Freedom of Information Act, is to promote honesty of government by seeing to it that public business functions under the hard light of full public scrutiny."); Note, *The Freedom of Information Act Amendments of 1974: An Analysis,* 26 SYRACUSE L. REV. 951, 983 (1975) ("The public policy objective of an informed citizenry is common to both the first amendment and the Information Act . . . the Constitution and the statute are inextricably intertwined.").

The FOIA may impact on recognized constitutional rights in some instances. There may arguably be an unconstitutional taking of property by agency failure to adequately protect individual or corporate trade secrets. The presence of a trade secrets exemption (§ 552(b)(4) of the Act) does not necessarily preclude the disclosure of such information. *See* note 83 *infra.* The Constitution prohibits the taking of property without due process of the law. U.S. CONST. amend. V. Another aspect of the Act which may give rise to constitutional problems is the "any person" standard contained in section 552(a)(6)(C) of the Act. Under FOIA any person may gain access to agency records regardles of whether he has a demonstrable need for such information. The absence of a "need requirement" arguably paves the way for equal protection claims in situations where it can be shown that access to records is inequitably provided. *See* O'REILLY, *supra* note 4, at 4-7 n.6.

to an expansive spectrum of governmental information;[6] however, access to information is not unlimited.[7] Thus, pursuant to the FOIA, any person may require any federal administrative agency to disclose any agency record[8] which is not otherwise made available, or is nondisclosable.[9] Under the FOIA a complaint may be brought in any appropriate federal district court to enjoin an agency from withholding requested information and to order disclosure of records improperly withheld.[10]

The litigation of FOIA complaints entails agency attempts to avoid disclosure on the ground that the requested information falls within one

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6. Under the FOIA any person has a statutory right which is legally enforceable to obtain nonexempt records from any federal administrative agency. 5 U.S.C. § 552(a)(6)(C) (1976); *see* B. SCHWARTZ, ADMINISTRATIVE LAW, A CASEBOOK 221 (1977). *See also* notes 87-90 and accompanying text *infra.*

7. The Act sets forth nine specifically enumerated categories of governmental information which may be withheld. 5 U.S.C. § 552(b)(1)-(b)(9) (1976). *See* note 83 *infra,* for full text of exemptions. *See generally* Gordon, Heinz, Gordon, and Divorski, *Public Information and Public Access: A Sociological Interpretation,* 68 NW. L. REV. 280, 286 (1973).

8. In order for FOIA to apply, the information must be formally recorded. The Act itself contains no definition of a record. A "record" may be defined as "any memorialization of a fact, opinion or idea which is not an irreproducible physical object." O'REILLY, *supra* note 4, at 5-7. For the purpose of responding to a FOIA request an agency cannot be required to create a record. Kissinger v. Reporters Comm. for Freedom of the Press, 445 U.S. 136, 152 (1980). *See generally* SDC Development Corp. v. Mathews, 542 F.2d 1116 (9th Cir. 1976).

9. Certain information is made available through other means than by requested or litigated disclosure. Section 552(a)(1) requires that certain information be published in the Federal Register and section (a)(2) requires that certain information be made available for public inspection and copying. 5 U.S.C. §§ 552(a)(1), (a)(2) (1976). *See* notes 76-77 *infra.*

10. The statute provides:

> On complaint, the district court of the United States in the district in which the complainant resides, or has his principle place of business, or in which the agency records are situated, or in the District of Columbia, has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant.

5 U.S.C. § 552(a)(4)(B) (1976). Counsel for the plaintiff in Coastal States Gas Corp. v. DOE, 495 F. Supp. 1172 (D. Del. 1980), explained that the Delaware district court was chosen as the forum for this action rather than the District of Columbia courts (in which venue is also proper) for three reasons:

> First, there are only three active district judges in that district, and they all have excellent reputations as jurists. . . . Second, the judges of the District of Delaware have had little previous experience with FOIA cases, which I considered to be an advantage in that the statute and legislative history are simply and, if literally applied, strongly [in] favor [of] the FOIA plaintiff. Finally, the District of Delaware is much more current with its docket than the District for the District of Columbia and thus offered a greater prospect of being able to conclude the litigation expeditiously and at a time when I could obtain the documents from the FOIA action and file them in the administrative proceeding *before* the administrative record closed.

Letter from J. Todd Shields, Counsel for the plaintiff, Coastal States Gas Corp. v. DOE, 495 F. Supp. 1172 (D. Del. 1980), to Patrick J. Ward (November 25, 1980) (emphasis in the original) [hereinafter cited as Letter of November 25, 1980].

Litigation under the Act has also taken the form of the "reverse" FOIA suit. These cases involve attempts by individuals and corportions to enjoin agency disclosure of information which is involved within one or more of the Act's exemptions. *See* note 83 *infra* where exemptions are set out in full. In Chrysler Corp. v. Brown, 441 U.S. 281 (1979), the issue was whether the decision to withhold was within the agency's discretion or was such withholding mandated by the Act. The *Brown* Court held that, "[b]y its terms, subsection (b) demarcates the agency's obligation to disclose; it does not foreclose disclosure." *Id.* at 292.

of the exemptions in the Act.[11] In *Vaughn v. Rosen,*[12] the United States Court of Appeals for the District of Columbia Circuit held that when an agency asserts an exemption to disclosure it must prepare and present to the district court an index of those documents withheld which describes the nature of the records and the justification for nondisclosure.[13] On June 30, 1980 the United States District Court for the District of Delaware rendered a decision which appears to represent a logical extension of the *Vaughn* indexing procedure. In *Coastal States Gas Corp. v. DOE,*[14] it was held that the Department of Energy presented the district court with a *Vaughn* index which failed to provide an adequate basis for evaluation of the agency's assertion that the requested information fell within the exemptions contained in the Act.[15] The agency was compelled to disclose the information without being provided further opportunity to correct the defects in the proffered index.[16]

This remedial decision represents this court's perception of agency compliance with the Freedom of Information Act and, if upheld, will have substantial impact on future FOIA litigation. One such consequence is that it will substantially strengthen the ability of a FOIA plaintiff to obtain disclosure of governmental agency information.[17] Moreover, it represents a conscious decision to provide a compelling in-

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11. The exemptions are listed in note 83 *infra.*

12. 484 F.2d 820 (D.C. Cir. 1973), *cert. denied,* 415 U.S. 977 (1974).

13. 484 F.2d at 827-28. This procedure was formulated to generally assist the plaintiff and specifically assist the court in ascertaining the legal propriety of the withholding. Since the obvious purpose of the withholding is to prevent the dissemination of specific information, the court record is not supplanted with that information. Thus, the most rudimentary function of the *Vaughn* requirements is to provide to the court and the plaintiff as much information about the specifically requested information as possible without actually disclosing that information. Yet, even with the *Vaughn* index requirements "the principle problem with [this] standard ... is the government's fear that detailed itemization and justification would enable the objects of its investigation to 'fill in the blanks.' " Kanter v. IRS, 433 F. Supp. 812, 823 (N.D. Ill. 1977). The *Vaughn* procedures and the practical problems inherent in FOIA litigation are discussed in notes 111-60 and accompanying text *infra.*

Perhaps the establishment of the *Vaughn* index by the District of Columbia Circuit was the motivating force behind the amendment of the FOIA in 1974 to provide for jurisdiction in all FOIA cases in the District of Columbia Circuit (although concurrent jurisdiction might be present in other circuits). 5 U.S.C. § 552(a)(4)(B) (1976). Congress may have recognized that the reasoning behind the *Vaughn* decision served to advance the general policies of the Act. Indeed the establishment of the "index" may have, in effect, served as a substitute for filling a gap in the cumbersome legislative process. *See also* notes 211-12 and accompanying text *infra.*

14. 495 F. Supp. 1172 (D. Del. 1980).

15. *Id.* at 1174-75.

16. *Id.* at 1180.

17. The FOIA as amended largely favors the plaintiff when litigating a FOIA claim. Yet in practice courts have failed to effectuate this statutory bias in favor of the plaintiff; more often displaying fear of ordering disclosure of possibly exempt information than demanding agency compliance with the FOIA. *See* Mobil Oil Corp. v. FTC, 430 F. Supp. 849 (S.D.N.Y. 1977). Coastal States Gas Corp. v. DOE, 495 F. Supp. 1172 (D. Del. 1980), clearly addresses this trend. "This Court has no intention of having this case added to the DOE's string citation of cases permitting second, third and even fourth 'bites of the apple' in FOIA litigation." *Id.* at 1176.

centive for agencies to comply in good faith with the requirements of the *Vaughn* index procedure.

This Comment focuses on the issues of whether the holding in *Coastal States* is consistent with the purpose of the FOIA and, if so, whether such a decision is desirable in FOIA litigation. The facts and holding of *Coastal States Gas Corp. v. DOE,* are presented in Section I. Section II presents a detailed examination of the background and development of the Freedom of Information Act. Section III examines the practical aspects of FOIA litigation with particular emphasis on development of the *Vaughn* index procedure. Finally, Section IV analyzes the decision in *Coastal States* and concludes that the court's reasoning is consistent with the policies underlying the FOIA. A disturbing aspect of this case, however, is the marked absence of a clear procedural foundation for the decision by the court.

I. COASTAL STATES GAS CORPORATION V. DEPARTMENT OF ENERGY

A. Factual Background

The plaintiff, Coastal States Gas Corporation, had been involved in an administrative proceeding brought against it by the Department of Energy's Office of Special Counsel for Compliance (OSCC).[18] Anticipating opposition to its motions for discovery pursuant to this administrative action,[19] Coastal, on October 18, 1978, submitted to the

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18. The central allegation by the OSCC was that certain gasoline and oil sales by Coastal constituted unlawful overcharges to certain customers. Brief for Appellant at 4, Coastal States Gas Corp. v. DOE, No. 80-2199 (3d Cir. 1981) [hereinafter cited as Brief for Appellant]. Early in 1981, Coastal and the Department of Energy reached a settlement of the matters involved in this administrative proceeding and certain other actions between the parties. That settlement did not include the issues involved in the decision which is the focus of this comment. Telephone Interview with J. Todd Shields, Attorney for the plaintiff, Coastal States Gas Corporation (Jan. 19, 1981).

19. The brief for the government suggested that the FOIA request was intitiated at the same time as motions for discovery in the administrative proceeding were filed by Coastal. "Coastal has filed motions for discovery in the administrative action which the Office of Special Counsel has opposed. Simultaneously, Coastal has invoked the FOIA as a tool for achieving essentially the same discovery which it seeks in the administrative action." Brief for Appellant, *supra* note 18, at 4. In fact, the FOIA request preceded by nearly a month the discovery motions pertaining to the administrative proceeding pending against Coastal. Counsel for Coastal explained that he had anticipated the denial of discovery by the Office of Special Counsel which "thereby puts Coastal to the task of seeking the same information by way of the FOIA." Letter of November 25, 1980, *supra* note 10, at 2. Therefore, Coastal filed the FOIA request prior to the denial of its motions for discovery. Plaintiff's counsel suggested that the discovery motions were denied for tactical reasons since:

> the DOE currently has in its exclusive possession all of the agency documents which are relevant to the administrative proceeding and so long as it retains sole access to those documents it can place in the administrative record only that selective portion of the documents which favor the government's position.

Id. at 1-2.

Coastal's FOIA request sought "all agency records pertaining to the 'formulation, adoption,

Department of Energy (DOE) a thirteen page FOIA request which "involved the FOIA ... as a means of making discovery of DOE documents for use in the administrative action."[20] In spite of statutory requirements (which required a prompt, initial response be made available to a FOIA requestor[21] which shall indicate whether the agency intends to comply with the request, and the extent of compliance, or

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interpretation and application' by DOE and its predecessor agencies of certain petroleum price and allocation regulations, particularly, all agency records pertaining to the so-called 'first sale to U.S. Commerce' exemption from those regulations." Brief for Appellants, *supra* note 18, at 2. *See* DOE Mandatory Petroleum Price Regulations, 10 C.F.R. § 212.53 (1980). The requested information also included all agency records which pertained to enforcement procedures against all firms violating the "first sale" exemption regulations. Brief for Appellant, *supra* note 18 at 2-3. *See also* Defendant's Memorandum of Points and Authorities in Support of its Opposition to Plaintiff's Motion for Partial Judgment and to Compel an Adequate Vaughn Index at 1, Coastal States Gas Corp. v. DOE, 495 F. Supp. 1172 (D. Del. 1980) [hereinafter cited as Defendant's Memorandum in Opposition to Partial Judgment].

20. Brief for Appellant, *supra* note 18, at 4. There is no dispute between the parties that Coastal is using the FOIA as a "discovery tool." "Coastal has always candidly acknowledged that its FOIA request at issue is 'directly related' to an administrative enforcement action which the DOE has brought against it." *Id.* at 3-4. "As might be expected, many of the documents at issue here relate to the DOE's investigation of Coastal and to the prosecution of the administrative enforcement action against Coastal." *Id.* at 9.

> Though Coastal has not been able to obtain documents in question through discovery in the administrative enforcement action pending against it, the distinct court's order allows it to obtain them under the FOIA. This is not only *not* what the FOIA was meant for ... but it is a direct contravention of the policies which led Congress to exempt documents like those at issue here from the FOIA.

Brief for Appellant, *supra* note 18, at 21 (emphasis in the original) (citations omitted). An accurate interpretation of the FOIA, however, is that it is clearly irrelevant that a FOIA requestor may be a litigant in an ongoing administrative or judicial proceeding and has initiated a FOIA request to obtain information relevant to that on-going proceeding. *See* 1 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 5:7 (1978). "By directing disclosure to any person, the Act precludes consideration of the interests of the party seeking relief." Soucie v. David, 448 F.2d 1067, 1077 (D.C. Cir. 1971). *Accord,* Moore-McCormack Lines v. I.T.O. Corp., 508 F.2d 945, 950 (4th Cir. 1974) (Rule 26(b) of the Federal Rules of Civil Procedure does not authorize the withholding by an agency of any records the Act commands it to disclose). Thus, the FOIA may be used as a discovery tool. It may be used:

> to acquire evidence for use in agency adjudication, or in judicial review of informal rulemaking. Or the documents requested may be utilized in litigation with third parties. discovery is sometimes sought to ascertain "secret law" — the informal practices which an agency utilizes, for example in settling disputed tax claims.

BREYER & STEWART, *supra* note 4, at 1061.

21. *See* U.S.C. § 552(a)(3) (1976) which provides:

> Except with respect to the records made available under paragraphs (1) and (2) of this subsection, each agency, upon any request for records which (A) reasonably describes such records and (B) is made in accordance with published rules stating the time, place, fees (if any), and procedures to be followed, shall make the records promptly available to any person.

Regarding the time factor for an intitial response, section 552(a)(6)(A) states:

> Each agency, upon any request for records made under paragraph (1), (2) or (3) of this subsection shall —
> (1) determine within ten days ... after the receipt of any such request whether to comply with such request and shall immediately notify the person making such request of such determination and the reasons therefor, and of the right of such person to appeal to the head of the agency any adverse determination. ...

whether the agency intends to deny the request[22]) the Department of Energy did not adequately respond to Coastal's FOIA request.[23] In fact, the only responses from the Department of Energy received by Coastal were "two letters granting itself [DOE] extensions of time. . . ."[24] Responding to the DOE's noncompliance with this procedural mandate, Coastal initiated suit in the United States District Court for the District of Delaware.[25] In addition to this complaint, Coastal submitted a motion to compel the Department of Energy to file an itemized index of all documents which the DOE claimed were exempt under the Freedom of Information Act, including detailed justification statements corresponding to each refusal to release to

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22. The agency denial should be comprehensive. *See* Shermco Indus. Inc. v. Secretary of United States Air Force, 452 F. Supp. 306 (N.D. Tex. 1978). The more detailed the denial letter is, the more likely it is that the issues which may be litigated will be sharpened and frivolous appeals reduced. Such detailed letters of response would limit the practice of "[s]ome agencies [which] overclaim exemptions as a matter of routine to deter the novice requester from proceeding further. . . ." O'REILLY, *supra* note 4, at 7-16a.

23. Coastal put the DOE on notice that it expected a "substantial response" within the statutorily prescribed time limits. Brief for Appellant, *supra* note 18, at 4. Thus, from the outset, the DOE acted in a manner inconsistent with the statute. The DOE might have been justified in refusing to provide the required response if the request had failed to reasonably describe the information sought. *See* 5 U.S.C. § 552(a)(3) (1976). By DOE's own admission, however, it knew precisely what information Coastal was seeking. Brief for Appellant, *supra* note 18, at 4.

24. Coastal States Gas Corp. v. DOE, 495 F. Supp. 1172, 1173 (D. Del. 1980). Neither the district court nor the DOE raised the issue that the DOE may have been justified in extending the time to respond for one ten day period on a showing that unusual circumstances were present. 5 U.S.C. § 552(a)(6)(B) (1976) states:

> In unusual circumstances as specified in this subparagraph, the time limits prescribed in either clause (i) or clause (ii) of subparagraph (A) may be extended by written notice to the person making such request setting forth the reasons for such extension and the date on which a determination is expected to be dispatched. No such notice shall specify a date that would result in an extension for more than ten working days. As used in this subparagraph, "unusual circumstances" means, but only to the extent reasonably necessary to the proper processing of the particular request —
>
> (i) the need to search for and collect the requested records from field facilities or other establishments that are separate from the office processing the request;
>
> (ii) the need to search for, collect, and appropriately examine a voluminous amount of separate and distinct records which are demanded in a single request; or
>
> (iii) the need for consultation, which shall be conducted with all practicable speed, with another agency having a substantial interest in the determination of the request or among two or more components of the agency having substantial subject-matter interest therein.

The search initiated by the DOE in response to the information request appears to have fallen within the exceptions for "unusual circumstances." *See* Brief for Appellant, *supra* note 18, at 6. If DOE's initial extension of time was permissible under the FOIA, the second grant for an extension of time was clearly impermissible. Furthermore, the DOE failed to comply with the applicable time limits, even if it is assumed that the extension was proper. Thus, the DOE's response to Coastal's FOIA request was woefully in conflict with established statutory requirements. In fact, even counsel for the DOE stated that "[t]he DOE does not dispute the fact that prior to the beginning of this litigation it had not properly processed Coastal's FOIA request." *Id.* at 5.

25. *See* Brief in Support of Plaintiff's Motion for Partial Judgment and to Compel an Adequate Vaughn Index at 1, Coastal States Gas Corp. v. DOE, 495 F. Supp. 1172 (D. Del 1980) [hereinafter cited as Brief in Support of Partial Judgment]. *See also* note 10 *supra*.

Coastal such documents.[26] This itemization is generally referred to as a *Vaughn* index.[27]

Subsequent to a pretrial conference with the court,[28] Coastal and the Department of Energy entered into a stipulation and order, which required the DOE to provide the court and Coastal with a schedule of indexing together with a detailed justification for refusal by the DOE to disclose requested documents and to any exemption claims to be made.[29] The order was entered on May 9, 1979 and was to be fully complied with by June 22, 1979.[30] Pursuant to this order, the DOE filed its index of exempt documents, an affidavit and a large number of documents claimed to be partially exempt, on July 2, 1978.[31] This index has variously been referred to as DOE's "*Vaughn* index,"[32] DOE's "purported *Vaughn* index,"[33] and DOE's "initial index."[34]

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26. 495 F. Supp. at 1173. In addition, the motion sought to compel disclosure within thirty days of all documents responsive to Coastal's request for which the DOE did not claim an exemption. Brief for Appellant, *supra* note 18, at 5. It is suggested that if such a motion for indexing and justification is to be filed, that it be done, as here, with the filing of the complaint. LITIGATION UNDER THE FEDERAL FREEDOM OF INFORMATION ACT AND PRIVACY ACT 29 (5th ed. C. Marwick ed. 1979) [hereinafter cited as FOIA LITIGATION]. It is suggested that because:

> FOIA cases . . . are seldom easy since Plaintiff and counsel usually lack anything beyond a generalized, rudimentry knowledge of the essential facts of the case: that is, the contents of the record sought. Consequently, *in camera* inspection, which is relatively rare in other areas of the law, is a common practice in FOIA cases, and counsel must demonstrate some ingenuity in using discovery procedures. . . .

Id. at 16.

27. *See* note 13 *supra.*

28. *See* note 259 and accompanying text *infra.*

29. 495 F. Supp. at 1173. The Stipulation and Order provided in part, that:

> 4. Defendant shall, on or before June 22, 1979, file and personally serve upon Plaintiff's counsel an itemized, indexed inventory of every document responsive to Plaintiff's FOIA request which the Defendant asserts to be exempt from disclosure, accompanied by a detailed justification statement covering each refusal to release documents, divided into manageable segments and cross-referenced to the itemized, indexed inventory, which inventory shall specify for each document:
>
> (a) The author(s), to the extent indicated in the document;
>
> (b) The date the document was prepared, to the extent indicated in the document;
>
> (c) The addressee(s), to the extent indicated in the document;
>
> (d) The additional person or persons to whom the document was circulated and/or made available to the extent indicated in the document;
>
> (e) The subject matter;
>
> (f) The regulation(s) expressly addressed or referred to either by number or by description (for example, 'first sale exemption'), to the extent indicated in the document;
>
> (g) The specific exemption(s) claimed to justify withholding each document, correlated specifically to the document or the segregable portion thereof claimed to be exempted from mandatory disclosure (with an explanation as to why exempt material could not be segregated from each document);
>
> (h) A detailed justification of the basis for each claim of exemption;
>
> (i) The specific injury to DOE which release of the document allegedly would create; and
>
> (j) Why the public interest does not favor disclosure of the document.

30. *Id.* Apparently, the DOE was granted an extension with regard to the date required by the order of submission of this index. Brief for Appellant, *supra* note 18, at 5.

31. 495 F. Supp. at 1173.

32. Defendant's Memorandum in Opposition to Partial Judgment, *supra* note 19, at 3.

33. Brief in Support of Partial Judgment, *supra* note 25, at 2.

34. Brief for Appellant, *supra* note 18, at 6.

Coastal then initiated discovery into the methods of preparation of the proffered index. The Department of Energy responded to this discovery by filing a motion for a protective order.[35] In support of its motion, the DOE stated that an additional affidavit would be forthcoming by August 3, 1979 which would satisfy plaintiff's purpose in initiating discovery and fully establish the propriety of its continued nondisclosure.[36] In addition to promising this forthcoming dispositive affidavit, the Department of Energy promised to file a motion for summary judgment.[37] Despite these assurances by the government, "no such affidavit further substantiating the DOE's assertions of exemption was ever filed. Similarly, the DOE's promised summary judgment motion ... was never filed."[38]

The district court denied the DOE's motion for a protective order and discovery by deposition ensued.[39] On December 7, 1979, Coastal moved for partial judgment and alternatively[40] to compel the Depart-

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35. 495 F. Supp. at 1173. The DOE stated that it sought a protective order against this discovery so as to prevent Coastal from obtaining discovery by deposition and thereby limit Coastal to discovery through interrogatories. Brief for Appellant, *supra* note 18, at 6.

36. Defendant has almost completed the preparation of a lengthy affidavit setting forth the facts concerning the initial handling of plaintiff's request; the scope of the extensive search that was undertaken to identify all responsive documents in May and June, 1979; defendant's efforts to segregate for release all information even if properly exempt, which would not be harmful to the government or private firms, if it were made public; *and further factual description and justification by categories of the information which the government has withheld.* That affidavit will be filed by the defendant no later than Friday, August 3, 1979.

495 F. Supp. at 1174 (emphasis in the original). Counsel for the Department of Energy stated:

The Government, as the cases have indicated, is entitled to attempt to provide by means of affidavit information about the document that's being withheld. The Government has prepared and will be filing tomorrow in the Court here an additional affidavit which will be providing additional information about the documents that are being withheld in this lawsuit. And it is the Government's contention that when this affidavit is examined in conjunction with the papers that have already been filed in this case — the other indexes — that there will be more than sufficient information on the public record before the Court and available to Plaintiff's counsel in order for an adversarial dispute about the invocation of the exemptions to take place.

Id. at 1174.

37. *Id.* Brief for Appellant, *supra* note 18, at 6.

38. 495 F. Supp. at 1174. It appears that the government has, in the past, attempted to avoid discovery, and indeed has realized some degree of success in staying discovery by making promises that it will file "in the near future" a dispositive motion. FOIA LITIGATION, *supra* note 26, at 25. "The government defendant in this case has made it a practice in other cases to attempt to avoid judicial determinations by purporting to 'moot' existing controversies with belated actions taken after protracted litigation has made it apparent that imminent judicial determinations are likely to be adverse to them." Reply Brief in Support of Plaintiff's Motion for Partial Judgment and to Compel an Adequate Vaughn Index at 10, Coastal States Gas Corp. v. DOE, 495 F. Supp. 1172 (D. Del. 1980) [hereinafter cited as Reply Brief for Partial Judgment].

39. 495 F. Supp. at 1174. Brief for Appellant, *supra* note 18, at 6. It is generally recognized that depositions are an important means of discovery in FOIA cases since this type of litigation is frequently decided on motions for summary judgment which necessitate consideration of such by the judge. FOIA LITIGATION, *supra* note 26, at 30-31.

40. The district court, as well as the DOE, described Coastal's motion as alternatively seeking to have a new *Vaughn* index prepared by the DOE and filed with the court. 495 F. Supp. 1173; Brief for Appellant, *supra* note 18, at 40; Memorandum in Support of Defendant's Motion for

ment of Energy to file an adequate *Vaughn* index.[41] The Department of Energy responded by claiming that Coastal's motion for an adequate *Vaughn* index would be mooted by the promised revision of its initial index which, while still being processed, would be completed prior to oral argument.[42] Finally, at 3:00 p.m. on the day prior to oral argu-

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Reconsideration of the Court's Partial Summary Judgment and Order of June 30, 1980 at 2, Coastal States Gas Corp. v. DOE, No. 79-197 (D. Del. August 14, 1980) (Memorandum Opinion) [hereinafter cited as Defendant's Memorandum for Reconsideration]; Defendant's Memorandum in Opposition to Partial Judgment, *supra* note 19, at 4. Coastal, however, stressed that this was not the nature of the motion, urging that it sought *both* partial judgment and an order compelling DOE to prepare an adequate index for all documents not covered by such partial judgment. Brief for Appellee, at 2 n.3, Coastal States Gas Corp. v. DOE, No. 80-2199 (3d Cir. 1981) [hereinafter cited as Brief for Appellee].

41. 495 F. Supp. at 1173. Coastal moved for partial judgment contending that the index filed by DOE failed to comply in any meaningful way with the court's order. Coastal argued:

> [T]he DOE's purported *Vaughn* index is so devoid of essential detail, so rife with boilerplate, conclusory statements, and so demonstrably inaccurate that it fails to comply with this Court's Order of May 9, 1979, and cannot be used for its intended purpose. Coastal will also demonstrate that the DOE's failure to comply with this Court's Order of May 9, 1979 makes this case appropriate for grant of partial judgment ordering disclosure of the documents identified in DOE's purported *Vaughn* index.

Brief in Support of Partial Judgment, *supra* note 25, at 3-4. The plaintiff argued that the Department of Energy did not contest that it had failed to comply with the court order, "effectively admit[ting] that it ha[d] not complied with its obligations by [its] suggest[ion] that it intend[ed] to comply with them at some future but unspecified time." Reply Brief for Partial Judgment, *supra* note 38, at 3. In light of the dilatory, cavalier attitude exhibited by the DOE, the plaintiff claimed "that where, as here, the Government ha[d] already made one such promise [of future action] in this case and then failed to keep it, its promises are entitled to no judicial cognizance." *Id.* The plaintiff stated:

> To allow the Government to file new information ... at some time in the future when it has already been more than six months since they represented in open Court that such information would be filed "tomorrow" would simply legitimize the Government's demonstrated abuse of the Vaughn indexing requirement and would nullify the FOIA's command that the FOIA plaintiff receive a treatment of this case that is "expedited in every way."

Id. at 19.

42. 495 F. Supp. at 1174. The defendant DOE also argued that such a "drastic action" (*i.e.* ordering disclosure of the documents) was in contravention of prior judicial treatment of the *Vaughn* index requirements. Defendant's Memorandum in Opposition to Partial Judgment, *supra* note 19, at 4. The DOE characterized its revised index as a "good faith," effort, *Id.* at 6, and claimed that the court's refusal to consider it would be inconsistent with prior judicial treatment of the *Vaughn* index requirements. According to the DOE:

> Coastal's assertion that ... judgment should be entered in this case because of what it claims are inadequacies in the present *Vaughn* index which place DOE in violation of the Court's order of May 9th and make such relief appropriate runs completely counter to the manner in which courts have consistently treated the need for improving or preparing a *Vaughn* index and is unsupported by the authorities Coastal relies upon its argument, or, for that matter, by any authorities. Courts which have found that additional *Vaughn* indexing is necessary in order to fully try the exemption issues in FOIA cases have inevitably ordered the additional indexing when at the trial level or remand for additional indexing when at the appellate level. To do otherwise and summarily enter judgment on the basis of an incomplete index without truly examining the exemption claims allows the "tail to wag the dog."

Id. at 5-6. The DOE claimed that to preclude consideration of its proffered index would deny the government the opportunity to "marshall its evidence" and thereby sustain its burden under the FOIA. *Id.* at 6-7. *See also* 5 U.S.C. § 552(a)(4)(B) (1976).

The DOE went on to state: "A *Vaughn* index is but a tool to be used by the parties and the

ment, the DOE filed its "revised index" together with an affidavit.[43] Plaintiff then moved to strike both the revised index and affidavit as untimely filed.[44] The court granted this motion.[45]

B. District Court Holding and Reasoning

Rejecting completely the arguments presented by the Department of Energy, the district court granted Coastal's motion for partial judgment and ordered production of all responsive documents based on a determination that the DOE failed to satisfy the burden necessary to sustain a withholding of agency record information.[46] The court first examined DOE's proffered *Vaughn* index.[47] The court determined that "analysis of the ... [first] index demonstrates conclusively that the index does not comply with this Court's Order. . . ."[48] This conclusion was not even "vigorously contest[ed]" by the Department of Energy.[49] More importantly, the court found the DOE's *Vaughn* index to be of no value in the effort to ascertain the validity of the department's claims of exemption[50] and furthermore, that "Coastal is unable to adequately argue

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Court to thrust the Government's claimed exemptions forward for examination. This examination process ought not to be summarily ended and meritorious exemptions ignored simply because that tool may occasionally need sharpening." Defendant's Memorandum in Opposition to Partial Judgment, *supra* note 19, at 7.

43. 495 F. Supp. at 1174.

44. *Id.*

45. *Id.*

46. *Id.* at 1180. Judge Schwartz stated: "I conclude the government has not met its statutory burden of sustaining its action and, accordingly, will order the production of all documents sought by the plaintiff in its motion for partial judgment." *Id.* The FOIA places the burden directly on the agency to sustain its claim of withholding. 5 U.S.C. § 552(a)(4)(B) (1976). *See, e.g.*, Committee on Masonic Homes v. NLRB, 556 F.2d 214, 218 (3d Cir. 1977).

47. 495 F. Supp. at 1174.

48. *Id.*

49. *Id.* The court noted that the DOE's brief failed to address this issue. It addressed the propriety of partial judgment and whether the DOE should prepare a new index. "Similarly, at oral argument, counsel for DOE, while not conceeding that the July index was 'woefully inadequate'; did not vigorously challenge plaintiff's contention that the index failed to comply with the Court's Order." *Id.* The filing of the revised index was, to the court, implicit recognition that the DOE's initial index was, indeed, deficient. *Id.* "Thus for all practical purposes the Government simply acknowledges noncompliance in apparent recognition that it cannot argue otherwise." Reply Brief for Partial Judgment, *supra* note 38, at 3. *But see* Defendant's Memorandum in Opposition to Partial Judgment, *supra* note 19 at 5 n.5. Additionally, the appellant noted:

> While in no way conceeding that its present *Vaughn* index is inadequate or violative of this Court's order of May 9, 1979, DOE intends with its revised and updated index to provide additional information concerning all documents withheld and to meet any legitimate concerns raised by Coastal in its brief.

Brief for Appellant, *supra* note 18, at 15.

50. "This index would be of absolutely no help to the Court in determining whether the numerous documents claimed by DOE to be exempt from disclosure are in fact exempt." 495 F. Supp. at 1174. "The method of a detailed index was devised by the court in *Vaughn v. Rosen* for the benefit of the court rather than the plaintiffs." Kanter v. IRS, 433 F. Supp. 812, 824 (N.D. Ill. 1977). This statement is somewhat inaccurate in that it deemphasizes the importance of the

to the Court *from this index* that specific documents are not exempt."[51]

Having concluded that the index failed to meet the *Vaughn* requirements, the court turned to the issue of determining an appropriate remedy. Restating the necessity of the *Vaughn* mandates,[52] the court asserted:

> The DOE's actions in the instant case indicate that the importance of the *Vaughn* requirements is not being recognized. Despite this often-stated judicial sentiment, agencies such as the DOE apparently believe they need not immediately comply with the well-established procedure for asserting exemptions, but may instead revise and correct their indices until they "get it right."[53]

The court chose to disassociate itself from the practice of other courts which had allowed agencies to amend initially inadequate *Vaughn* indices.[54] The court felt that to allow the DOE to complete and submit

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Vaughn index as an aid to the plaintiff. In the *Vaughn* decision the court stated that the primary function of the remedial measures it mandated was to benefit the trial court. Vaughn v. Rosen, 484 F.2d 820, 825-26 (D.C. Cir. 1973). The court also emphasized the plight of the plaintiff. *Id.* at 824. "In light of this overwhelming emphasis upon disclosure, it is anomalous but obviously inevitable that the party with the greatest interest in obtaining disclosure is at a loss to argue with the desirable legal precision for the revelation of the concealed information." *Id.* at 823. *See* notes 111-60 and accompanying text *infra,* for a further discussion of the purposes of the *Vaughn* procedures.

51. 495 F. Supp. at 1174.

52. *Id.* at 1175. "This requirement, announced in *Vaughn* and refined in many subsequent cases, has been repeatedly described as 'critical to effective enforcement of FOIA.' " *Id., quoting* Founding Church of Scientology, Inc. v. Bell, 603 F.2d 945, 947 (D.C. Cir. 1979). *See also* Ray v. Turner, 587 F.2d 1187, 1191-92 (D.C. Cir. 1978); Mead Data Central, Inc. v. United States Dept. of Air Force, 566 F.2d 242, 251 (D.C. Cir. 1977); Pacific Architects & Eng. Inc. v. Renegotiation Board, 505 F.2d 383, 385 (D.C. Cir. 1974).

53. 495 F. Supp. at 1176.

54. The court stated:

> However, in light of DOE's long-standing knowledge of the *Vaughn* index requirements and its importance and the clear congressional policy in favor of expeditious handling of FOIA cases, this Court has no intention of having this case added to the DOE's string citation of cases permitting second, third and even forth "bites at the apple" in FOIA litigation.

The approach taken by other courts is exemplified by the following cases. In Founding Church of Scientology, Inc. v. Bell, 603 F.2d 945 (D.C. Cir. 1979), the court found that the FBI had failed in its "attempts to provide an adequate Vaughn index. . . ." *Id.* at 949. In reversing the district court's grant of summary judgment to the FBI, the District of Columbia Circuit remanded the case and required the FBI to produce an adequate *Vaughn* index, specifying certain information which should be included in that index. *Id.* at 949. Certain parts of a motion for summary judgment were deferred in Mobil Oil Corp. v. FTC, 406 F. Supp. 305 (S.D.N.Y. 1976), pending submission of a revised index to further justify the FTC's refusal to release certain documents. *Id.* at 851. Even after submission of a revised index there remained a category of documents for which there was no sufficient factual showing or substantiation of the agency's claim for exemption. *Id.* at 854. This court also analogized the situation to what *Vaughn* was primarily directed to: "Plaintiff has not and cannot comment further, since the government has given it no specific justifications or facts to which it can respond." *Id.* Notwithstanding this remark, the court again permitted the agency to substantiate the claims, within thirty days, by submission of "affidavits specifying why these memoranda should be withheld . . . in such a way as to afford plaintiff sufficient notice of the basis for the claimed objective." *Id.* at 855. *See also* Tarnopol v. FBI, 442 F. Supp. 5 (D. D.C. 1977).

another *Vaughn* index would be clearly inconsistent with congressional intent.[55] After stating the provisions of the FOIA, including the 1974 amendments, which represented "Congress' overwhelming intent to avoid undue delay in the production of information by the government,"[56] the court concluded that refusing to consider the DOE's revised index would not preclude granting partial judgment for Coastal. The court stated that to allow "the DOE to rely upon its latest eleventh-hour effort to delay those proceedings would make a mockery of the legislation."[57]

Further, the district court relied on an analogous case in the District of Columbia Circuit which involved the same parties. In *Coastal States Gas Corp. v. DOE (Coastal I),*[58] the court found that the DOE had failed to sustain its statutory burden through its *Vaughn* index. Accordingly, in finding that the DOE had failed to sustain its burden regarding most of its exemption claims, the appeals court upheld the district court's ruling that the documents would be disclosed without further substantiation of those exemption claims.[59] The Delaware district court in the present case, *Coastal States Gas Corp. v. DOE (Coastal II)*[60] rejected the government's attempt to distinguish *Coastal I* on the ground that the earlier case had involved cross motions for summary judgment. The basis of the argument was that by not having moved for summary judgment the government had not rested its case.[61] In limiting the DOE to its initial index, the Delaware district court stated that "the agency should be prepared to rest upon [its *Vaughn* index] whether or not it formally moves for summary judgment."[62]

The court also relied on its "inherent powers" to control its own

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55. 495 F. Supp. at 1175.

56. *Id.* A historical discussion of the FOIA is presented in notes 66-110 and accompanying text *infra.*

57. 495 F. Supp. at 1176. "The DOE's initial failure to respond at all to Coastal's request for information . . . , and its dilatory attitude toward this litigation, as expressed in its repeated offers and unfulfilled promises to revise its index of withheld documents, are exactly what Congress intended to eliminate with the 1974 amendments." *Id.* at 1175-76.

58. Coastal States Gas Corp. v. DOE, 617 F.2d 854 (D.C. Cir. 1980).

59. *Id.* at 870. Reemphasizing the importance of the *Vaughn* requirements the circuit court, in *Coastal I,* wrote:

> DOE submitted an index of the withheld documents, along with affidavits from regional counsel in support of its decision not to release the memoranda. The parties have referred to these materials as the Government's "*Vaughn* Index," but we wish to make clear that this index is not what we had in mind in our decision in *Vaughn v. Rosen*. . . . We repeat, once again, that conclusory assertions of privilege will not suffice to carry the Government's burden of proof in defending FOIA cases.

Id. at 861.

60. 495 F. Supp. 1172 (D. Del. 1980). Despite the *Coastal II* court's view, the government's argument had merit from a procedural standpoint. The procedural aspects of *Coastal II* are discussed in notes 219-68 and accompanying text *infra.*

61. 495 F. Supp. at 1177.

62. *Id.*

docket.[63] Finally, the court examined the competing factors of conducting an in camera review of agency documents, despite the fact that the DOE never submitted nor offered to submit the documents for an in camera inspection and concluded that such an inspection would be inappropriate since it would shift the burden of establishing the exempt nature of the documents from the agency to the court.[64] On December

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63. *Id.* at 1178. Without elaboration the court cited a recent Third Circuit decision which mentioned the "inherent powers of a trial court." *See* DeLong Corp. v. Raymond International, Inc., 622 F.2d 1335, 1340 n.5 (3d Cir. 1980), *citing* Jones v. Menard, 559 F.2d 1282, 1285 n.5 (5th Cir. 1977) (which sustained the trial court's refusal to accept at oral argument on a summary judgment motion an affidavit submitted at that time). 495 F. Supp. at 1180. "The DOE apparently believes it can set its own schedule for compliance with Court orders in this District. . . . [I]t must be made clear to the DOE that it must comply with Court orders, within the time limits set by the Court for doing so, or face the consequences." *Id.* at 1178. The court concluded that the policies of the FOIA for prompt disclosure warranted its disclosure order. *Id.* "While important in all cases, FOIA's clear policy of prompt disclosure of information supplies an additional reason for judicial insistence upon control of its docket through required adherence to its orders." *Id.*

64. *Id.* at 1179. Finding other factors persuasive in not granting in camera review, the court chose to place, once again, the most weight on the FOIA itself. "Perhaps the most compelling reason, however, for not resorting to *in camera* review where the government has failed to proffer adequate information in support of its claims of exemption is the statutory placing of the burden of proof in FOIA litigation upon the government agency withholding documents." *Id.* In camera review is not mandatory and its availability remains at the discretion of the trial judge. *See, e.g.,* FOIA LITIGATION, *supra* note 26, at 32. The House report stated that the amendment "make[s] it clear that court review *may* include examination of the contents of any agency records *in camera* to determine if such records or any part thereof shall be withheld. . . ." HOUSE COMM. ON GOV'T OPERATIONS, AMENDING SECTION 552 OF TITLE 5 UNITED STATES CODE, KNOWN AS THE FREEDOM OF INFORMATION ACT, H.R. REP. NO. 876, 93d Cong., 2d Sess., *reprinted in* STAFF OF HOUSE SUBCOMM. ON GOV'T INFORMATION AND INDIVIDUAL RIGHTS & STAFF OF SENATE SUBCOMM. ON ADMIN. PRACTICE AND PROCEDURE, 94th CONG., 1ST SESS., FREEDOM OF INFORMATION ACT AND AMENDMENTS OF 1974 (P. L. 93-502): SOURCE BOOK 117, 127 (Joint Comm. Print 1975) (emphasis in original) [hereinafter cited as SOURCEBOOK II]. During the House debate on the 1974 amendments, it was stated in reference to in camera review: "The court would not be required to . . . [inspect]. We say that the court may inspect *in camera.* That is one device that would be made available to the court." SOURCEBOOK II, at 253 (remarks of Rep. Erlenborn).

See generally Ray v. Turner, 587 F.2d 1187 (D.C. Cir. 1978); Mead Data Central, Inc. v. United States Dep't of the Air Force, 566 F.2d 242 (D.C. Cir. 1977); Weisman v. CIA, 565 F.2d 629 (D.C. Cir. 1977); Vaughn v. Rosen, 484 F.2d 820 (D.C. Cir. 1973), *cert. denied,* 415 U.S. 977 (1974); Military Audit Project v. Bush, 418 F. Supp. 876 (D. D.C. 1976).

The most influential factor in support of the *Coastal II* court's refusal to undertake an in camera inspection, is that such a procedure is discretionary. *See* 5 U.S.C. § 552(a)(4)(B) (1976); St. Louis Post-Dispatch v. FBI, 447 F. Supp. 31, 35 (D. D.C. 1977). "Congress left the matter of *in camera* inspection to the discretion of the district court, without any indication of the extent of its proper use." *Accord,* Church of Scientology of California v. United States Dep't of Army, 611 F.2d 738 (9th Cir. 1979), wherein the court stated:

> We cannot stress strongly enough however, that the district court's inspection prerogative [sic] is not a substitute for the governments' burden of proof, and should not be resorted to lightly. In cases involving requests for hundreds of documents, no trial court can reasonably be expected to wade through a mass of exhibits *in camera.*

Id. at 743.

As noted, the DOE failed to raise this issue in *Coastal II.* In fact, the DOE neither made a motion nor tendered to the court any documents for an in camera inspection. The first time the issue was even mentioned by the DOE was in its brief to the trial court for reconsideration of its disclosure order. *See* Memorandum in Support of Plaintiff's Opposition to Defendant's Motion

4, 1980, the United States Court of Appeals for the Third Circuit heard oral argument in *Coastal II* pursuant to the government's appeal.[65] No decision has been rendered at this time.

II. DEVELOPMENT AND GROWTH OF "ANY PERSON" ACCESS TO FEDERAL ADMINISTRATIVE AGENCY RECORDS

The first comprehensive federal statutory scheme to respond to the growing public skepticism regarding the federal bureaucracy was section 3 of the Administrative Procedure Act.[66] This public information section purported to be the vehicle which would afford the public free access to federal agency records.[67] Section 3 did not, however, realize such expectations of accessability to administrative agency information.[68] Due in large part to administrative agency discretionary release of information, section 3 evolved into a statutory *excuse* for withholding agency information,[69] rather than a disclosure statute as

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for Reconsideration of the Court's Partial Summary Judgment and Order of June 30, 1980, at 3, Coastal States Gas Corp. v. DOE, No. 79-197 (D. Del. August 14, 1980) (Memorandum Opinion) [hereinafter cited as Memorandum in Support of Plaintiff's Opposition to Reconsideration]; Defendant's Memorandum for Reconsideration, *supra* note 40, at 6 n.7.

65. Coastal State Gas Corp. v. DOE, No. 80-2199 (3rd Cir. 1981).

66. *See* note, 2 & 4, *supra*. Prior to enactment of the public information section of the APA, Congress provided for the publication of administrative rules and regulations by passing the Federal Register Act, 44 U.S.C. § 1502 (1976) (originally enacted as Act of July 26, 1935, ch. 417, 49 Stat. 500). Responding to the vast growth of federal administrative agencies in the 1930's, procedures were proposed which would promulgate standards for the control of the federal agencies. One of the overriding concerns expressed was the lack of public knowledge of administrative law and "concern [with] the secrecy with which agencies could operate." Koch, Jr., *The Freedom of Information Act: Suggestions For Making Information Available To The Public*, 32 MD. L. REV. 189, 191 (1972). One of the recommendations made was to provide for availability of agency record information to *"interested* persons."

The precise contours of the terminology "all interested persons" were not clearly delineated. Despite indications that Congress intended to provide a vehicle which would insure general public access to bureaucratic data, the unfortunate choice of the term "interested" served to restrict access in practice by, in effect, creating a "standing" requirement thereby minimizing the availability of the procedure. *Id.* at 190-93.

67. "The section has been drawn upon the theory that administrative operations and procedures are public property which the general public, rather than a few specialists or lobbyists, is entitled to know or have ready means of knowing with definiteness assurance [sic]." H.R. REP. NO. 752, 79th Cong., 1st Sess. 198 (1945), *cited in* SOURCEBOOK I, *supra* note 4, at 6.

68. The old section 3 of the APA failed because no substantive legal right to governmental information was provided: "the people's 'right to know' was a journalistic slogan rather than a legal right." B. SCHWARTZ, ADMINISTRATIVE LAW 128 (1976).

69. Although the theory of an informed electorate is vital to the proper operation of a democracy, there is nowhere in our present law a statute which affirmatively provides for that information. Many witnesses have testified that the present public information section of the Administrative Procedure Act has been used more as an excuse for withholding than as a disclosure statute.

SENATE SUBCOMM. ON ADMIN. PRACTICE AND PROCEDURE, CLARIFYING AND PROTECTING THE RIGHT OF THE PUBLIC TO INFORMATION, AND FOR OTHER PURPOSES, S. REP. NO. 813, 89th Cong., 1st Sess. 3 (1965), *reprinted in* SOURCEBOOK I, *supra* note 4, at 38.

conceived.[70] The failure of section 3 is traceable to two flaws. First, the vague draftsmanship of section 3 was quickly contorted by the federal agencies into destructive loopholes which enabled the easy withholding of information.[71] Second, there was no effective provision for judicial review of agency compliance with the mandates of section 3.[72] Although section 3 must be regarded as a failure, it is properly viewed as the forerunner of the Freedom of Information Act.

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70. "[S]ection 3 of the Administrative Procedure Act has become the major statutory excuse for withholding Government records from public view." HOUSE COMM. ON GOV'T OPERATIONS, CLARIFYING AND PROTECTING THE RIGHT OF THE PUBLIC TO INFORMATION, H.R. REP. NO. 1497, 89th Cong., 2d Sess. 3, *reprinted in* SOURCEBOOK I, *supra* note 4, at 24.

71. "Section 3 of the APA (5 U.S.C. 1002), though titled 'Public Information' and clearly intended for that purpose, has been used as an authority for withholding, rather than disclosing, information. Such a 180° turn was easy to accomplish given the broad language of 5 U.S.C. 1002." HOUSE COMM. ON GOV'T OPERATIONS, CLARIFYING AND PROTECTING THE RIGHT OF THE PUBLIC TO INFORMATION, H.R. REP. NO. 1497, 89th Cong., 2d Sess. 3, *reprinted in* SOURCEBOOK I, *supra* note 4, at 25.

"FOIA was enacted because agencies had turned the predecessor statute on its head, transforming a public information statute into a secrecy statute." Frosham v. Harris, 445 U.S. 169, 188 n.4 (1980) (Brennan, J., dissenting). The Senate Report, in examining the presence of the large number of loopholes in section three of the APA, stated: "innumerable times it appears that information is withheld only to cover up embarrassing mistakes or irregularities, . . ." SENATE SUBCOMM. ON ADMIN. PRACTICE AND PROCEDURE, CLARIFYING AND PROTECTING THE RIGHT OF THE PUBLIC TO INFORMATION, AND FOR OTHER PURPOSES, S. REP. NO. 813, 89th Cong., 1st Sess. 3 (1965), *reprinted in* SOURCEBOOK I, *supra* note 4, at 38.

Examples of the phrases which were convoluted into withholding provisions are: "[a]ny function . . . requiring secrecy in the public interest"; "any matter relating solely to the internal management of an agency"; "required for good cause to be held confidential"; "matters of official record"; "persons properly and directly concerned"; and "except information held confidential for good cause found." The number of restrictive phrases which can be found in the old section 3 of the APA numbers at least 24. HOUSE COMM. ON GOV'T OPERATIONS, CLARIFYING AND PROTECTING THE RIGHT OF THE PUBLIC TO INFORMATION, H.R. REP. NO. 1497, 89th Cong., 2d Sess. 6, *reprinted in* SOURCEBOOK I, *supra* note 4, at 27. The phrase which most undermined congressional intent for disclosure was "persons properly and directly concerned." "The statutory requirement that information about routine administrative actions need be given only to 'persons properly and directly concerned' has been relied upon almost daily to withhold government information from the public." *Id.*, *reprinted in* SOURCEBOOK I, *supra* note 1, at 27. "The nebulous exceptions to disclosure under the APA became self-dealing devices, enabling agency satraps to conceal mistakes, favoritism, and political embarrassment." Note, *The Freedom of Information Act: A Seven-Year Assessment*, 74 COLUM. L. REV. 895, 918 (1974).

72. This was section 3's most crippling defect. Had de novo review been provided, the loopholes could have been largely closed or, at a minimum, construed narrowly so as to effectuate congressional intent. *See* note 71 *supra;* 112 CONG. REC. 13007 (remarks of Rep. Reid), *reprinted in* SOURCEBOOK I, *supra* note 4, at 56 ("[P]erhaps most important, an individual has the right of prompt judicial review in the Federal district court"). *See* SCHWARTZ, *supra* note 6, at 221; Note, *Freedom of Information: The Statute and The Regulations*, 56 GEO. L. J. 18, 27 (1967). *Cf.* Note, *The Freedom of Information Act: A Critical Review*, 38 GEO. WASH. L. REV. 150, 151-52 (1969) (the most important flaw in section 3 was its numerous restrictions on free disclosure).

It has been suggested that section 3 could have been a true public information statute had the agencies desired. *See* Koch, *supra* note 66, at 194. The fact is agencies have historically been reluctant to provide informational access unles very clearly required to do so. During the reign of section 3, the agencies "vigorously opposed opening up agency processes. . . . The Freedom of Information Act was an idea whose time came when and only when the agencies were satisfied that compromises had been made and that further opposition was futile." O'REILLY, *supra* note 4, at 2-15.

A. *The Freedom of Information Act*

Cast in absolute terms, the Freedom of Information Act is the antithesis of section 3 of the APA; disclosure is the focal point of the FOIA.[73] Under the FOIA,[74] there are three methods by which agencies are required to make information public.[75] The first method requires

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73. Section 552(c) states: "This section does not authorize withholding of information or limit the availability of records to the public, except as specifically stated in this section." 5 U.S.C. § 552(c) (1976).

In discussing this section, the House Report stated: "The purpose of this subsection is to *make clear beyond doubt* that all the materials of Government are to be available to the public unless specifically exempt from disclosure. . . ." HOUSE COMM. ON GOV'T OPERATIONS, CLARIFYING AND PROTECTING THE RIGHT OF THE PUBLIC TO INFORMATION, H.R. REP. NO. 1497, 89th Cong., 2d Sess. 11, *reprinted in* SOURCEBOOK I, *supra* note 4, at 32 (emphasis added).

In regard to the overall scope of the FOIA, the Senate Report concluded: "It is the purpose of the present bill . . . to establish a general philosopy of full agency disclosure. . . ." SENATE SUBCOMM. ON ADMIN. PRACTICE AND PROCEDURE, CLARIFYING AND PROTECTING THE RIGHT OF THE PUBLIC TO INFORMATION, AND FOR OTHER PURPOSES, S. REP. NO. 813, 89th Cong., 1st Sess. 3 (1965), *reprinted in* SOURCEBOOK I, *supra* note 4, at 38. One FOIA commentator has written: "The Act is entirely clear: It never forbids disclosure. . . . It has no provision that can be interpreted as a prohibition on disclosure. It contains no ambiguity and no uncertainty on that subject." DAVIS, *supra* note 20, at § 5:8.

Case law on this very basic principle of the FOIA has been predominantly in accord. *See, e.g.*, Department of Air Force v. Rose, 425 U.S. 352, 361 (1976), ("[T]hese limited exceptions do not obscure the basic policy that disclosure, not secrecy, is the dominant objective of the Act."); Irons v. Gottschalk, 548 F.2d 992, 995 (D.C. Cir. 1976), *cert. denied,* 434 U.S. 965 (1977) ("The Act's language is broad, emphasizing disclosure, and its exemptions are narrow, eschewing exception."); Bristol-Myers Co. v. FTC, 424 F.2d 935, 938 (D.C. Cir.), *cert. denied,* 400 U.S. 824 (1970) ("The legislative plan creates a liberal disclosure requirement, limited only by specific exemptions which are to be narrowly construed.")

Emphasis upon the fact that the FOIA is not a withholding statute is exemplified, by some courts, in an encouragement to voluntarily provide access to and disclosure of all information. *See, e.g.*, Mead Data Central, Inc. v. United States Dept. of Air Force, 566 F.2d 242, 261 (D.C. Cir. 1977); Vaughn v. Rosen, 484 F.2d 820, 828 (D.C. Cir. 1973), *cert. denied,* 415 U.S. 977 (1974). *Accord,* Montrose Chemical Corp. of Cal. v. Train, 491 F.2d 63, 66 (D.C. Cir. 1973) ("Notwithstanding the general goal of disclosure, it was recognized that something less than 100% disclosure of all government operations was only practical and reasonable").

74. The FOIA is divided into five subsections. The first subsection describes what must be disclosed. The second enumerates what records may be withheld. The third subsection espouses the clear intent that only records which are within the "specifically stated" exemptions may be withheld. The fourth subsection provides for "yearly accounting" by the agencies to Congress of their activity pursuant to the Act. The last subsection, set forth in note 75 *infra,* describes applicable agencies.

75. Section 552(e) defines the term agency as:

> For purposes of this section, the term "agency" as defined in section 551(1) of this title includes any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government (including the Executive Office of the President), or any independent regulatory agency.

5 U.S.C. § 552(e) (1976). For text of section 551(1), *see* note 3 *supra. See* Soucie v. David, 448 F.2d 1067, 1073 (D.C. Cir. 1971). Although "agency" is defined in the FOIA, "agency records" is not. Thus, a determination of whether an agency has improperly withheld records is secondary to, and dependent upon, an initial determination that the records sought in the FOIA section are "agency records."

Recently, the Supreme Court has issued a decision dealing with the definition of agency and

certain procedural and substantive rules "of general applicability" to

agency records. Justice Rehnquist, writing for the Court in Forsham v. Harris, 445 U.S. 169 (1980), examined a FOIA request which was submitted to the Department of Health, Education and Welfare (HEW) seeking the raw data which had been compiled by a group of physicians, the University Group Diabetics Program (UGDP), which, solely under federal grants, undertook a lengthy study of various methods of diabetes treatment. *Id.* at 171. The conclusions and recommendations of the UGDP were highly controversial and subject to intense critical comment. One of the groups critical of the UGDP study sought access to this data through the FOIA. The federal agency funding the grant had exercised some supervision over the group's activity, and clearly had a right of access to those records. *Id.* at 172-73. Moreover, the Federal Food and Drug Administration (FDA) conducted, through a delegation of authority from the grant issuing agency, an audit of the record wherein certain amounts of the UGDP raw data was copied, abstracted or directly transferred to government premises. *Id.* at 175. The FDA responded to some of the data with regulatory actions including a labeling proposal regarding certain drugs involved in the study. Then HEW suspended the new drug application for one of the drugs studied. At an administrative proceeding, the Administrative Law Judge (ALJ) found that HEW's suspension order was supported by the evidence. The Supreme Court held that these were not agency records under the FOIA. The Court also stated that: "[f]ederal participation in the generation of the data by means of a grant from the Department of Health, Education, and Welfare does not make the private organization a federal 'agency' within the terms of the Act." *Id.* at 171. The Court refused to order disclosure "[s]ince the enforcement provision of the Act, § 552(a)(4)(B), refers only to 'agency records' it is certain that the disclosure obligations imposed by § 552(a)(3) [sic] were only intended to extend to agency records." *Id.* at 178 n.8.

This holding may be questioned. At a minimum it appears to indicate that the mood of a majority of the Court is to narrowly construe the intent of the FOIA. This holding appears to be inconsistent with the FOIA. Although the majority was correct in stating that FOIA clearly does not apply to collective bodies outside of the government, *id.* at 182, the main purpose behind the Act was the abolition of secret law stemming from general disenchantment with an evergrowing administrative bureaucracy which was "not directly reponsible to the people. . . . [T]he theory of an informed electorate is vital to the proper operation of a democracy. . . ." SENATE SUBCOMM. ON ADMIN. PRACTICE AND PROCEDURE, CLARIFYING AND PROTECTING THE RIGHT OF THE PUBLIC TO INFORMATION, AND FOR OTHER PURPOSES, S. REP. NO. 813, 89th Cong., 1st Sess. 3 (1965), *reprinted in* SOURCEBOOK I, *supra* note 4, at 38. The decision by HEW to suspend the new drug application was, in part, based on the UGDP study. *See* Forsham v. Harris, 445 U.S. 169, 177 (1980). Furthermore, the ALJ found that raw data which was in the possession of the FDA was sufficient evidence to support the HEW suspension. *Id.* at 175. To hold that this raw data (of which some uncertain amount prompted administrative action) did not constitute agency records appears contrary to the fundamental principles of the FOIA. Indeed, as Justice White has written, "the public is vitally concerned with the reasons which did supply the basis for an agency policy actually adopted." NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 152 (1975) (White, J.).

This decision does present a close case however. *See* Comment, *Freedom of Information Act,* 94 HARV. L. REV. 232 (1980). Several factors militate against a finding that this data was within the FOIA's reach (*i.e.,* "agency records"). "At no time did HEW hold the data. As to possible 'control' over the material ... [HEW] did not play a significant role in the study's development, did not participate in the generation of data, and had no duty to obtain any materials generated by UGDP." *Id.* at 240.

In sum, if the true purpose of the FOIA is to peel back the curtain of secrecy so as to expose the decision-making process of the administrative branch of government, then this decision truly undermines that purpose. Justice Brennan has suggested:

> Where the nexus between the agency and the requested information is close, and where the importance of the information to public understanding of the decisions or the operation of the agency is great, I believe the congressional purposes require us to hold that the information sought is an "agency record" within the meaning of the FOIA. . . .
>
> The weight to be given [the] factor [of importance] can be tested by examining the role accorded the material in agency writings and the extent to which the agency reached its conclusions in reliance upon the particular source.

Forsham v. Harris, 445 U.S. 169, 188-89 (1980) (Brennan, J., dissenting). *See also* Warth v. Department of Justice, 595 F.2d 521 (9th Cir. 1979); Valenti v. Department of Justice, 503 F. Supp. 230 (E.D. La. 1980).

be published in the Federal Register.[76] Records which involved agency opinions, policy statements and general administrative staff instructions shall, under the second method, be made available for public inspection and in certain instances, an index of this class of agency records may be required.[77] The final method by which agency records are made public, "[t]he key provision of the FOIA . . ."[78] mandates that upon request, records not made available to the public by the foregoing means and which do not come within one of the nine specifically enumerated exemptions to the FOIA, shall be disclosed.[79]

76. 5 U.S.C. § 552(a)(1) (1976). This section further provides that if such information has not been published, and if not deemed to have been incorporated by reference in the Federal Register, "a person may not in any manner be required to resort to, or be adversely affected by, a matter required to be published . . . and not so published," presuming that person has no actual notice. *Id. See, e.g.*, Morton v. Ruiz, 415 U.S. 199, 233-35 (1974); Appalachian Power Co. v. Train, 566 F.2d 451 (4th Cir. 1977) (failure to have a "reference" publication approved by agency director found not to be validly adopted); City of Santa Clara v. Kleppe, 418 F. Supp. 1243 (N.D. Cal. 1976).

77. 5 U.S.C. § 552(a)(2) (1976). Relative to indexing, the statute states in part: "Each agency shall also maintain and make available for public inspection and copying current indexes providing identifying information for the public as to any matter issued, adopted or promulgated after July 4, 1967, and as required by this paragraph to be made available or published." *Id.* Subsection (a)(2)'s fundamental purpose was to mandate disclosure of what Professor Davis has labeled "secret law." *See* Davis, *The Information Act: A Preliminary Analysis,* 34 U. CHI. L. REV. 761, 779, 797 (1967). "The term 'secret law' has become a major force in giving meaning to the Information Act. The concept is useful and beneficial. It is very much a part of the Information Act even though Congress did not put it there." DAVIS, *supra* note 20, at § 5:18.

There is, however, some question as to the scope of the prohibition on agency "secret law." "Generally speaking, (a)(2) materials consist of those documents which contain what the agency has treated as authoritative indications of its position on legal or policy questions." GELLHORN, *supra* note 4, at 580 n.3. Section (a)(2)(A) refers to "final opinions" only. Under this section, therefore, opinions which are not final are not required to be made available for public inspection. Yet nonfinal opinions may also connote "secret law" and remain exempt from the requirements of this section. In NLRB v. Sears, Roebuck & Co., 421 U.S. 132 (1975), the Court gave an example of what would constitute a final opinion. Legal memoranda which explain decisions made to prosecute a case would not be a final opinion whereas, conversely, a decision set forth in a legal memorandum *not* to prosecute *would* be a final opinion. *Id.* at 155-59. It is difficult to see that a decision to prosecute, though obviously such a decision can be retracted at a later date, would not have precedential effect, and therefore connote "secret law." Thus, to ask the question whether it was absolutely a final opinion and subject to section (a)(2)(A) or whether it was somewhat less than a final opinion and not subject to section (a)(2)(A), is to engage in a game of semantics. The result is that the agencies may still rely on some forms of "secret law." It may be possible, however, for this type of information to be obtained if it has been "memorialized" in a written form and is not otherwise exempt under section (b) of the FOIA. *See* DAVIS, *supra* note 20, at § 5:13. It has been suggested that some court decisions are "considerabl[y] broadening . . . the class of documents which meet these [(a)(2)] criteria." GELLHORN, *supra* note 4, at 580 n.3. *See generally* B. MEZINES, J. STEIN & J. GRUFF, ADMINISTRATIVE LAW §§ 9.02, 9.03 (1980).

78. DAVIS, *supra* note 20, at § 5.1.

79. The exemptions are set forth in note 83 *infra.* Professor Davis points out that the interrelationship between section (a)(2) and section (a)(3) has generally been neglected. He suggests that judges and practitioners have often failed to consult section (a)(3) when dealing with section (a)(2) and that "doubtful questions under (a)(2) need not be resolved because (a)(3) may require disclosure if (a)(2) does not." DAVIS, *supra* note 20, at § 5.4. Conversely, Professor Davis also suggests that what may be disclosed under section (a)(3) may be restricted by section (a)(2). Professor Davis concludes that these sections should be frequently considered together and that therefore Congress did not intend to create mutually exclusive categories between section (a)(2) and section (a)(3). It is therefore important to realize that unresolved matters of interpretation remain concerning the relationship between section (a)(2) and section (a)(3).

Enacted in 1966,[80] the Freedom of Information Act made three significant changes over section 3 of the APA. First, the FOIA provided for judicial oversight by the de novo review of agency refusals to release requested information.[81] The second major change established

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80. The expression of dissatisfaction with section 3 of the APA was relatively swift. The House Report credits Dr. Harold, L. Cross for the first extensive study of the numerous and increasing restrictions on the peoples' right to know which was to become "[t]he broad outlines for legislative action to guarantee public access to Government information. . . ." HOUSE COMM. ON GOV'T OPERATIONS, CLARIFYING AND PROTECTING THE RIGHT OF THE PUBLIC TO INFORMATION, H.R. REP. NO. 1497, 89th Cong., 2d Sess. 2, *reprinted in* SOURCEBOOK I, *supra* note 4, at 23. In response to a task force study which had recommended some minor changes in section three of the APA, two bills were introduced in the Senate during the first session of the 84th Congress. *Id., reprinted in* SOURCEBOOK I, *supra* note 4, at 24. During the 85th Congress, bills introduced in both the House and Senate, which would have amounted to the first major revision of the public information section, were not acted upon. Attempts to restructure section 3 continued: the 88th Congress passed a bill which was the predecessor of the FOIA as eventually enacted. Finally, the 89th Congress passed S. 1160, the FOIA.

> Without glamor, pomp and circumstance, ten years of effort and persuasion were put into a 500-word omnibus statute which its drafters believed would cure a complex and frustrating administrative law problem: the problem of access to the information on which wise (or at least wiser) decisions could be made by the public, about the performance of federal agencies.

O'REILLY, *supra* note 4, at 2-2.

81. The Act provides in part: "On complaint ... the court shall determine the matter de novo. . . ." 5 U.S.C. § 552(a)(4)(A) (1976). This provision is indeed an integral part of the Act:

> The ultimate weapon provided to the public under the Freedom of Information Act that can be wielded against a recalcitrant Federal bureaucracy is the right to file suit in a U.S. District Court to obtain requested Government records if all other efforts are fruitless. The law directs that such cases be considered in the form of injunctive proceedings against the Government. Such cases are considered *de novo* and the burden is on the agency to justify its refusal to make records available to the complainant.

HOUSE COMM. OF GOV'T OPERATIONS, ADMINISTRATION ON THE FREEDOM OF INFORMATION ACT, TWENTY-FIRST REPORT, H.R. REP. NO. 1419, 92d Cong., 2d Sess. 70 (1972), *reprinted in* SOURCEBOOK II, *supra* note 64, at 77. "Fortunately the Freedom of Information Act contemplated more than a toothless guardian of the public's right to know. The act gave to citizens the right to go into court to compel agency heads to comply with the requirements of the act." 120 CONG. REC. S. 17022 (daily ed. May 30, 1974) (remarks of Sen. Cranston), *reprinted in* SOURCEBOOK II, *supra* note 64, at 301.

De novo review is to be contrasted with two basic principles of administrative law: first, the scope of review of agency action will be limited; second, the administrative action will be accorded a presumption of validity. Thus, de novo review requires the courts to examine whether the agency has correctly withheld information, in essence as if it were the agency deciding the issue for the first time. *See* HOUSE COMM. ON GOV'T OPERATIONS, CLARIFYING AND PROTECTING THE RIGHT OF THE PUBLIC TO INFORMATION, H.R. REP. NO. 1497, 89th Cong., 2d Sess. 9, *reprinted in* SOURCEBOOK I, *supra* note 4, at 30; SCHWARTZ, *supra* note 6, at 221-22.

Under FOIA, as well as the APA generally, all administrative remedies must be exhausted before a complaint is properly brought in district court. *See, e.g.,* Tuchinsky v. Selective Serv. Sys., 418 F.2d 155, 158 (7th Cir. 1969); United States Aviation Consumer Action Project v. Civil Aeronautic Bd., 370 F. Supp. 945, 947 (D. D.C. 1972), *aff'd,* 480 F.2d 1195 (D.C. Cir. 1973); Jeffess v. Secretary, Dep't of HEW, 393 F. Supp. 626 (S.D.N.Y. 1975). There are exceptions to this doctrine. *See, e.g.,* Diapulse Corp. of America v. FDA, 500 F.2d 75, 77 (2d Cir. 1974). This doctrine does not restrict the scope of de novo review nor does it occasion a normal deference to the administrative agency. It is simply a choice by the legislature which reflects a desire not to have the courts crippled with an unmanageable number of FOIA cases. *See* Comment, *Administrative Law — Freedom of Information Act — Agency Secrecy Continues — NLRB v. Sears, Roebuck & Co.,*

"workable standards for what records should and should not be open to public inspection."[82] The FOIA made disclosure the rule, limited only by nine "specifically stated exemptions" which permited agencies to withhold information.[83] The exemptions mark the outer limits of agen-

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421 U.S. 132 (1975); Renegotiation Board v. Grumman Aircraft Engineering Corp., 421 U.S. 168 (1975), 52 WASH. L. REV. 121, 131 n.46 (1976).

Due to the DOE's failure to initially respond in a timely manner (*see* notes 21-24 *supra*), Coastal's administrative remedies are deemed to be exhausted. *See* 5 U.S.C. § 552(a)(6)(C) (1976). Furthermore, as a result of the 1974 amendments to the FOIA, the administrative agency must respond within a set number of days. Failure to do so will also be deemed to signify an exhaustion of all administrative remedies. 5 U.S.C. § 552(a)(6)(A) (1976) provides:

> Each agency, upon any request for records ... shall — ... (ii) make a determination with respect to any appeal within twenty days ... after the receipt of such appeal. If on appeal the denial of the request for records is in whole or in part upheld, the agency shall notify the person making such request of the provisions for judicial review of that determination. ...

See also 5 U.S.C. § 552(a)(6)(C) (1976). In sum, failure to pursue all administrative remedies with an agency which has complied with the statutory time provisions will, in most cases, preclude judicial review of a denied request. *See* Note, *The Freedom of Information Act: A Seven Year Assessment*, 74 COLUM. L. REV. 895, 926 (1974).

In a large number of cases, the mere filing of a FOIA complaint has the effect of shaking loose a certain amount of previously denied information. *E.g.*, Ray v. Turner, 587 F.2d 1187, 1189 (D.C. Cir. 1978); Schwartz v. IRS, 511 F.2d 1303, 1304 (D.C. Cir. 1975); Lamont v. Department of Justice, 475 F. Supp. 761, 764 (S.D.N.Y. 1979). *Cf.* Weissman v. CIA, 565 F.2d 692, 698 (D.C. Cir. 1977) (releasing more information as a result of an administrative appeal); Lobosco v. IRS, 78-2 U.S. Tax Cas. ¶ 9578 n.1 (E.D.N.Y. 1978) (on second summary judgment motion, 460 previously withheld documents were voluntarily disclosed); FOIA LITIGATION, *supra* note 26, at 14 ("Most agencies have a good record of releasing substantially more material when it is reviewed on appeal").

82. SENATE SUBCOMM. ON ADMIN. PRACTICE AND PROCEDURE, CLARIFYING AND PROTECTING THE RIGHT OF THE PUBLIC TO INFORMATION, AND FOR OTHER PURPOSES, S. REP. NO. 813, 89th Cong., 1st Sess. 5 (1965), *reprinted in* SOURCEBOOK I, *supra* note 4, at 40. The report continues: "In particular, it avoids the use of such vague phrases as 'good cause found' and replaces them with specific and limited types of information that may be withheld." *Id.*

83. The exemptions provide:

> (b) This section does not apply to matters that are —
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> (1)(A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order;
>
> (2) related solely to the internal personnel rules and practices of an agency;
>
> (3) specifically exempted from disclosure by statute (other than section 552b of this title), provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld;
>
> (4) trade secrets and commercial or financial information obtained from a person and privileged or confidential;
>
> (5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency;
>
> (6) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;
>
> (7) investigatory records compiled for law enforcement purposes, but only to the extent that the production of such records would (A) interfere with enforcement proceedings, (B) deprive a person of a right to a fair trial or an impartial adjudication, (C) constitute an unwarranted invasion of personal privacy, (D) disclose the identity of a confidential source and, in the case of a record compiled by a criminal investigation, or by an agency conducting a lawful national security intelligence investigation, confidential information furnished only by the confidential source, (E) disclose investigative techni-

cy withholding,[84] representing a carefully balanced compromise between the need for governmental secrecy and absolute disclosure.[85] The

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ques and procedures, or (F) endanger the life or physical safety of law enforcement personnel;

(8) contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions; or

(9) geological and geophysical information and data, including maps, concerning wells.

5 U.S.C. § 552(b) (1976).

President Johnson, upon signing the FOIA, stated:

> [T]he welfare of the Nation or the rights of individuals may require that some documents not be made available. As long as threats to peace exist, for example, there must be military secrets. A citizen must be able in confidence to complain to his Government and to provide information, . . . fairness to individuals . . . requires that information accumulated in personal files to be protected from disclosure. . . . I know that the sponsors of this bill recognize these important interests and intend to provide for both the need of public for access to information and the need of Government to protect certain categories of information. Both are vital to the welfare of our people.

Statement By President Johnson Upon Signing Public Law 89-487 on July 4, 1966, *reprinted in* SOURCEBOOK I, *supra* note 4, at 195. President Johnson's remarks concerning the inherent conflict between the need for government secrecy as well as the need for openness in government, are representative of the concerns of many others regarding the need to strike a careful balance between what should be disclosable and what should be nondisclosable. *See* HOUSE COMM. ON GOV'T OPERATIONS, CLARIFYING AND PROTECTING THE RIGHT OF THE PUBLIC TO INFORMATION, H.R. REP. NO. 1497, 89th Cong., 2d Sess. 6, *reprinted in* SOURCEBOOK I, *supra* note 4, at 27. SENATE SUBCOMM. ON ADMIN. PRACTICE AND PROCEDURE, CLARIFYING AND PROTECTING THE RIGHT OF THE PUBLIC TO INFORMATION, AND FOR OTHER PURPOSES, S. REP. NO. 813, 89th Cong., 1st Sess. 3 (1965), *reprinted in* SOURCEBOOK I, *supra* note 4, at 38.

84. *See, e.g.*, Chrysler Corp. v. Brown, 441 U.S. 281, 292 (1979); O'REILLY, *supra* note 4, at 9-19.

85. It has yet to be conclusively resolved whether the courts have retained traditional equitable powers so that in the "proper" case a court could refuse disclosure despite the inapplicability of one of the nine exemptions. "The equity dispute exemplifies loose ends left in the 1966 compromise versions of the Freedom of Information Act, loose ends which remain to be argued and decided at some future date in the Supreme Court." O'REILLY, *supra* note 4, at 8-15. The Act did not specifically address this aspect of FOIA litigation. Congress, however, did consider but rejected the provision for equitable balancing by the district courts:

> Finally, some courts have decided for themselves that it is discretionary with them whether they order the production of information which is held not to be subject to the exemptions permitted by subsection (b) of the FOIA act. In effect, they are applying theories of equity to balance the need of the individual citizen to the information requested under the act and the need of the Government to withhold such information. Information requested under the act by the plaintiff should be considered only with respect to whether or not the Government's arguments fulfill the "burden of proof" requirement that the information is subject to the subsection (b) exemptions claimed. If the court finds that the Government has not met such test, the information should be ordered to be made promptly available to the plaintiff *solely on the substantive merits of the case.*

HOUSE COMM. ON GOV'T OPERATIONS, ADMINISTRATION OF THE FREEDOM OF INFORMATION ACT, TWENTY-FIRST REPORT, H.R. REP. NO. 1419, 92d Cong., 2d Sess. 77 (1972), *reprinted in* SOURCEBOOK II, *supra* note 64, at 84 (emphasis added).

A substantial portion of the equity dispute is traceable to dictum of the Supreme Court in Renegotiation Bd. v. Bannercraft Clothing Co., 415 U.S. 1, 20 (1974), which suggested that Congress did not intend FOIA to limit the inherent powers of an equity court. A more persuasive reading of congressional intent is that the overwhelming emphasis on disclosure indicates Congress itself "weighed the equities." Many courts have adopted this latter view: "Since judicial use of traditional equitable principles to prevent disclosure would upset this legislative resolution of con-

exemptions were to be narrowly construed and a presumption in favor of dislosure was established.[86] The third significant change between section three of the APA and the FOIA was to replace the "properly and directly concerned" test,[87] which had severely limited the class of potential information requesters, with an "any person" standard.[88] This ob-

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flicting interests, we are persuaded that Congress did not intend to confer on district courts a general power to deny relief on equitable grounds apart from the exemptions in the Act itself." Soucie v. David, 448 F.2d 1067, 1077 (D.C. Cir. 1971) (footnote omitted). Another court of appeals has specifically rejected the Supreme Court dictum in *Bannercraft* stating: "[N]either the Act nor any court construction of it intimates that such power [to prohibit nonexempt disclosure], was granted except to carry out the disclosure purposes intended." Seafarers Int'l Union, AFL-CIO v. Baldouin, 508 F.2d 125, 128 (5th Cir. 1975). *Compare* General Services Admin. v. Bensen, 415 F.2d 878, 880 (9th Cir. 1969), and Consumers Union, Inc. v. Veterans Admin., 301 F. Supp. 796 (S.D.N.Y. 1969), *dismissed as moot,* 436 F.2d 1363 (2d Cir. 1971) *with* Freuhauf Corp. v. IRS, 522 F.2d 284, 291-92 (6th Cir. 1975); Hawkes v. IRS, 467 F.2d 787, 792 n.6 (6th Cir. 1972); Wellford v. Hardin, 444 F.2d 21, 24-25 (4th Cir. 1971); Getman v. NLRB, 450 F.2d 670 (D.C. Cir. 1971); Soucie v. David, 448 F.2d 1067, 1076 (D.C. Cir. 1971). *Accord,* Mead Data Central, Inc. v. United States Dep't of Air Force, 566 F.2d 242 (D.C. Cir. 1977). In *Mead,* it is noted that where a court decides that an agency's segregability of a document, in the judgment of the court, would leave the document with minimal or no informative value, the court may decline to require segregability and disclosure. *Id.* at 261.

See Note, *Administrative Law — The Freedom of Information Act and Equitable Discretion,* 51 DEN. L. J. 263 (1974). In this Note a compromise is suggested which recognizes the FOIA's imposition of limits on a court's traditional equity powers, but recommends that courts should be able to utilize their equity powers in certain specific FOIA areas. *Id.* at 273.

86. The exemptions are to be narrowly construed so as to effectuate the congressional intent favoring disclosure and "that issues of construction be resolved in favor of public disclosure. . . ." Freuhauf Corp. v. IRS, 522 F.2d 284, 288 (6th Cir. 1975), *vacated and remanded,* 429 U.S. 1085 (1977); Charlotte-Mecklenburg Hosp. Auth. v. Perry, 571 F.2d 195 (4th Cir. 1978). *See* EPA v. Mink, 410 U.S. 73, 79 (1973) ("the Act creates nine exemptions from compelled disclosures. These exemptions are explicitly made exclusive. . . ."); Mead Data Central, Inc. v. United States Dep't of Air Force, 566 F.2d 242, 259 (D.C. Cir. 1977) (exemptions are "narrowly drafted and narrowly construed in order to counterbalance the self-protective instincts of the bureaucracy which, like any organization, would prefer to operate ... [out of] the more revealing 'sunlight' of public scrutiny"); Vaughn v. Rosen, 523 F.2d 1136, 1149 (D.C. Cir. 1975) (a narrow construction of the exemptions is implicit in the "specifically stated" clause); Ethyl Corp. v. EPA, 478 F.2d 47, 49 (4th Cir. 1973) (the exemptions are narrowly construed).

The wording of the Act prohibits an enlargement of exemptions either by the agencies or the courts. Simply, either the information falls within a specifically stated exemption or it does not. *See, e.g.,* Washington Research Project Inc. v. HEW, 504 F.2d 238 (D.C. Cir. 1974), *cert. denied,* 421 U.S. 963 (1975); Getman v. NLRB, 450 F.2d 670, 674 n.10, 678 (D.C. Cir. 1971); Mobil Oil Corp. v. FTC, 406 F. Supp. 305 (S.D.N.Y. 1976); DAVIS, *supra* note 20, at § 5:28. ("The pull of the word 'specifically' is away from all else — away from implied meanings, away from reliance on legislative history, and away from needed judicial legislation in interpreting the Act". *But see* Federal Open Market Comm. v. Merrill, 443 U.S. 340 (1979), (in effect creating a temporary exception which slightly delays disclosure).

87. "Previously, legal procedures to obtain information were limited to official bodies, or to participants in formal agency proceedings (to the extent agency rules might so provide)." GELLHORN, *supra* note 4, at 581. *See also* note 66 and accompanying text *supra.*

88. 5 U.S.C. § 552(a)(6)(C) (1976). The APA, in 5 U.S.C. § 551(2) (1976), defines person as "an individual, partnership, corporation, association, or public or private organization other than an agency."

The Senate Report stated: "For the great majority of different records, the public as a whole has a right to know what its government is doing." SENATE SUBCOMM. ON ADMIN. PRACTICE AND

viously more liberal requirement is absolute[89] and despite occasional judicial reluctance to accept it as such, need, motivation, intent, tangible or intangible interests of the public do not delimit the literal statutory right of any person to invoke the FOIA.[90]

From the standpoint of access to governmental information, the FOIA was a vast improvement over section 3 of the APA. The FOIA did, however, engender a significant amount of criticism.[91] One of the

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PROCEDURE, CLARIFYING AND PROTECTING THE RIGHT OF THE PUBLIC TO INFORMATION, AND FOR OTHER PURPOSES, S. REP. NO. 813, 89th Cong., 1st Sess. 3 (1965), *reprinted in* SOURCEBOOK I, *supra* note 4, at 38. Congress was deeply concerned about an informed electorate. It has been suggested, however, that the FOIA is ill suited to actually provide governmental information to the electorate. *See* KOCH, *supra* note 66, at 195. In fact the more realistic view recognizes that "[a]chievement of the ideal behind the Freedom of Information Act presumes a degree of sophistication on the part of the interested citizen that is exceedingly difficult, perhaps impossible to attain." Giannella, *Agency Procedures Implementing the Freedom of Information Act: A Proposal for Uniform Regulations,* 23 ADMIN. L. REV. 217, 225 (1971). While it is true that not every citizen will resort to the Act as a means of obtaining governmental information, many will benefit vicariously by resort to its provisions by others, most obviously, researchers and the media. One commentator suggests that the FOIA is not a viable means for either of these two sources to gain governmental information and concludes that "the Act has not provided the electorate with information because it has not adequately opened government operations to researchers and the media." KOCH, *supra* note 66, at 198. *See also* GELLHORN, *supra* note 4, at 581-82.

89. *See, e.g.,* Neal-Cooper Grain Co. v. Kissinger, 385 F. Supp. 769 (D. D.C. 1974) (citizenship is not the test of ability to effectuate the FOIA; a foreign government is, under the FOIA, a 'person'). *See also* Cox v. Department of Justice, 601 F.2d 1 (D.C. Cir. 1979); Fackelman v. Bell, 564 F.2d 734 (5th Cir. 1977).

90. The courts have displayed most displeasure when the FOIA is used as a discovery device. The issue is most often raised in the context of labor relation hearings and it is not uncommon to find statements such as: "to interpret FOIA as a pre-trial discovery weapon . . . seems to us to go beyond anything contemplated by Congress in FOIA. . . ." New England Medical Center Hosp. v. NLRB, 548 F.2d 377 (1st Cir. 1976). *See, e.g.,* Mitsubishi Elec. Corp. v. Department of Justice, 39 Ad. Law 2d 1133 (D.C. Cir. 1976); Kreindler v. Department of Navy, 363 F. Supp. 611 (S.D.N.Y. 1973). *Cf.* Kanter v. IRS, 433 F. Supp. 812, 816-17 (N.D. Ill. 1977) ("The applicability of an exemption therefore is not to be determined on the basis of the identity of the plaintiff, the label given to the file or document, nor the isolated fact that the information may aid a party in other litigation.") (footnote omitted).

Simply, the actual *need* of the requestor for the information is irrelevant in a FOIA dispute. *See, e.g.,* NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 143 n.10 (1975); EPA v. Mink, 410 U.S. 73, 79 (1973); Baker v. CIA, 580 F.2d 664 (D.C. Cir. 1978); Robles v. EPA, 484 F.2d 843, 847 (4th Cir. 1973); Bannercraft Clothing Co. v. Renegotiation Bd., 466 F.2d 345, 352 (D.C. Cir. 1972) *rev'd on other grounds,* 421 U.S. 168 (1975); Sterling Drug Inc. v. FTC, 450 F.2d 698, 705 (D.C. Cir. 1971). *See also* Association of Gen. Contracters v. EPA, 488 F. Supp. 861 (D. Nev. 1980); Concord v. Ambrose, 333 F. Supp. 958, 959 (N.D. Cal. 1971).

Regarding standing, once there has been a denial of a FOIA request and subsequent access to agency records, a controversy exists and injury is presumed. *See* Nixon v. Sampson, 389 F. Supp. 107, 121-22 (1973).

91. *See generally* Davis, *The Information Act: A Preliminary Analysis,* 34 U. CHI. L. REV. 761 (1967); Katz, *The Games Bureaucrats Play: Hide and Seek Under The Freedom of Information Act,* 48 TEX. L. REV. 1261, 1261-63 (1970) ("After three years of operation, the Freedom of Information Act has not fulfilled its advocates' most modest aspirations."); Koch, *supra* note 66, at 190. ("Unfortunately . . . utilization of the Act has been limited to providing those directly involved in the administrative process with some means of obtaining the information necessary to protect their special interests."); Nader, *Freedom from Information: The Act and the Agencies,* 5 HARV. CIV. R. — CIV. LIB. L. REV. 1, 2 (1970) ("[T]he Act, designed to provide citizens with tools of disclosure, has been forged into a shield against citizen access.").

Act's most significant flaws is its failure to specifically articulate the requisite procedures for agencies to comply with an order to sustain their burden of proof so as not to defeat the ultimate aim of disclosure. The agencies were, during the formative years of the Act, inclined to exhibit a proprietary nature regarding records in their possession, displaying significant resistance to the mandates of the FOIA.[92] One of the weapons of the agencies became protracted delay.[93]

B. The Amendments

Despite the FOIA's improvements over section 3 of the APA, Congress was not satisfied with the practical operation of the FOIA.[94] A report by the House Committee on Government Operations stated: "The efficient operation of the Freedom of Information Act has been hindered by 5 years of foot dragging by the Federal bureaucracy. The widespread reluctance of the bureaucracy to honor the public's legal

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92. The agency resistance to enactment of the FOIA was so pronounced that they engaged in "chicancery" by adversely influencing the authorship of the House Report. *See* Jordon v. United States Dep't of Justice, 591 F.2d 753, 761-71 (D.C. Cir. 1978). Professor Davis has noted:

> After the Senate committee had made its report and after the Senate had passed the bill, the House committee yielded to pressures to restrict the disclosure requirements, but instead of changing the bill it wrote the restrictions into the committee report, often contradicting the words of the bill and sometimes contradicting both those words and th Senate report.

DAVIS, *supra* note 20, at § 5:3. Interestingly, but not suprisingly, the Attorney General's Memorandum relied exclusively on the House Report. *Id.* Virually all courts which have considered the matter agree that the Senate Report is the accurate indicator of legislative intent. This may mean that any cases which have been based upon the House Report were incorrectly decided. *See, e.g.*, Department of the Air Force v. Rose, 425 U.S. 352, 365-66 (1976); Vaughn v. Rosen, 523 F.2d 1136, 1141 (D.C. Cir. 1975) (and cases cited at 1141 n.13); Hawkes v. IRS, 467 F.2d 787, 797 (6th Cir. 1972); Soucie v. Davis, 448 F.2d 1067, 1077 n.39 (D.C. Cir. 1971).

A great deal of the initial criticism focused on the statute's poor draftsmanship, most notably with regard to the Act's nine exemptions. "But for the Act to be meaningful, these exemptions must be sharply drawn, and it is here that the new section three is inadequate. While its nine exemptions are an improvement over the earlier two, they are still too vague to guarantee any real 'right to know.' " Note, *Freedom of Information: The Statute and the Regulations,* 56 GEO. L. J. 18, 52 (1967). *See* Kramer & Weinburg, *The Freedom of Information Act,* 63 GEO. L. J. 49, 59 (1974); Note, *The Freedom of Information Act — The Parameters of the Exceptions,* 62 GEO. L. J. 177, 206 (1972).

The FOIA is not entirely well written and its legislative history is most notable for the confusion it can create.

> General principles of statutory construction are hard to apply to the Act which has a checkered legislative history in some places. Since the Attorney General's 1967 Memorandum suggested that the courts resort to the legislative history this confusion is not unexpected by the government *(and generally has worked in the government's favor).*

O'REILLY, *supra* note 4, at 3-3 n.13 (emphasis added). In fairness, much of the criticism emanated from those who were unable to subdue their own preconceived biases in order to make a fully objective assessment. *Id.* at 3-4 to 3-5.

93. Delay was due in part to factors outside agency control, such as a large influx of FOIA requests. *See* GELLHORN, *supra* note 4, at 582.

94. Letter from Senator Edward M. Kennedy to Senator James O. Eastland (1974) *Letter of Transmittal, reprinted in* SOURCEBOOK I, *supra* note 4, at (III).

right to know has been obvious in parts of two administrations."[95] Thus, while the report noted that a substantial amount of previously withheld information had been made available to the public pursuant to the FOIA,[96] aggregate agency response was still inadequate.[97]

Congress, growing increasingly cynical about agency performance under the FOIA, promptly responded to the challenge presented by the Supreme Court's decision in *EPA v. Mink*,[98] and substantially amended

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95. HOUSE COMM. ON GOV'T OPERATIONS, ADMINISTRATION OF THE FREEDOM OF INFORMATION ACT, TWENTY-FIRST REPORT, H.R.REP. NO. 1419, 92d Cong., 2d Sess. 13, *reprinted in* SOURCEBOOK II, *supra* note 64, at 15. The hearings included sworn testimony of some 142 witnesses covering a period of forty-one days and were conducted by the Foreign Operations and Government Information Subcommittee of the House Committee on Government Operations, which has legislative and investigative jurisdiction over the FOIA. "The hearings were an intensive study of the effectiveness of the Freedom of Information Act. . . ." *Id., reprinted in* SOURCEBOOK II, *supra* note 64, at 14. The report further stated:

> When Congress passed the Freedom of Information Act, it issued a rule of government that all information with some valid exceptions was to be made available to the American people — no questions asked. . . . When in doubt, the department or agency was supposed to lean toward disclosure, not withholding.
>
> But most of the Federal bureaucracy already set in its ways never got the message. They forgot they are the servants of the people — the people are not their servants. This report is another reminder to our Government of that fact. Agency officials appeared and actually testified under oath that they had to balance the Government's rights against the people's rights. The government, however, has no rights.

Id., reprinted in SOURCEBOOK II, *supra* note 64, at 14. The committee was not complimentary of presidential administrations during the life of the FOIA. The report pointed out that "years of study by this committee show each new administration develops its own special secrecy techniques which, as time passes, become more and more sophisticated." *Id., reprinted in* SOURCEBOOK II *supra* note 64, at 13.

96. *Id., reprinted in* SOURCEBOOK II *supra* note 64, at 16.

97. Not surprisingly, many of the committee's conclusions and recommendations were to become incorporated into the FOIA amendments of 1974. Some of the more pertinent findings were:

> (1) Agency delay. The average response time was 33 days with 50 additional days on agency appeals.
>
> (2) Lack of utilization of the FOIA by the news media, again stressing the excessive time factor as problematic.
>
> (3) Lack of general "positive attitude" by top level administrators in particular and the agencies in general.
>
> (4) Failure of agencies to inform requesters of precise exemptions claims.
>
> (5) The 'identifiable record' requirement was used by many agencies as an excuse for withholding.
>
> (6) No provision for reporting to Congress of agency activity under the act.
>
> (7) Exemptions were misused by agencies to withhold records which may prove embarrassing.

Id., reprinted in SOURCEBOOK II, *supra* note 64, at 15, 17-18.

98. 410 U.S. 73 (1973). This litigation was conceived when thirty-three members of the House of Representatives were denied their FOIA request for recommendations which had been made to the President on the advisability of a scheduled underground nuclear test. *Id.* at 75. Nine documents in total were sought. The district court granted summary judgment against the plaintiffs, finding the documents exempt under section (b)(1) and section (b)(5) and the court of appeals reversed. The Supreme Court reversed the court of appeals.

A number of courts and commentators have stated that the 1974 amendments were precipitated by the United States Supreme Court's decision in EPA v. Mink, 410 U.S. 73 (1973). *See, e.g.*, Ray v. Turner, 587 F.2d 1187, 1190-91 (D.C. Cir. 1978); Alfred A. Knopf, Inc. v. Colby, 509 F.2d 1362, 1367 (4th Cir.), *cert. denied*, 421 U.S. 992 (1975); Seafarers Int'l Union AFL-CIO

the FOIA. The holding in *Mink,*[99] and the subsequent legislative overriding of the decision, is significant since it clearly manifested Congressional intent to provide a wide latitude for disclosure. The *Mink* holding effectively removed de novo review of agency asserted exemptions for national security documents ((b)(1) claims). Congress responded by amending (b)(1) so that de novo review of these claims would not be precluded.[100] The Court in *Mink* also tried to restrict the availability of in camera review to which Congress also responded by specifically providing that in camera review may be utilized by a court at its discretion in conducting mandatory de novo review.[101] The Supreme Court's holding was overridden by Congress in such a fashion as to leave no mistaken impressions regarding the congressional intent to effectuate disclosure, and to make clear that the *Mink* holding was in contravention with that intent.[102]

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v. Baldovin, 508 F.2d 126, 129 n.9 (5th Cir. 1975); SCHWARTZ, *supra* note 6, at 226; and Comment, *supra* note 81, at 125 n.16.

99. The Court held, with regard to exemption (b)(1) claims, that once the federal district court has determined the Executive has made a decision that these matters shall be kept secret, the court's inquiry ends. Furthermore, the court shall not attempt, by an in camera inspection, to separate the secret from the nonsecret and order that the latter be disclosed. The Court concluded the Congress did not intend "the Freedom of Information Act to subject executive security classifications to judicial review at the insistence of anyone who might seek to question them." 410 U.S. at 82. The Court also held that in camera inspection with respect to exemption (b)(5) claims is by no means automatic. *Id.* at 93.

> The unmistakable implication of the decision below is that any member of the public invoking the Act may require that otherwise confidential documents be brought forward and placed before the District Court for *in camera* inspection — no matter how little, if any, purely factual material may actually be contained therein. Exemption 5 mandates no such result.

Id. at 92. The Court therefore stripped the lower courts of their statutorily created power of de novo review regarding (b)(1) claims and limited the same with repect to (b)(5) claims.

100. Exemption (b)(1) as amended, as well as the amendment to exemption (b)(5), are set out fully in note 83 *supra.*

101. The Conference Committee stated:

> [T]he court may examine records *in camera* in making its determination under any of the nine categories of exemptions under section 552(b) of the law. While *in camera* examination need not be automatic, in many situations it will plainly be necessary and appropriate. Before the court orders *in camera* inspection, the Government should be given the opportunity to establish by means of testimony or detailed affidavits that the documents are clearly exempt from disclosure. The burden remains on the Government under this law.

JOINT EXPLANATORY STATEMENT OF THE COMM. OF CONFERENCE, 93d. Cong., 2d Sess. 3, *reprinted in* SOURCEBOOK II, *supra* note 64, at 226.

By vesting discretion in the courts to conduct in camera reviews in FOIA litigation, Congress attempted to rectify one of the procedural gaps in the statute which had plagued FOIA litigation. *See* Vaughn v. Rosen, 484 F.2d 820 (D.C. Cir. 1973), *cert. denied,* 415 U.S. 977 (1974).

102. The battle to amend FOIA's national security exemption was hard fought. The Ford Administration vigorously sought to maintain the holding of *Mink* especially pertaining to (b)(1) exemption cases culminating in a Presidential veto. *See* 10 WEEKLY COMP. OF PRES. DOCS. 1318 (1974). Those advocating less then de novo review of (b)(1) claims offerred a "reasonable basis" test. "Those that prevailed . . . stressed the need for an objective, independent judicial determination, and insisted that judges could be trusted to approach the national security determinations with common sense, and without jeopardy to national security." Ray v. Turner, 587 F.2d 1187,

Also important were the procedural provisions of the 1974 amendments.[103] These procedural amendments were largely motivated by the undue delay in *all* aspects of agency compliance with the FOIA. The "legislative history of the 1974 FOIA Amendments ... is replete with criticism of the excessive delay by federal agencies in responding to requests for public records under the FOIA."[104] Most important among the new provisions are the reduced time for an agency to file a responsive pleading,[105] required responses to FOIA requests within ten days,[106] and the requirement that FOIA cases be given precedence on district

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1193-94 (D.C. Cir. 1978). For a synopsis of the fight over the scope of review relating to national security claims, *see id.* at 1209-11. (Wright, C.J., concurring).

The 1974 amendments also restricted overly expansive judicial interpretations of exemption (b)(5), investigatory records compiled for law enforcement purposes. The Conference Committee adopted a Senate amendment which permits agency withholding of such investigatory records compiled for law enforcement purposes "only to the extent that the production of such records would interfere with enforcement proceedings, deprive a person of a right to a fair trial or an impartial adjudication, constitute a clearly unwarranted invasion of personal privacy, disclose the identity of an informer, or disclose investigative techniques and procedures." JOINT EXPLANATORY STATEMENT OF THE COMM. OF CONFERENCE, 93d Cong., 2d Sess. 6, *reprinted in* SOURCEBOOK II, *supra* note 64, at 229. For a number of post amendment cases detailing a narrowed exemption (b)(7) and an examination of the relevant history, *see, e.g.*, Lamont v. Department of Justice, 475 F. Supp. 761 (S.D.N.Y. 1979); Kanter v. IRS, 433 F. Supp. 812 (N.D. Ill. 1977); Title Guarantee Co. v. NLRB, 407 F. Supp. 498 (S.D.N.Y. 1975).

103. The procedural aspect of the amendments added two completely new sections to the FOIA. Prior to these amendments, there was no provision requiring administrative agencies to inform Congress of annual agency FOIA activities. The lack of such a provision was recognized as a weakness in the Act. HOUSE COMM. ON GOV'T OPERATIONS, ADMINISTRATION OF THE FREEDOM OF INFORMATION ACT, TWENTY-FIRST REPORT, H.R. REP. NO. 1419, 92d Cong., 2d Sess. 13, *reprinted in* SOURCEBOOK II, *supra* note 64, at 15, 17-18. Congress mandated that each agency submit a detailed yearly FOIA report to the Speaker of the House and the President of the Senate. 5 U.S.C. § 552(d) (1976) states in part:

> The report shall include —
> (1) the number of determinations made by such agency not to comply with requests for records ... and the reasons for each such determination;
> . . .
> (3) the names and titles or positions of each person responsible for the denial of records requested ... and the number of instances of participation for each;
> . . .
> (5) a copy of every rule made by such agency regarding this section;
> (6) a copy of the fee schedule and total amount of fees collected by the agency for making records available . . .;
> (7) such other information as indicates efforts to administer fully this section.
> The Attorney General shall submit an annual report. . . . Such report shall also include a description of the efforts undertaken by the Department of Justice to encourage agency compliance with this section.

The second completely new section was an expansion of the agency definition given in the FOIA. *See* JOINT EXPLANATORY STATEMENT OF THE COMM. OF CONFERENCE, 93d Cong., 2d Sess. 8, *reprinted in* SOURCEBOOK II, *supra* note 64, at 231. This additional section is codified at 5 U.S.C. § 552(e) (1976), and is set out in full at note 75 *supra*.

104. 495 F. Supp. at 1175, *citing* SOURCEBOOK II, *supra* note 64, at 17 *passim*.

105. 5 U.S.C. § 552(a)(4)(C) (1976). *See* FED. R. CIV. P. 12(a), which provides: "The United States or an office or agency thereof shall serve an answer to the complaint ... within 60 days after ... service ... of the pleading."

106. 5 U.S.C. § 552(a)(6)(A)(i), (ii),(B) (1976).

court dockets.[107] These amendments evidenced congressional recognition that a delayed response may be the equivalent of no response at all. "All together the amended Act reflects the power of frustration reflected in Congressional distrust for agency withholding."[108] The FOIA was subsequently amended in 1976,[109] again in response to a challenge by the Supreme Court.[110]

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107. 5 U.S.C. § 552(a)(4)(D) (1976) states: "Except as to cases the court considers of greater importance, proceedings before the district court, . . . and appeals therefrom, take precedence on the docket over all cases and shall be assigned for hearing and trial or for argument at the earliest practicable date and expedited in every way."

Of additional significance was a relaxation of the requisite specificity required of FOIA requests. 5 U.S.C. § 552(a)(3) (1976). Another very significant amendment was added to section (b) which codified a line of cases which had judicially instituted a requirement of segregability applicable to all documents withheld under one of the exemptions. *See* Vaughn v. Rosen, 484 F.2d 820, 827 (D.C. Cir. 1973), *cert. denied,* 415 U.S. 977 (1974); Soucie v. David, 448 F.2d 1067, 1078 (D.C. Cir. 1971); Grumman Aircraft Engineering Corp. v. Renegotiation Bd., 425 F.2d 578 (D.C. Cir. 1970). As indicated by *Soucie,* although a voluminous document may be exempt from disclosure, smaller portions of that document may not come within an exception, and therefore require disclosure. 448 F.2d at 1078. The conference committee adopted the Senate amendment requiring "that any reasonably segregable portion of a record shall be provided to any person requesting such record after the deletion of portions which may be exempted under subsection (b) of the Freedom of Information Law." JOINT EXPLANATORY STATEMENT OF THE COMM. OF CONFERENCE, 93 Cong., 2d Sess. 7, *reprinted in* SOURCEBOOK II, *supra* note 64, at 230.

108. O'REILLY, *supra* note 4, at 3-31.

109. Act of Sept. 13, 1976, Pub. L. No. 94-409 § 5(b), 90 Stat. 1247 (codified at 5 U.S.C. § 552 (1976)).

110. *See* FAA v. Robertson, 422 U.S. 255 (1975). At issue in *Robertson* was the Federal Aviation Act of 1958, 49 U.S.C. 1104 (1976), a statute on which the FAA relied in claiming that certain requested information was exempted from disclosure. The information sought "consisted of analyses made by representatives of the FAA concerning the operation and maintenance performance of commercial airlines." *Id.* at 257. The information request was refused and administrative appeal followed. The FAA subsequently refused to disclose the requested documents, alleging that § 1104 permits the Administrator to exercise his judgment that information be withheld if an objection is raised. In this case objection was made by the Air Transport Association. The FAA position was that the Administrator was given discretion to withhold disclosure if it would adversely affect the interest of the objecting party and, in addition, that disclosure of such information was not in the interest of the public. *Id.* at 258-59.

The district court found that the documents were public and nonexempt and gave plaintiffs judgment. The court of appeals affirmed the district court's decision regarding the exemption three claim, since the broad discretionary authority of § 1104 precluded that statute from coming within the scope of exemption three. *Id.* at 260. The Supreme Court reversed.

The holding was summarized by Justice Stewart in his concurring opinion by quoting the same passage he had written in *Mink.* Justice Stewart analogized the holding in that opinion which had actually stripped the federal courts of their de novo review authority, in cases involving a (b)(3) exemption claim. He stated:

> As matters now stand, when an agency asserts a right to withhold information based on a specific statute of the kind described in Exemption 3, the only question "to be determined in a district court's *de novo* inquiry is the factual existence of such a statute, regardless of how unwise, self protective, or inadvertent the enactment might be."

Id. at 269-70 (Stewart, J. concurring), *quoting* EPA v. Mink, 410 U.S. 73, 96 n.* (1973) (Stewart, J. concurring).

The Court, in order to reach this holding, was required to review the legislative history of the FOIA and to conclude that Congress did not intend to repeal statutes such as the one in question when it enacted the FOIA. 422 U.S. at 263-65. Its analysis of the legislative history was, however,

III. THE INHERENT PROBLEMS IN FREEDOM OF INFORMATION ACT LITIGATION

In comparison to most civil litigation, Freedom of Information Act litigation is unique. In general civil litigation the respective positions of the parties are, arguably, essentially equivalent. The Federal Rules of Civil Procedure on discovery functionally structure the mechanics of dispute resolution on factually well-informed participants.[111] In most FOIA cases, however, it is obvious that if the plaintiff acquires equivalent knowledge of the issues in dispute, the entire basis of the litigation becomes moot.

The Act itself is largely silent on this crucial distinguishing characteristic of FOIA litigation. Although the burden of proof is placed on the administrative agency, the Act fails to articulate specific, unambiguous procedural requirements.[112] Thus, despite this carefully conceived placement of the burden directly on the agencies, the agencies have been able to displace this burden to the FOIA plaintiff.[113] Resolution of this situation and the problems of procedure and proof inherent in FOIA litigation has implicitly been delegated to the courts.[114] The seminal case attempting to seek a resolution of these problems is *Vaughn v. Rosen.*[115]

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one sided. The Court failed to even consider the legislative history that had been relied upon by the court of appeals in deciding the question the other way. *See* DAVIS, *supra* note 20, at § 5:31. Thus, the overriding purpose of the 1976 amendment to exemption three of the FOIA was to mandate that statutes which allowed for discretionary decisions by administrative agencies (which furthered policies of withholding) were not consistent with the fundamental policies which underlie the FOIA. Only statutes which specifically articulate what information may be withheld fall within the scope of exemption three. *See, e.g,* Ray v. Turner, 587 F.2d 1187, 1203 (D.C. Cir. 1978); Stretch v. Weinburger, 495 F.2d 639, 640 (3d Cir. 1974).

111. *See* FED. R. CIV. P. 26-37. One of the chief aims of the rules of discovery was to eliminate unfair surprise. Of course, to accomplish this the rules of discovery comprise a structure which allows a participant to obtain expansive and comprehensive knowledge of the facts relating to the issues to be litigated. "The primary purpose of the discovery process was to insure that the facts would be fully disclosed at the trial." M. GREEN, BASIC CIVIL PROCEDURE 139 (2d ed. 1979). *See also* United States v. Procter & Gamble Co., 356 U.S. 677, 682 (1958) (the intent of the rules of discovery is to create "a fair contest with the basic issues and facts disclosed to the fullest practicable extent").

112. The Act only provides for de novo review of the agency's assertion of exemption, the possibility of an in camera inspection, and the placing of the burden of proof on the agency. 5 U.S.C. § 552(a)(4)(B) (1976).

113. Since the plaintiff is unable to carry such a burden, it inevitably is shifted to the court. *See* Vaughn v. Rosen, 484 F.2d 820, 826 (D.C. Cir. 1973), *cert. denied,* 415 U.S. 977 (1974). In Ray v. Turner, 587 F.2d 1187 (D.C. Cir. 1978), the court noted that *Vaughn* "initiated procedures designed to mitigate the administrative burden on the courts and ensure that the burden of justifying claimed exemptions would in fact be borne by the agencies to whom it had been assigned by Congress." *Id.* at 1191.

114. *See, e.g.,* Vaughn v. Rosen, 484 F.2d 820 (D.C. Cir. 1973). *Cf.* Weissman v. CIA, 565 F.2d 692, 694 (D.C. Cir. 1977) (Congress recognized difficult problems with disclosure pertaining to sensitive areas yet gave only general guidance leaving the court to divulge the necessary standards and procedures).

115. 484 F.2d 820 (D.C. Cir. 1973).

A. *Identifying the Problem:* Vaughn v. Rosen

1. The Problem

In 1973, the United States Circuit Court of Appeals for the District of Columbia decided *Vaughn v. Rosen.*[116] In doing so, it became the first court to directly confront the procedural aspects of FOIA litigation.[117] Noting that the overwhelming emphasis of the FOIA was on disclosure, the court proceeded to emphasize the inequitable position in which a FOIA plaintiff is in since "only one side to the controversy (the side opposing disclosure) is in a position confidently to make statements categorizing information . . . ; [o]bviously the party seeking disclosure cannot know the precise contents of the documents sought. . . ."[118] The FOIA plaintiff, therefore, is without personal knowledge on which to base a statement that the agency characterization of withheld documents is not in fact a proper characterization and is, therefore, in-

116. The plaintiff in *Vaughn* was a law professor engaged in research involving the Civil Service Commission. The Commission has overall responsibility to supervise and evaluate the personnel management of various federal agencies. The evaluation is conducted by the Bureau of Personnel Management and entails evaluating and making of recommendations regarding the particular agencies. The plaintiff requested access primarily to these evaluations. The Bureau declined to disclose the information and was sustained by the Executive Director of the Civil Service Commission based on three exemptions: (b)(2) information relating primarily to internal rules and practice of an agency, (b)(5) information which constitutes memoranda or letters not available by law to a party other than an agency in litigation with the agency, and (b)(6) information composed of personal and medical files, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Professor Vaughn initiated a FOIA action in the District Court for the District of Columbia. The Government's motion for summary judgment was granted by the district court. *Id.* at 822-23. Appeal was then taken to the United States Court of Appeals for the District of Columbia.

117. Neither courts nor commentators had addressed these issues prior to *Vaughn. See* Comment, *Vaughn v. Rosen: Procedure and Proof Under the FOIA,* 35 U. PITT. L. REV. 850, 860 (1974). A few decisions had, however, identified the problem caused by agencies' failures to segregate exempt from nonexempt portions of documents. *See* Soucie v. David, 448 F.2d 1067 (D.C. Cir. 1971); Sterling Drug v. FTC, 450 F.2d 698 (D.C. Cir. 1971).

In Vaughn, the government presented an affidavit which failed to "illuminate or reveal the contents of the information sought, but rather set forth in conclusory terms the Director's opinion that the evaluations were not subject to disclosure under the FOIA. On the basis of this affidavit, the trial court granted the Government's motion for summary judgment." 484 F.2d at 823. The court of appeals reversed and remanded for further deliberation consistent with the remedial procedures set forth in its decision. *Id.* at 828. The court opted to resolve the problems of proof and procedure in FOIA litigation on its own initiative. Neither the plaintiff's nor the defendant's briefs on the defendant's motion for summary judgment raised such issues, focusing instead on the substantive dispute of whether the inspection reports in question were in fact interagency memoranda and therefore exempt from disclosure pursuant to 5 U.S.C. § 552(b)(5) (1976). The court's concern with the plight of the FOIA plaintiff was, however, expressed by it during oral argument on the government's motion for summary judgment. *See* Vaughn, *The Freedom of Information Act and Vaughn v. Rosen: Some Personal Comments,* 23 AM. L. REV. 865, 871-73 (1974).

118. 484 F.2d at 823-24. *See also* Stephenson v. IRS, 629 F.2d 1140, 1144 (5th Cir. 1980). Writing for the unanimous panel, Judge Wilkey modestly suggested that "from the general descriptions provided it seems reasonable to conclude that the documents run to many hundreds of pages." 484 F.2d at 825 (Wilkey, J.). In fact, there were approximately 2,448 documents involved which filled 17 standard-size, five drawer filing cabinets. Vaughn, *supra* note 117, at 873.

accurate.[119] It is, therefore, virtually irrelevant whether the government's characterization is, in fact, accurate; the FOIA plaintiff's lack of knowledge neither increases nor decreases in relation to whether the government has properly or improperly invoked a statutory exemption. Thus, with only an awareness of the general nature of the documents sought, the only recourse the FOIA plaintiff has is to argue that the delineated scope of a particular exemption would appear to preclude the inclusion of documents of this particular nature within its ambit.[120]

Thus, in most FOIA cases,[121] the inherent ignorance of the specific factual nature of the requested information places the FOIA plaintiff "at a loss to argue with desirable legal precision for the revelation of the concealed information."[122] Consequently, the traditional mode of dispute resolution is seriously impaired; the lack of respective adversariness between litigants prevents adequate factual development during litigation.[123] Absent meaningful development of the facts, the record lacks the requisite clarity needed for a trial court to make an appro-

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119. 484 F.2d at 824. It is apparent that in such a situation the plaintiff is virtually precluded from submitting a valid affidavit sufficient to raise a material issue of fact on a summary judgment motion since an affidavit must be based on personal knowledge. "Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and show affirmatively that the affiant is competent to testify to the matters stated therein." FED. R. CIV. P. 12(e).

120. 484 F.2d at 824.

121. There are two general scenarios in which FOIA claims are litigated. The first situation is present where the factual nature of the document or documents in dispute is clearly known to the FOIA plaintiff. An example of such a situation was present in EPA v. Mink, 410 U.S. 73 (1973). In *Mink,* the plaintiffs knew that the nature of the documents which they were requesting pertained to recommendations on nuclear testing. Prior to the 1974 amendment to exemption (b)(1) (national security matters), the only inquiry which a court was to undertake was whether the particular records in question were in fact classified to be withheld pursuant to an executive order. *Id.* at 81-85. Therefore, since the fact that the documents were classified was known and uncontested the government had only to show that they were classified pursuant to an executive order to sustain the burden necessary for continued withholding. *Id.* at 85. Similarly, this situation may be present where the FOIA plaintiff may readily ascertain the factual nature of a particular document that is somewhat common. In Information Acquisition Corp. v. Department of Justice, 444 F. Supp. 458, 462-63 (D.D.C. 1978), for example, the defendant agency responded that partially responsive to the plaintiff's request was a standard, frequently used form which depicts personal background information of agency employees. The court found no need for further elaboration by the agency of the factual nature of this document since "[t]he nature of standard Civil Service Commission forms is well known to the public. Blank copies are easily obtained, and in any case, defendants have provided plaintiff with blank copies of all [such] forms. . . ." *Id.* at 463.

The second and more common situation is present when the plaintiff has no knowledge of the factual nature of the documents and the agency characterization of the specific document fails to provide, on the record, facts which indisputably come within one of the Information Act's nine exemptions. *See* Vaughn v. Rosen, 484 F.2d 820, 824 (D.C. Cir. 1973).

122. *Id.* at 823.

123. *See, e.g.,* Mobil Oil v. FTC, 406 F. Supp. 305 (S.D.N.Y. 1976). "[S]ince the government — the party opposing disclosure — is the only side capable of confidently categorizing the type of information at issue, the 'traditional adversary nature of our legal system' is seriously distorted, if not altogether hamstrung." *Id.* at 312-13.

priate legal ruling. This fact indicates the need for the courts to take a more active role in the resolution of FOIA disputes.[124] The reality is, therefore, that the administrative agency need only aver that the material falls within a category that Congress has deemed may be withheld.[125] To prevent the FOIA from becoming a complete nullity, the trial court, in effect, assumes the burden of proof which has been displaced from the agencies to the plaintiff. Were the court not to do so, the agency would be able to withhold information which the FOIA has deemed should be disclosed.[126] The *Vaughn* court summarized the situation: "The simple fact is that existing customary procedures foster inefficiency and create a situation in which the government need only carry its proof against a party that is effectively helpless and a court system that is never designed to act in an adversary capacity."[127]

The method available to the court to assume the agency's burden is

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124. In FOIA litigation, an active role by the court supplants a role traditionally reserved for the party litigants. The court's role is not and should not become an adversarial one; to allow such would be to disturb a delicately balanced system. *See* Comment, *Vaughn v. Rosen: Toward True Freedom of Information,* 122 U. PA. L. REV. 731, 733 n.15 (1974). It would indeed be a weak argument to suggest that Congress implicitly intended to render FOIA litigation unique by placing the court in an adversarial rather than an adjudicative role. Yet, prior to *Vaughn,* the FOIA plaintiff's inequitable position severely strained the efficacy of the adversarial mode of civil litigation.

> We still subscribe to the adversary theory of justice which is bottomed on the implicit assumption that a lawsuit is a fight, that each party must exert his utmost energy to overcome his opponent, and when the dust of battle settles in the legal arena, justice will emerge triumphant. The theory possesses a certain charm and it frequently works, at least in the cases in which the parties are evenly matched.

GREEN, *supra* note 111, at 138.

125. 484 F.2d at 825-26. In one pertinent case, the court noted:

> After the Government alleges that the documents in controversy do not contain material which must be disclosed, but on the other hand consist of information whose secrecy must be preserved, the very claim of secrecy, under the usual court procedures in vogue, means that the Government has substantially relieved itself of the burden of proving more.

Cuneo v. Schlesinger, 484 F.2d 1086, 1091 (D.C. Cir. 1973), *cert. denied,* 415 U.S. 977 (1974).

126. As the court in *Vaughn* stated: "*If justice is to be done* and the Government's characterization adequately tested, the burden now falls on the court system to make its own investigation." 484 F.2d at 826 (emphasis added). Under circumstances such as those present in *Vaughn* the means by which de novo review would be realized is through the intolerable method of complete in camera review. *See* Cuneo v. Schlesinger, 484 F.2d 1086, 1091 (D.C. Cir. 1973); Soucie v. David, 448 F.2d 1067, 1079 (D.C. Cir. 1971). The *Vaughn* court found that the existing procedures encouraged overbroad claims of exemptions. If the agencies refused disclosure, the most severe sanction was to bring the agency into court where it would simply claim that the material is exempt. "[T]he tactical ploy is, to the extent the number of facts in dispute are increased, efficiency of the court system involved in that dispute resolution will be decreased." 484 F.2d at 826. The problem is more pronounced since the exemptions are imprecise. *Id.* Thus, it is likely that material that should be disclosed will be buried.

The *Vaughn* court was not overstating the case. Congress had previously documented agency reluctance to comply with the disclosure provisions of the Act. *See* note 95 and accompanying text *supra.* Furthermore, the agencies employed a number of methods to avoid disclosure. Among these was the "contamination ploy," an intermingling of disclosable information with exempt information and claiming the whole matter was exempt. *See* Nader, *supra* note 91, at 9-10.

127. 484 F.2d at 826.

an in camera inspection of the documents.[128] Despite the requirements for de novo review, such a procedure is inappropriate. The cost factor in terms of the time necessary to conduct such a review will, more often than not, be prohibitive.[129] Moreover, the use of an in camera review of agency documents exacerbates the adversarial imbalance. A court is not accorded the benefit of interested adversarial argument which is needed to sharply focus the inquiry of the trial court.[130] Additionally, an in camera review is not on the public record, making appellate review virtually impossible. Even without an in camera inspection of disputed documents, the findings of the trial courts are neither sharply drawn nor clearly stated, requiring the appellate court to commit enormous resources to the task of conducting their own investigations into the propriety of the agency characterization. In effect, an appellate court would be acting as second trial court.[131] The *Vaughn* court rejected such an expenditure of judicial time as clearly undesirable.[132]

Thus, procedures for litigating a pre-*Vaughn* FOIA request encouraged the government agencies to respond with overly broad assertions of exemption.[133] This result occurs in the first place because the agency's burden is assumed by the court creating "an innate impetus that encourages agencies automatically to claim the broadest possible grounds for exemption for the greatest amount of information."[134] Secondly, the pre-*Vaughn* procedures produced no incentives for affirmative agency compliance with the FOIA and, therefore, the agen-

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128. The Vaughn court stated: "In an effort to compensate, the trial court, as the trier of fact, may and often does examine the document *in camera* to determine whether the Government has properly characterized [it] as exempt." *Id.* at 825.

129. *Id.* The use of in camera inspection should be limited to those instances where it is impossible to develop a factual record of the agency's withheld documents by any other procedure. *Id.*

130. A trial court is not an interested party in dispute resolution. It therefore can not be expected that the court will probe as deeply or as perceptively as would a party to a lawsuit, especially a plaintiff asserting a right to relief. *Id. See also* Cuneo v. Schlesinger, 484 F.2d 1086, 1091 (D.C. Cir. 1973).

131. Simply, the appellate court does not have a record of any substance on which to examine the holding of the district court. This was noted by the court in *Vaughn:*

> Frequently trial courts' holdings in FOIA cases are stated in very conclusory terms, saying simply that the information falls under one or another of the exemptions to the Act. An appellate court, like the trial court, is completely without controverting illumination that would ordinarily accompany a request to review a lower court's factual determination; it must conduct its own investigation into the document.

484 F.2d at 825. *See also* Cuneo v. Schlesinger, 484 F.2d 1086, 1091 (D.C. Cir. 1973).

132. The court stated: "Such an investment of judicial energy might be justified to determine some issues. In this area of the law, however, we do not believe it is justified or even permissible." 484 F.2d at 825.

133. *Id.* at 826.

134. *Id. See* note 126 and accompanying text *supra.*

cy loses nothing and might actually gain by asserting expansive exemption claims.[135]

2. The Remedy

In most FOIA cases the issue is the factual nature of the documents in dispute.[136] In *Vaughn v. Rosen,*[137] the court established remedial procedures designed to increase both the plaintiff's and the courts' knowledge of the factual nature of the disputed documents without actually revealing the factual contents of the documents themselves.[138] The *Vaughn* decision was primarily designed to accomplish three objectives. The first was simply to put the government agencies on notice that the courts would no longer assume the agency's burden of proof and the agencies would be required to substantiate broad claims of exemption by providing detailed analyses of all the information asserted to be exempt.[139] Second, the *Vaughn* court realized that in situations where the information is voluminous, the specificity required for each claim of exemption would not materially advance the resolution of the dispute without a system of itemization and indexing of each agency justification for withholding information which is specifically correlated to the appropriate document.[140] Third, the specificity of the indexing must be correlated to the segregable portions of each document. Certainly, the apparent exempt status of a large document will not necessarily mean that individual portions within that document are not exempt.[141] Addi-

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135. 484 F.2d at 826. The court stated:

> Under current procedures government agencies *lose* very little by refusing to disclose documents. At most they will be put to a court test stacked in their favor, the burden of which can be easily shifted to another by simply arguing that the information falls under one of several unfortunately imprecise exemptions. Conversely, there is little to be *gained* by making the disclosure. Indeed, from a bureaucratic standpoint, a general policy of revelation could cause positive harm, since it could bring to light information detrimental to the agency and set a precedent for future demands for disclosure.

Id. (emphasis in original).

136. *Id.* at 823.

137. 484 F.2d 820 (D.C. Cir. 1973).

138. *Id.* at 823-26.

139. *Id.* at 826. The court noted that such an analysis could ordinarily be done without revealing the specific information sought to be withheld by the use of language that is analogous to but different from the actual language of the document. *Id.* at 826-27.

140. The indexing properly done is a tool which focuses the issues in dispute. It enables plaintiff's counsel to sharpen his inquiry into specific areas which after examination of the index are reasonably controverted. Secondly, it allows the district court to make narrower, presumably more accurate legal rulings on specific segments of the itemized index. It enhances appellate review in that the appellate court may look directly at the particular legal ruling based on a specific portion of the index. *Id.* at 827.

141. The court stated that "[i]n a large document it is vital that the agency specify in detail which portions of the document are disclosable and which are allegedly exempt." *Id.*

tionally, if more than one exemption is asserted for a particular document, each exemption must be adequately justified as well as specifically correlated.[142]

Thus, the *Vaughn* court formulated fairly specific, yet sufficiently flexible, procedures for the litigation of FOIA cases. The court recognized that compliance with these procedures would place a heavy burden on the agencies but found that this would conform to the congressional intent of disclosure; it would now be more burdensome to withhold information than to disclose it.[143]

B. *The Use of* Vaughn *in the District Courts*

The remedial provisions mandated in *Vaughn* were well received[144] and have subsequently developed into "a fundamental principal for the resolution of FOIA actions in a district court. . . ."[145] Problems of proof and procedure continue since most FOIA dispute resolution

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142. *Id.* The *Vaughn* court concluded that the case presented an excellent example of the need for specific indexing and itemization. The government claimed that three exemptions were applicable to all of the documents yet the court was unable to determine if a specific document or portion thereof fell within one or another of the asserted exemptions. The court felt it would be highly unlikely for all exemptions to apply to a specific portion of a document. The court stated:

> Even if isolated portions of the document are exempt under more than one exemption, it is preposterous to contend that all of the information is equally exempt under all of the alleged exemptions. It seems probable that some portions may fit under one exemption, while other segments fall under another, while still other segments are not exempt at all and should be disclosed.

Id. at 827-28. The *Vaughn* court noted that even if there is compliance with these procedures FOIA cases may be still very burdensome to a trial court. In such instances, the court concluded a special master could be appointed by a trial court which would examine the documents and make an assessment of the agency's assertions of exemptions. For an early critique of this approach *see* Comment, *supra* note 117, at 861-62.

143. The court in *Vaughn* stated: "Our decision here may sharply stimulate what must be, in the final analysis, the simplest and most effective solution — for agencies voluntarily to disclose as much information as possible and to create internal procedures that will assure that disclosable information can be easily separated from that which is exempt." 484 F.2d at 828. *See, e.g.*, Mobil Oil Corp. v. FTC, 406 F. Supp. 305, 312 (S.D.N.Y. 1976).

144. *See generally* Comment, *Vaughn v. Rosen: New Meaning for the Freedom of Information Act*, 47 TEMPLE L. Q. 390 (1974); Comment, *Vaughn v. Rosen: Toward True Freedom of Information*, 122 U. PA. L. REV. 731 (1974); Comment, *supra* note 117. Although Congress has not explicitly sanctioned the *Vaughn* procedures by incorporation into the FOIA, a case may be made that these procedures have been approved by Congress. First, Congress incorporated the segregability portion of *Vaughn* and earlier cases in the 1974 amendments. *See* note 107 *supra*. Secondly, the Senate Committee, after briefly describing the thrust of the *Vaughn* decision, specifically approved of this procedure. SENATE COMM. ON THE JUDICIARY, AMENDING THE FREEDOM OF INFORMATION ACT, S. REP. NO. 854, 93d Cong., 2d Sess., *reprinted in* SOURCEBOOK II, *supra* note 64, at 167.

145. Information Acquisition Corp. v. Department of Justice, 444 F. Supp. 458, 462 (D. D.C. 1978). "The historical basis for *Vaughn v. Rosen* lies in the congressional attempt to fashion a judicial remedy without automatically releasing government secrets upon every occasion of a suit. . . . As a reform, its roots must be seen in convenience as well as in fairness." O'REILLY, *supra* note 4, at 8-44, 8-45.

revolves around the factual nature of the documents in issue.[146] Thus, one of the principle purposes of the *Vaughn* procedures is to provide a FOIA plaintiff with sufficient information of the factual nature of a particular agency characterization of the documents in dispute to stimulate the adversarial process and to delimit the scope of the trial court's application of the appropriate legal principles.[147] The prerequisite for the use of the *Vaughn* procedures is a plaintiff who lacks personal knowledge of the factual nature of the documents or, at least, the existence of an ambiguity with respect to the nature of the disputed documents.[148] Therefore, the index must enlighten both the court and the plaintiff as to the factual nature of the withheld information. This descriptive element of a *Vaughn* index is but one component of the total index.[149]

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146. *See* Stephenson v. IRS, 629 F.2d 1140, 1144 (5th Cir. 1980).

147. In Founding Church of Scientology v. Bell, 603 F.2d 945, 948 (D.C. Cir. 1979), the court noted that the "central purpose of the index requirement is to facilitate court review of agency FOIA rulings by making clear the basis for the agency's refusal to release certain information." *See, e.g.*, Founding Church of Scientology v. National Security Agency, 610 F.2d 824, 832 (D.C. Cir. 1979) (importance of maximizing adversary procedures in FOIA suits); National Parks and Conservation Assoc. v. Kleppe, 547 F.2d 673, 680 (D.C. Cir. 1976) (conclusory allegations are improper means of sustaining burden of nondisclosure because they avoid the illuminating scrutiny resulting from an adversarial proceeding, frustrating appellate review and the fair assertion of rights under the Act). *Accord,* Exxon Corp. v. FTC, 384 F. Supp. 755, 761 (D.D.C. 1974), *remanded,* 527 F.2d 1386 (D.C. Cir. 1976) (extent to which a *Vaughn* index facilitates adversarial analysis by information requester is only a by-product).

148. The most relevant example is, again, EPA v. Mink, 410 U.S. 73 (1973). The court in *Vaughn* premised its procedural mandate in FOIA cases on the skeletal outline provided by the Court in *Mink*. In *Mink*, the FOIA request was for recommendations made on underground nuclear testing. There was no factual dispute between the parties regarding the nature of the information requested. In such a scenario, the *Vaughn* procedures need not be mandated since the relevant inquiry is a legal one — whether the exemption applies to the documents in question.

In a case decided prior to *Vaughn* (but reheard on a motion to reconsider in light of *Vaughn*), the court made a similar distinction in deciding that the *Vaughn* decision would alter neither the initial disposition of the case nor its procedural requirements. "At the outset ... [plaintiff] through his counsel was familiar with the form which solicited specific cost-accounting information from defense contractors through direct inquiries and ... therefore, ... it does not appear that [the plaintiff] can justly contend that he was unable to characterize and categorize the cost-accounting information." Petkas v. Staats, 364 F. Supp. 680, 685 (D.D.C. 1973), *rev'd,* 501 F.2d 887 (D.C. Cir. 1974). Thus, in the rare case that there is no factual dispute whatever as to the documents in issue, the *Vaughn* procedure will be unnecessary.

149. The descriptive portion of a *Vaughn* index would likely require the inclusion of information revealing the author, the date, the addressee, the person to whom the document was circulated, the subject matter of the document, and the regulation or regulations expressly addressed or referred to in the document. *See* note 29 *supra*. In Coastal Corp. v. DOE, 496 F. Supp. 57 (D. Del. 1980) (motion to compel preparation of a *Vaughn* index), the Department of Energy conceded to most of the elements stated above except the requirement that the index reveal to whom the document was circulated, arguing that such a requirement would be too burdensome. Additionally, the DOE contended that inclusion of this element in the descriptive portion of the *Vaughn* index was a decision to be made by the DOE since they "are the ones that have to justify their exemptions, and if in fact they leave out necessary information, it is their responsibility for leaving it out, it is their problem." *Id.* at 60. Based partially on the past practice of the DOE, the court rejected the DOE's arguments for not including the circulation element in the index and

The second element of the procedures established in *Vaughn,* was the requirement that the agency submit a detailed justification for the assertion that each document withheld, as well as each segregable portion, was exempt from disclosure. This requirement was strengthened by the court's holding in *Mead Data Central, Inc. v. United States Department of Air Force.*[150] The *Mead* court reinforced the segregability requirement articulated in *Vaughn.*[151] As noted in *Vaughn,* a FOIA plaintiff is generally without sufficient information to attack agency exemption claims.[152] The *Mead* court noted that because segregability is dependent on the actual content of the document itself, the FOIA plaintiff is equally as helpless to meet and challenge agency claims that the information in dispute is exempt and that there exists no reasonably segregable material within a withheld document.[153] Therefore, "unless the segregability provision of the FOIA is to be nothing more than a

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specifically required the DOE to include this element for every document withheld. *Id.* Additionally, the DOE attempted to limit the requirement of a description of the subject matter to situations where the subject matter of the withheld documents was relevant to the exemption claims. The court similarly rejected this "relevancy" argument noting that preparation and inclusion of this element is relatively easy to comply with and may assist both court and the plaintiff in determining the correctness of the agency's claim. *Id.*

Taking this opinion in conjunction with Coastal States Gas Corp. v. Department of Energy, 495 F. Supp. 1172 (D. Del. 1980) (motion for partial judgment) some of the lack of specificity in *Coastal II's* holding that the DOE index prepared pursuant to the court's order was inadequate, becomes clearer. It is not difficult to conclude that had the DOE's initial index contained these elements, this additional opinion would have been unnecessary. Indeed, as Coastal stated, in the spirit of *Vaughn's* purpose for revealing such description of the subject matter of the disputed documents, had the DOE complied with this requirement it "would have provided Coastal with at least the 'frame of reference' details concerning the withheld documents that would have facilitated Coastal's ability to 'argue with legal precision' for their disclosure." Brief in Support of Partial Judgment, *supra* note 25, at 12.

150. 566 F.2d 242 (D.C. Cir. 1977). Interestingly, the court agreed with the plaintiff's contention that the *Vaughn* procedures were equally applicable to agency proceedings, yet found the failure of an agency to comply with those procedures an insufficient reason to reverse a district court's judgment where those procedures have been followed in the district court action. *Id.* at 251.

151. The court noted that "[t]he focus of the FOIA is information, not documents, and an agency cannot justify withholding an entire document simply by showing that it contains some exempt material." *Id.* at 260.

152. The court observed that the initial prerequisite for application of the *Vaughn* procedures to a FOIA dispute was present since "[t]he dispute between the parties ... centers basically around the question of how that [withheld] information ought to be characterized." *Id.* at 250. The case was, however, substantially different from the situation present in *Vaughn.* Here, the total number of documents in dispute consisted of approximately thirty pages. *Id.* at 252. Another factor distinguishing *Mead* from *Vaughn* is that the *Mead* court found the agency's affidavits descriptive enough to enable the plaintiff to argue effectively against the Air Forces' exemption claims. *Id.* at 251.

153. *Id.* at 261-62. The court correctly noted that agency reluctance to provide detailed justifications pertinent to segregable portions of a withheld document is not ameliorated by use of in camera inspection. Use of in camera review only sanctions agency noncompliance with the segregability requirement by permitting broad, conclusory claims of nonsegregable information which consequently shifts the burden of segregability to the district courts. *Id.* at 262.

precatory precept, agencies must be required to provide the reasons behind their conclusions in order that they may be challenged by FOIA plaintiffs and reviewed by the courts."[154] Additionally, the descriptive portion of the *Vaughn* index shall be (in the case of a very long document) by section rather than by the document as a whole.[155] Thus, *Mead* implicitly reenforced the FOIA's presumption of disclosure.[156] The *Mead* decision also suggests that there is a presumption that the withheld information is segregable. Such a presumption can be rebutted through the provision of detailed statements, justifying the assertion that information is non-segregable.[157] The court in *Mead* was not unaware of the additional and substantial burden which such requirements would impose on an agency.[158] Characteristically, the *Mead* court noted that such burdens could be avoided by disclosure of the requested information.[159] The decision did state, however, that in certain limited circumstances, the court may determine that the information cannot be segregated in such a manner so as to leave anything of value for disclosure to the plaintiffs. In such instances, the agency should not be burdened by the segregability requirements.[160]

Mead reemphasized the completeness and conclusiveness requirements of the *Vaughn* procedures. The exemption at issue in *Mead* was the provision exempting "intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency."[161] The accepted substantive interpretation of this exemption is that it generally incorporates privileges of discovery.[162]

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154. *Id.* at 261.

155. *Id.* at 261 n.54.

156. *See, e.g.,* Jordan v. United States Dep't of Justice, 591 F.2d 753, 779 (D.C. Cir. 1978) ("It is basic that the FOIA establishes a statutory presumption that all federal records are available to 'any person' "). *See also* Kent Corp. v. NLRB, 530 F.2d 612, 617 (5th Cir. 1976).

157. *Id. See* Jordan v. United States Dep't of Justice, 591 F.2d 753, 779 (D.C. Cir. 1978).

158. The cost to the agencies under the *Mead* procedures is significant. The procedures compel the agencies to devote considerably more time to preparing the basis of their exemption claims. All responsive documents must be painstakingly examined to justify the relevance of each exemption asserted and to specifically correlate such exemption claims to the specific segregable portion of a withheld document to which the asserted claims are allegedly applicable. *See* O'REILLY, *supra* note 4, at 8-48.

159. Mead Data Central, Inc. v. United States Dep't of Air Force, 566 F.2d 242, 261 (D.C. Cir. 1977). The court stated that these "burdens may be avoided at the option of the agency, however, by immediate disclosure. . . . [A]n agency's own balancing of the resource costs of justifying nondisclosure against the value of secrecy may provide a rough estimate of how compelling is its reason for withholding." *Id.*

160. *Id.* For a court to sanction nondisclosure in this instance, it must determine that the agency would have "to commit significant time and resources ... [which would result in] the separation of disjointed words, phrases, or even sentences which taken separately or together have minimal or no information content." *Id.* at 261 n.55. Additionally, the agency would be held to a high burden of proof for the court to approve of nondisclosure. *Id.* at 261.

161. 5 U.S.C. § 552(b)(5) (1976).

162. In its first FOIA case the Supreme Court stated that "at best, the discovery rules can only be applied under Exemption 5 by way of rough analogies." EPA v. Mink, 410 U.S. 73, 86

The *Mead* court agreed that the attorney-client privilege, which was asserted under this exemption, does have "a proper role to play in exemption five cases."[163] A fundamental prerequisite to invoking the privilege, however, is a showing that the information has in fact been communicated in confidence and that confidentiality has been preserved.[164] In *Mead,* the Air Force failed to show that this prerequisite had been met. Therefore, the Air Force had not sustained its burden "and since the FOIA places the burden on the Government to prove the applicability of a claimed privilege, the court could not assume that it was confidential."[165]

The *Vaughn* procedural requirements are appropriate, and in fact necessary, in FOIA cases.[166] While most courts appear to apply the *Vaughn* procedures to FOIA litigation, a number of courts do so

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(1973). This case is discussed in notes 99 to 102 and accompanying text *supra.* In NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 149 (1975), the court noted that exemption 5 is construed "to exempt those documents, and only those documents normally privileged in the civil discovery context." In *Sears,* it was recognized that two common law privileges are within the scope of exemption 5; the executive privilege protecting predecisional communications, *id.* at 150-51, and the attorney work product privilege, *id.* at 154. The attorney-client privilege is similarly included within the scope of exemption 5. *See* Federal Open Market Comm. v. Merrill, 443 U.S. 340 (1979).

The purpose of this exemption is to facilitate frank discussions of legal and policy matters within the agency without impinging on the efficiency of the government. SENATE SUBCOMM. ON ADMIN. PRACTICE AND PROCEDURE, CLARIFYING AND PROTECTING THE RIGHT OF THE PUBLIC TO INFORMATION, AND FOR OTHER PURPOSES, S. REP. NO. 813, 89th Cong., 1st Sess. 9 (1965), *reprinted in* SOURCEBOOK I, *supra* note 4, at 44. For the general scope of exemption 5, *see, e.g.,* Kent Corp. v. NLRB, 530 F.2d 612 (5th Cir. 1976); Sterling Drug Inc. v. Harris, 488 F. Supp. 1019 (S.D.N.Y. 1980).

163. Mead Data Central, Inc. v. United States Dep't of Air Force, 566 F.2d 242, 252 (D.C. Cir. 1977). Since exemption 5 protects agency decision making, "this covers professional advice on legal questions which bears on those decisions." *Id.* This privilege is not defeated when documents are exchanged between agency attorneys. *Id.* at 253 n.21. Similarly, circulation of documents among agency employees, allegedly protected by exemption 5's incorporation of the attorney-client privilege, does not necessarily defeat the privilege. *Id.* at n.24. *See* Sterling Drug Inc. v. Harris, 448 F. Supp. 1019, 1025 (S.D.N.Y. 1980) (briefly examines the control group and scope of employment tests that may be made regarding issue of to whom communication of allegedly privileged matter may be made, without losing the requisite confidentiality).

164. *See* Coastal States Corp. v. Department of Energy, 617 F.2d 854, 863 (D.C. Cir. 1980). The court in *Mead* wrote: "The privilege does not allow the withholding of documents simply because they are the product of an attorney-client relationship. . . . It must also be demonstrated that the information is confidential." 666 F.2d at 253.

165. *Id.* at 254. On remands the court mandated that the district court "order disclosure of these documents unless the Air Force demonstrates . . . that the attorney-client privilege does apply to these documents because the information on which they are based was secrecy and was not known or disclosed to any third party. . . ." *Id.*

Additionally, the court in *Mead* found that in instances of deliberation or negotiations between the agency and outside parties (Mead Data Central in this case) does not fall clearly within the protection of the deliberative process afforded by exemption 5. *See* note 162 *supra.* The exemption may be applicable if it can be shown that to reveal such negotiations would inhibit private parties in future dealings with the government. Therefore, when an agency attempts to protect information of this nature, "[i]t must show by specific and detailed proof that disclosure would defeat, rather than further, the purposes of the FOIA." 566 F.2d at 258.

166. Exxon Corp. v. FTC, 384 F. Supp. 755, 761 (D.D.C. 1974), *remanded* 527 F.2d 1386 (D.C. Cir. 1976). In Murphy v. FTC, 490 F. Supp. 1138 (D.D.C. 1980) on plaintiff's motion

without specific reference to, or labeling of, the *Vaughn* procedures.[167] These cases generally apply the *Vaughn* procedures directly to agency affidavits.[168] One court of appeals has specifically rejected the mandate

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challenging the sufficiency of the government's compliance with *Vaughn* procedures, the court determined that the *Vaughn* index was sufficient where only two claims of exemption were claimed for all four responsive video and audio FBI tapes on the ABSCAM investigation. Dispositive in the court's opinion was that further "itemization would undermine the efficacy of the claimed exemptions, [and therefore] a more generalized index, such as that provided herein, suffices." *Id.* at 1145. *See* Cuneo v. Schlesinger, 484 F.2d 1086, 1092 (D.C. Cir. 1973) (Bazelon, C. J., concurring), *cert. denied sub nom.* 415 U.S. 977 (1974). The *Vaughn* procedures should not be inflexibly applied "because the *Vaughn* ... requirements are not ends in themselves. Information Acquisition Corp. v. DOJ, 444 F. Supp. 458, 462 (D.D.C. 1978). The requisite extent of specification, itemization, justification and correlation is determined in each case based upon the nature of the documents in dispute and the corresponding exemptions claimed. *Id. See* Stephenson v. IRS, 629 F.2d 1140, 1145 (5th Cir. 1980). The *Vaughn* procedure has, in applicable part, been extended by the District of Columbia Court of Appeals to a non-FOIA case. In Nixon v. Sirica, 487 F.2d 700 (D.C. Cir. 1973) the court held that the President's claims of executive privilege should be presented to the court in the same manner as required by agencies asserting FOIA exemption post-*Vaughn*. Recently, the District Court of the District of Columbia has applied the *Vaughn* procedure to a case involving the Speech or Debate Clause. (U.S. CONST. art. 1 § 6). A Congressman responded to a grand jury subpoena of various articles contained in the Congressman's office files by asserting the protection of the Speech or Debate Clause. The court held that the materials should be presented in compliance with the procedural mandates of *Vaughn*. This would enable the court to determine what sections of the material are in fact protected by the Speech or Debate Clause. *See In re* Possible Violations of 18 U.S.C. §§ 201, 371, 491 F. Supp. 211, 213-14 (D.D.C. 1980).

167. The cases in the Ninth Circuit provide a pertinent example. In Harvey's Wagon Wheel, Inc. v. NLRB, 550 F.2d 1139, 1142 (9th Cir. 1976), the court required that the agency affidavit be sufficiently detailed so as to provide a foundation for a decision that disclosure would be appropriate in light of one of the FOIA's exemptions. The court did so, however, by referring not to *Vaughn* but to the case upon which *Vaughn* elaborated, EPA v. Mink, 410 U.S. 73 (1973). Similarly, in Hardy v. Bureau of Alcohol, Tobacco & Firearms, 631 F.2d 653, 657 (9th Cir. 1980), the court noted that when an agency is asserting an exemption from disclosure it must do so by detailed affidavit. The court cited not to *Vaughn* but to Cuneo v. Schlesinger, 484 F.2d 1086, 1092 (D.C. Cir. 1973), *Vaughn's* companion case.

One can conclude that the Ninth Circuit applies the *Vaughn* procedures, but does not require a separate document to manifest compliance with those procedures. *But see* Ollestad v. Kelley, 573 F.2d 1109, 1110 (9th Cir. 1978) (where a different panel specifically referred to the *Vaughn* procedures, yet on remand, suggested that the court require a *Vaughn* index or detailed affidavits and/or testimony.

168. *See, e.g.*, Scherer v. Kelly, 584 F.2d 170, 175 (7th Cir. 1978); Baker v. CIA, 580 F.2d 664, 669 (D.C. Cir. 1978); Navasky v. CIA, 499 F. Supp. 269, 277 (S.D.N.Y. 1980); Anastas v. United States of America, 79-2 U.S. Tax Cas ¶9510 (N.D. Cal. 1979); Amway Corp. v. FTC, 76-1 Trade Cas ¶60,798 (D.D.C. 1976) (agency can meet burden of nondisclosure by demonstrating the nature of the document by reference to the surrounding circumstances). While it is not clear, some circuits seem to rely in certain instances on the affidavit alone. *See* Crooker v. Office of Pardon Att'y — United States Dep't of Justice, 614 F.2d 825, 828 (2d Cir. 1980); Irons v. Bell, 596 F.2d 468, 471, 476 (1st Cir. 1979); Cox v. United States Dep't of Justice, 576 F.2d 1302, 1310-12 (8th Cir. 1978). *But see* Stephensen v. IRS, 629 F.2d 1140, 1145 (5th Cir. 1980) ("In situations where records do not exist, affidavits are probably not only sufficient but possibly the best method of verification. However, once it is established that records and documents are in the possession of the governmental agency, more is required"); Thorstad v. CIA, 494 F. Supp. 500, 502, 504 (S.D.N.Y. 1979) ("It is clear that the *Vaughn* requirements apply with full force in this court. . . . [T]he court cannot accord any weight to affidavits which do not give a sufficient description of the contested documents so that a *de novo* review may be conducted").

of *Vaughn*. In *Barney v. IRS,*[169] the plaintiff alleged that the procedures the district court utilized to determine that all withheld documents were exempt were deficient in that a detailed *Vaughn* index was not required.[170] The decision held that the agency burden for withholding was sustained since all the government had to establish was that the records requested were investigatory, compiled for law enforcement proceedings, and that production of these documents would interfere with pending enforcement proceedings.[171] The decision is a narrow one: it applies to exemption (7)(a) situations and other exemption claims will likely require a more extensive showing by the government utilizing the *Vaughn* procedures.[172]

In two situations, the *Vaughn* procedures need not be strictly adhered to for the government to justify nondisclosure. The first is present when the *Vaughn* procedures might reveal the requested information.[173] One alternative is to compel the preparation of the *Vaughn* index for submission to the court in camera.[174] Such a procedure should, however, be used sparingly. This method is essentially ex parte, placing the FOIA plaintiff in the very position which prompted the *Vaughn* decision and requires the court to assume the agency's burden.[175] The second situation where the *Vaughn* procedures are often not utilized and the government is often allowed to stand on its affidavit, occurs in cases involving classified information or national security issues.[176] The issue in this

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169. 618 F.2d 1268 (8th Cir. 1980). *See also* Moorefield v United States Secret Service, 611 F.2d 1021 (5th Cir. 1980); Eisenberg v. United States Dep't of Justice, GOV'T. DISCLOSURE (P-H) ¶ 81,034 [1980] (D.D.C. 1980). Barney v. IRS, 618 F.2d 1268, 1272-73 (8th Cir. 1980).

171. *Id.* at 1272-73. The court stated that "[w]hile we acknowledge that in some cases a *Vaughn* index or *in camera* inspection may be necessary to permit a proper *de novo* determination of exemption this is not such a case." *Id.* at 1272.

172. *Id.* at 1274. The court noted, however, that a similar general showing by the government, on these facts, may also be applicable to exemption 3 claims. *Id.* at n.15.

173. This fear often manifests itself in criminal cases where the government alleges that a detailed index "would enable the astute defendants in the criminal case to divine with great accuracy the identity and nature of the information in the possession of the prosecution." Kanter v. IRS, 433 F. Supp. 812, 820 (N.D. Ill. 1977). *See* O'REILLY, *supra* note 4, at 8-48 to 8-49.

174. *See, e.g.*, Anastas v. United States of America, 79-2 U.S. Tax Cas ¶ 9510 (N.D. Cal. 1979); Tarnopol v. FBI, 442 F. Supp. 5, 9 (D.D.C. 1977); Kanter v. IRS, 433 F. Supp. 812, 823-24 (N.D. Ill. 1977). *See also* Playboy v. Justice Department [1980] GOV'T. DISCLOSURE (P-H) ¶ 81,037 (D.D.C. 1980).

175. *See* notes 123-32 and accompanying text *supra*. *See also* note 64 and accompanying text *infra*.

176. *See, e.g.*, Weissman v. CIA, 565 F.2d 629, 696-98 (D.C. Cir. 1977); Bell v. United States, 563 F.2d 484, 486-87 (1st Cir. 1977). *See generally* National Comm'n on Law Enforcement and Social Justice v. CIA, 576 F.2d 1373 (9th Cir. 1978); DiViaio v. Kelley, 571 F.2d 538 (10th Cir. 1978); Maroscia v. Levi, 569 F.2d 1000 (7th Cir. 1977). Some courts require the submitted affidavits to be subjected to some degree of critical analysis. See Founding Church of Scientology v. National Security Agency, 610 F.2d 824, 832-33 (D.C. Cir. 1979); Hayden v. National Security Agency, Central Security Service, 608 F.2d 1381, 1386-88 (D.C. Cir. 1979), *cert. denied,* 100 S.Ct. 2156 (1980). In *Hayden,* the court refused to mandate compliance with the *Vaughn* procedures. "We recognize that a fuller public record could enhance the adversary process; but it could also

situation has yet to be definitively resolved. While the government will normally have substantial reasons for maintaining the secrecy of such matters, it should be remembered that proposals to omit judicial review of exemption (1) (national security information) to a reasonable basis test in place of de novo review failed.[177]

The *Vaughn* requirements continue to be vigorously reasserted by the courts in FOIA cases.[178] Despite this reemphasis it is evident that tactics of delay and a generally dilatory attitude on the part of agencies still thwart the FOIA's disclosure mandates notwithstanding the *Vaughn* procedures.[179] The question arises, therefore, as to what additional remedies are needed to endure the expedient litigation of FOIA disputes in a manner consistent with the policies of the statute.

IV. ANALYSIS

A. Policy of the FOIA

The Freedom of Information Act is not a complex piece of legislation, it is, in fact, a "deceptively simple document."[180] At the heart of the Act is the premise that any person may request disclosure of governmental information[181] and that such information is prima facie disclosable.[182] To be entitled to relief under the Act a person need only request that which reasonably describes the governmental information sought.[183] Once the dispute is brought to a court, disclosure shall be granted unless the government sufficiently sustains its burden of

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reveal sensitive information. . . ." *Id.* at 1385. The court scrutinized the agency affidavits in camera, specifically rejecting plaintiff's proposal that plaintiff's attorney examine the documents in camera in conjunction with the court. *Id.* at 1385-86. *Accord,* Stephenson v. IRS, 629 F.2d 1140, 1145 (5th Cir. 1980) (where records in fact exist, court must do more than rely on agency affidavit).

177. *See* note 102 *supra.* It should be noted that failure to timely move a court to order a *Vaughn* index may preclude its use. *See, e.g.,* McCorstin v. United States Dep't of Labor, 630 F.2d 242, 244 (5th Cir. 1980).

178. *See, e.g.,* Coastal States Gas Corp. v. DOE, 617 F.2d 854 (D.C. Cir. 1980); Founding Church of Scientology v. Bell, 603 F.2d 945 (D.C. Cir. 1979); Ray v. Turner, 587 F.2d 1187 (D.C. Cir. 1978); Mead Data Central, Inc. v. United States Dep't of Air Force, 566 F.2d 242 (D.C. Cir. 1977); Church of Scientology of California v. Department of State, 493 F. Supp. 418 (D.D.C. 1980); Founding Church of Scientology v. Miller, 490 F. Supp. 144 (D.D.C. 1980).

179. *See* notes 188-97 and accompanying text *infra.*

180. Comment, *supra* note 144, at 734.

181. 5 U.S.C. § 552(a)(3) (1976).

182. *See, e.g.,* Jordan v. United States Dep't of Justice, 591 F.2d 753, 779 (D.C. Cir. 1978). "It is basic that the FOIA established a statutory presumption that all federal records are available to 'any person.' This presumption is rebutted only by evidence presented by an agency that the item sought is exempt under one of the nine enumerated exemptions." *Id.* at 779. *See also* notes 83-86 and accompanying text *supra.*

183. 5 U.S.C. § 552(a)(3) (1976). The request must also conform with the requirements of any published rules. *Id.*

proving that one or more of the FOIA's exemptions to mandatory disclosure can be applied.[184]

Congress structured the FOIA in a manner favorable to a FOIA plaintiff by removing the barriers which had prevented full disclosure.[185] Moreover, in response to inadequate agency compliance with the FOIA, Congress subsequently strengthened the Act by narrowing the scope of certain exemptions by reducing the time for agency responses to requested information.[186] This apparent strengthening of the Act, however, has not enhanced a FOIA plaintiff's prospects of successfully litigating an information request. Despite the attempts of various courts to effectuate the policies of the FOIA through remedial procedures such as the *Vaughn* index, these procedures are not always complied with by the agencies.[187]

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184. *See* 5 U.S.C. § 552(a)(4)(B) (1976). *See also* Founding Church of Scientology v. National Security Agency, 610 F.2d 824 (D.C. Cir. 1979) wherein it is stated: "[T]o prevail in a Freedom of Information Act suit, 'the defending agency must prove that each document that falls within the class requested either has been produced, is unidentifiable, or is wholly exempt from the Act's inspection requirements.' " *Id.* at 836, *quoting* National Cable Television Ass'n v. FCC, 479 F.2d 183, 186 (D.C. Cir. 1973); Radowich v. United States Attorney District of Maryland, 501 F. Supp. 284, 288 (D. Md. 1980) ("[T]he federal defendants in this case have failed to demonstrate the facts sufficient to bring these particular documents within the express terms of the § 552(b)(7)(D) exemption and, as such, the documents must be provided under the compulsion of the Freedom of Information Act.").

185. *See* notes 66-93 and accompanying text *supra.*

186. *See* notes 94-110 and accompanying text *supra. See generally* Clark, *Holding Government Accountable: The Amended Freedom of Information Act,* 84 YALE L. J. 741, 763-69 (1975) wherein it is stated:

> Much of the testimony at the hearings [on implementation of the FOIA] expressed disappointment that the agencies had not been more cooperative. The top administrators, witnesses alleged, had failed to push full implementation of the Act, while middle-level officials had no incentive to abandon past habits of caution. The safe course continued to be "when in doubt, deny."
>
> The Amendments were designed to change these conditions and to create an atmosphere in which officials disclose first and suppress only if they are personally prepared to defend their action. . . . [I]t is likely that the provisions which will most significantly contribute to opening the files are those to speed the processes, increase agency and individual responsibility, and lower costs.

Id. at 763-64 (footnote omitted).

187. *See* Coastal States Gas Corp. v. DOE, 617 F.2d 854 (D.C. Cir. 1980) (failure to comply with *Vaughn* procedures); The Founding Church of Scientology v. National Security Agency, 610 F.2d 824 (D.D.C. 1979) (denying possession of material requested which was found to contain an inadequate justification for withholding); Founding Church of Scientology v. Bell, 603 F. Supp. 945 (D.C. Cir. 1979) (failure to comply with *Vaughn* procedures); Irons v. Bell, 596 F.2d 468 (1st Cir. 1978) (proceedings protracted by agency dilatoriness and conclusory allegations of exemptions); Ray v. Turner, 587 F.2d 1187 (D.C. Cir. 1978) (failure to provide specific justification and segregation of exemption claims); Cox v. United States Dep't of Justice, 576 F.2d 1302 (8th Cir. 1978) (generalized and conclusory justifications for exemption claims); Mead Data Central, Inc. v. United States Dep't of Air Force, 566 F.2d 242 (D.C. Cir. 1977) (failure to adequately comply with segregation requirements); Pacific Architects & Engineers, Inc. v. The Renegotiation Bd., 505 F.2d 383 (D.C. Cir. 1974) (failure to adequately justify exemptions claimed to provide sufficient record to determine the applicability of specific exemptions). *See also* Church of Scientology of Cal. v. Department of State, 493 F. Supp. 418 (D.D.C. 1980); Founding Church of Scientology v. Miller, 490 F. Supp. 144 (D.D.C. 1980); Founding Church of Scientology v. National Security

Agency failure to comply with the *Vaughn* requirements can be partially traced to the continuous deference given by the courts to the administrative agencies.[188] This judicial deference frustrates the policies behind the FOIA. Agencies are given repeated opportunities to come before the court and to attempt to sustain its burden of nondisclosure, even after it has been found that compliance with the *Vaughn* procedures has not been achieved and that the agency has not sustained its burden.[189] For example, in *Mobil Oil Corp. v. FTC,*[190] the district court

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Agency, 489 F. Supp. 951 (D.D.C. 1980); Thorstad v. CIA, 494 F. Supp. 500 (S.D.N.Y. 1979); Britt v. IRS, U.S. 79-2 Tax Cas ¶ 9,450 (D.D.C. 1979); Mobil Oil Corp. v. FTC, 430 F. Supp. 849 (S.D.N.Y. 1977); ITT Continental Baking Co., Inc. v. FTC, 76-1 Trade Cas ¶ 60,795 (D.D.C. 1976); Military Audit Project v. Bush, 418 F. Supp. 876 (D.D.C. 1976); Mobil Oil v. FTC, 406 F. Supp. 305 (S.D.N.Y. 1976); Bodner v. Shell Oil Co., 75-1 Trade Cas ¶ 60,118 (D.D.C. 1975).

188. An example of misguided deference by a district court to an administrative agency's claim of exemption is evidenced in Founding Church of Scientology v. National Security Agency, 610 F.2d 824 (D.C. Cir. 1979). In this case, the district court had granted the government's motion for summary judgment based on submission, by the agency, of an affidavit alleging the exempt nature of the documents requested by the plaintiff. The court of appeals reversed, finding the submitted affidavit failed to contain a sufficient basis to determine the applicability of the asserted exemption. *Id.* at 826. The court stated that the government "affidavit was far too conclusory to support the summary judgment awarded. . . ." *Id.* at 831. "[O]ne will search the ... [government] affidavit in vain for anything more ... [than] [b]arren assertions that an ... [exemption] has been met." *Id.* Most disturbing about the deference shown by the district court to the government's claims of exemption was the fact, noted by the court of appeals, that the agency's claims of exemption were purposefully vague. *Id.* at 832. The government "compellingly envince[s] the feasibility of further elaboration of the agency's public affidavit." *Id.* Moreover, the court wrote: "At oral argument, counsel for NSA suggested that the agency must necessarily be vague until it learns precisely what the requester's arguments will be — when the agency can sharpen its claim accordingly." *Id.* at n.72. To this, the court of appeals responded:

> [W]e firmly reject the notion that an agency should advance just so much as it deems essential to establish the applicability of a claimed exemption when it is able, without endangering activity that should remain secret, to supply publicly further details that well might aid the de novo determination on disclosability or nondisclosability of the desired documents.

Id. The failure of the district court to subject the government's substantiation of its exemption claims to strict scrutiny defeats the purpose of the Act, especially when the government is purposefully vague.

189. This point was raised through the DOE's argument before the district court. The thrust of the argument was that granting of partial judgment at that stage of the litigation was inappropriate since it was not supported by case law and, therefore, the motion for partial judgment should be refused and the DOE should be allowed to prepare a new index. *See* note 42 and accompanying text *supra.* The essence of the argument was that case law provides that an agency may be allowed to (or required to) revise and more adequately prepare its *Vaughn* index. The DOE's brief to the district court in *Coastal II* substantially relied on this line of reasoning and devoted virtually no argument to other possible issues. *See generally* Defendant's Memorandum in Opposition, *supra* note 19 at 1-15. "Indeed, the DOE relies primarily upon these cases [which allow the government repeated attempts to produce an adequate *Vaughn* index] in support of its contention that it should be permitted to revise its deficient index." Coastal States Gas Corp. v. DOE, 495 F. Supp. 1172, 1176 (D. Del. 1980).

The plaintiff took the position that DOE had become addicted to a "bad habit," fully expecting judicial permission to defer compliance not only with the FOIA but also with the court's order. Reply Brief for Partial Judgment, *supra* note 38, at 6. "[T]he government has aggravated the effects of its bad habit by acknowledging that its index was inadequate, promising to rectify its admitted failure and then not keeping its promise." *Id.* at 6. *See* Brief for Appellee, *supra* note 40, at

held that the agency had not remotely sustained its burden of nondisclosure when it moved for summary judgment.[191] The court deferred a ruling on this motion and required the agency to comply with the requirements of *Vaughn* to set forth facts sufficient to sustain its burden.[192] When this case came before the court a second time, it was found that the *Vaughn* procedures had been inadequately effectuated by the agency.[193] Once again, the court postponed granting summary judgment, allowing the agency to resubmit facts that would be sufficient to properly invoke an exemption from disclosure.[194] Finally, the court warned that failure of the agency to submit sufficient facts would result in a court order directing disclosure.[195] Although the request for information commenced in 1973, the government did not sustain its

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20. ("Were the DOE to prevail in this court, an agency could blatantly ignore a court's order. . . ."). Indeed, "the Government's argument is that because the Government has gotten away with filing inadequate Vaughn indices many times in the past, the Government should be allowed to get away with it again in this case." Reply Brief for Partial Judgment, *supra* note 38, at 4. Counsel for Coastal further argued: "If this Court accepts that argument it is difficult to see how the Government can construe the Court's acceptance as anything other than an open-ended invitation to further pursue precisely the same tactic in every future FOIA case." *Id.* The court did not accept the DOE's argument. It noted that the DOE was representative of agencies which "apparently believe they need not immediately comply with the well-established procedure for asserting exemptions, but may instead revise and correct their indices until they 'get it right.' " 495 F. Supp. at 1176.

190. 406 F. Supp. 305 (S.D.N.Y. 1976). The request by Mobil pertained to information relating to certain aspects of petroleum use. This request had been partially responded to by the FTC. *Id.* at 308. As to those documents not released, Mobil filed suit pursuant to the FOIA. *Id.* The information which was provided to Mobil had been largely blacked out, obscurring nearly all identifiable details. *Id.* at 309.

191. *Id.* at 312. The court stated:

> Defendants have not remotely sustained their burden. They have failed to present a single affidavit by a member of the FTC or its staff which states the basis for concluding the documents in question are confidential or privileged. Nor has the government made any attempt to scrutinize the documents individually before blocking out identifying details. . . . Although we recognize that a request for documents of the magnitude here saddles an agency with a substantial, time-consuming task, adherence to the FOIA's scheme requires that the job be done.

Id. Despite the failure of the agency to generally carry its burden of nondisclosure, the court did find, after an in camera review, that exemption 5 (*see* note 83 *supra* for text) was properly invoked with respect to a small number of documents. 406 F. Supp. at 315-16.

192. *Id.* at 314. "[S]ummary judgment on the validity of the deletion of identifying details is deferred pending submission by defendants of affidavits consistent with the requirements of *Vaughn v. Rosen*. . . ." *Id.*

193. Mobil Oil Corp. v. FTC, 430 F. Supp. 849, 851 (S.D.N.Y. 1977). Despite the court's warning that failure to provide adequate support for continued withholding would fail to sustain the burden of nondisclosure, "the FTC has failed to submit any affidavit to support its position with respect to the over 200 pages of documentary material contained in . . ." its index. *Id.* The court additionally noted that the government had failed to adequately index the in camera exhibit and that "the government . . . continues to place the burden on the court of sorting a gross amount of undifferentiated material to determine whether or not the claimed exemption applies." *Id.*

194. *Id.* at 854-55.

195. *Id.* at 855. "Unless within thirty days the government submits . . . [the] necessary material setting forth in detail the basis for its claim that Exemption 5 justifies it in withholding the remainder of the material set forth in the Index . . . an order will be entered on submission by the plaintiff directing the FTC to disclose . . ." this information. *Id.*

burden to withhold information until four years later.[196] Thus, the failure of an agency to affirmatively sustain its burden of nondisclosure through compliance with indexing procedures results in protracted delay which may leave a FOIA plaintiff in a position of virtual helplessness.[197]

The FOIA does not provide for an agency to be accorded the privilege of repeated attempts to sustain its burden of nondisclosure. While the FOIA does exempt subsection (b) from disclosure, it does so only upon a showing by the agency that the information requested does, in fact, fall within the restricted scope of that subsection.[198] Extended

196. *See* Mobil Oil Corp. v. FTC, 406 F. Supp. 305, 308 (S.D.N.Y. 1976); Mobil Oil Corp. v. FTC, 430 F. Supp. 849 (S.D.N.Y. 1977). In Founding Church of Scientology v. Bell, 603 F.2d 945 (D.C. Cir. 1979), the court found the indexing produced by the government insufficient to carry its burden of nondisclosure. *Id.* at 948-49. The agency had presented the district court with what purported to be an index of withheld documents. *Id.* at 947. The district court found that the indexing by the government did not comport with the requirements enunciated in *Vaughn v. Rosen*, and thereby ordered the government to prepare a new index. *Id.* at 949. Upon submission of additional affidavits, the district court granted summary judgment for the government. *Id.* at 948.

The appeals court reversed, and in remanding the case for further indexing in conformity with the *Vaughn* requirements stated:

> According to the Government, if one simultaneously consults the Fourth Howard Affidavit, the First and Third Hoeting Affidavits, and the Lindblom and Poptanich Affidavits, one can devine the asserted justification for withholding or deleting all material at issue here. Thus, the Government continues, the FBI discharged its obligation to provide a *Vaughn* index. The Government is mistaken.
>
> A central purpose of the index requirement is to facilitate court review of agency FOIA rulings by making clear the basis for the agency's refusal to release certain information. The FBI's 'index' in this case falls far short of this goal of enhancing judicial economy. . . . For many documents different exemptions are contained in different affidavits. . . . In addition, only . . . [one] affidavit provides a brief description of each document, but the exemptions claimed in that statement were in many instances in later FBI affidavits. . . . Finally, for some documents, the FBI offered insufficient justification for withholding information under *any* of the exemption claimed.

Id. at 948-49. (emphasis in the original) (footnote omitted). The opinion is a clear statement of what is required from an agency when it asserts a claim of exemption. The opinion fails to point out, however, that the plaintiff was unable to realize a final disposition of its information request, even though it had been four years since the request had been initiated. The proper course would be to order disclosure of all documents for which the government had failed to sustain its burden through its initial *Vaughn* index. *See also* Thorstad v. CIA, 495 F. Supp. 500 (S.D.N.Y. 1979). (agency defendants given a second chance to comply with *Vaughn* requirements, when its initial attempt to do so failed to meet these requirements).

197. An excellent example of the vulnerable position a FOIA plaintiff is in when a court refuses to order disclosure when an agency has failed to adequately comply with the *Vaughn* procedures is set forth in Founding Church of Scientology v. Miller, 490 F. Supp. 144 (D.D.C. 1980). In that case, the government's first attempt to comport with the *Vaughn* procedures was determined to be inadequate by the court because the agency's index was conclusory, failing to set forth sufficient factual support for the exemption claims. *Id.* at 150 n.9. The government's second attempt to fully comply with the *Vaughn* procedures took over two full years. Nonetheless that "*Vaughn* index . . . suffered from most of the same ills." *Id.* Even after the court had warned that this second attempt to comply with *Vaughn* would be the government's last, the court nonetheless accepted the government's third attempt at producing a sufficient *Vaughn* index. *Id.* The third attempt was equally inadequate. *Id.* The court stated that "[i]t ill-behooves the United States Government to participate with such cunning creatively in what can only be seen as an attempt to frustrate the will of Congress in enacting the Freedom of Information Act and this court in enforcing it." *Id.* at 150. Despite such strong language, the court did not order full disclosure.

198. *See* 5 U.S.C. § 552(a)(4)(B),(b) (1976). The House Report stated:

> Information requested under the act by the plaintiff should be considered only with

delay may serve as a potent weapon for a recalcitrant administrative agency.[199] Not only will delay substantially wear down the financial and spiritual resources of an information requester, it might also eliminate the need or intended use of such information.[200] In such situations, the

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respect to whether or not the Government's arguments fulfill the "burden of proof" requirement that the information is subject to the subsection (b) exception claimed. If the court finds that the Government has not met such test, the information should be ordered to be made promptly available to the plaintiff. . . .

HOUSE COMM. ON GOV'T OPERATIONS, ADMINISTRATION OF THE FREEDOM OF INFORMATION ACT, TWENTY-FIRST REPORT, H. REP. NO. 1419, 92 Cong., 2d Sess. 77, *reprinted in* SOURCEBOOK II, *supra* note 64, at 84.

199. The House Report noted that "[t]he delay [engaged in] by most Federal agencies . . . frequently has negated the basic purpose of the Act. . . ." *Id., reprinted in* SOURCEBOOK II, *supra* note 64, at 17. Additionally, the report stated:

> The imposition of such a reasonable time limit [to respond to a FOIA request] would substantially speed up the handling of requests under the act and help correct one of the most flagrant and widespread bureaucratic abuses noted in the subcommittee's inquiry — the stalling tactics that often cause the requester of information to abandon his efforts to obtain information because it is no longer timely for his purposes.

Id., reprinted in SOURCEBOOK II, *supra* note 64, at 45. The report observed that agency delay may be combated through judicial enforcement of the Act. "The *ultimate weapon* provided to the public under the Freedom of Information Act *that can be wielded against a recalcitrant Federal bureaucracy* is the right to file suit in a U.S. District Court to obtain requested Government records if all other efforts are fruitless." *Id., reprinted in* SOURCEBOOK II, *supra* note 64, at 77 (emphasis added). That ultimate weapon has slight force where the agencies are frequently able to substantially extend the time to reach a final disposition of a FOIA suit. Additionally, the cost of litigating a FOIA suit seriously limits the availability of this "ultimate weapon." *Id., reprinted in* SOURCEBOOK II, *supra* note 64, at 80. *See also* notes 187-97 and accompanying text *supra.*

200. *See* note 199 *supra.* Further noting the difficulty an information requester may face, the House Report stated:

> The delay by Government attorneys in filing responsive pleadings in suits brought by individuals to obtain public records and the high costs to an individual in pursuing litigation under the Act have often been serious deterents in obtaining public records, giving unfair advantage to the Government. Nearly all agencies move so slowly and carefully in responding to a request for public records that the long delay often becomes tantamount to a denial.

HOUSE COMM. ON GOV'T OPERATIONS, ADMINISTRATION OF THE FREEDOM OF INFORMATION ACT, TWENTY-FIRST REPORT, H.R. REP. NO. 1419, 92d Cong., 2d Sess. 14, *reprinted in* SOURCEBOOK II, *supra* note 64, at 17, 27.

While it is true that the Act prohibits an individual requester's need from entering into the decision to disclose government documents, "[i]t was not the intent of Congress . . . that motivation be a factor for the courts to concern themselves with during litigation under the act." *Id., reprinted in* SOURCEBOOK II, *supra* note 64, at 83-84. Congress was clearly concerned with the need of a special segment of potential information requesters to obtain timely information disclosure — the news-media. In examining the difficulty that faced this class of information requesters, the House report noted that agency "foot-dragging in the courts can render the information totally useless, if and when it is ever made available by the Federal bureaucracy." *Id., reprinted in* SOURCEBOOK II, *supra* note 64, at 81. Since Congress obviously intended disclosed information to retain its value, the time provisions were amended to specifically incorporate within the FOIA this concern and to enable those information requesters who refrained from using the Act because of time constraints to fully utilize the FOIA. *See* notes 103 to 108 and accompanying text *supra.*

The situation present in *Coastal II* is a pertinent example of how delay by an agency can render the information eventually disclosed valueless. Counsel for Coastal indicated that he sought to resolve the FOIA action as expeditiously as possible in order to be able to obtain documents which he would then be able to file in the administrative action pending against Coastal before the administrative record closed. *See* Letter of November 25, 1980, *supra* note 10, at 2.

efficacy of the Act is undermined and is no more effective than the prior public information statute.[201] In light of Congress's overwhelming repudiation of the prior public information statute, clearly it intended no such result.

B. The Propriety of District Court's Order

1. Jurisdictional Considerations

In making its order, the *Coastal II* court must have acted within the powers conferred upon it under the FOIA. The FOIA confers on a federal district court "jurisdiction to enjoin the agency from withholding agency records and to order the production of any ageny records improperly withheld from the complainant."[202] Thus, the propriety of the holding in *Coastal II* is premised on the inquiry of whether the court exceeded its statutorily imposed powers.

The DOE argued that the district court lacked the requisite jurisdiction to make the disclosure order.[203] This argument rests on the following syllogism: Since jurisdiction to order production of documents does not apply to records which fall within the FOIA's provisions for exemptions, a determination that the records are without the Act's exemption provisions, yet continue to be improperly withheld, must be made by the court before it has jurisdiction to order production. The DOE claimed that the records were exempt and that the court should have decided the exemption issue. Thus, the DOE argued the failure of the court to address this threshold issue should have precluded its disclosure order.[204]

The DOE's argument, however, does not appear sound. Recently, the United States Supreme Court has decided several FOIA cases which deal with the definitional terms of the Act which confer to a federal district court the power "to ensure private access to requested materials. . . ."[205] In *Kissinger v. Reporters Committee for Freedom of*

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201. *See generally* notes 66-93 and accompanying text *supra*.

202. 5 U.S.C. § 552(a)(4)(B) (1976).

203. The DOE contends:

> If the DOE is correct in its assertion that the documents at issue in this case fall within the claimed exemptions to the FOIA, then its withholding of those documents has not been "improper" for the FOIA "does not apply" to them. The district court did not decide that the documents in question did not fall within the FOIA exemptions claimed, however. Indeed, it did not even address the question. Instead, it devised a remedy which it considered appropriate for effectuating certain policies of the FOIA. In doing so, it committed a clear error of law.

Brief for Appellant, *supra* note 18, at 13.

204. *See* Brief for Appellee, *supra* note 40, at 21-22.

205. Kissinger v. Reporters Comm'n for Freedom of the Press, 445 U.S. 136, 150 (1980). *See also* Forsham v. Harris, 445 U.S. 169 (1980); GTE Sylvania, Inc. v. Consumers Union of the United States, 445 U.S. 375 (1980).

the Press,[206] the court wrote that a FOIA court's "jurisdiction is dependent upon a showing that an agency has (1) 'improperly'; (2) 'withheld'; (3) 'agency records' . . . . Judicial authority to devise remedies and enjoin agencies can only be invoked . . . if the agency has contravened all the components of this obligation."[207] Because it was not at issue in this case, a full definition of what constitutes an *improper* withholding was not reached.[208]

Since the *Coastal II* court could only have ordered partial judgment for the release of the documents if such information was improperly withheld, the inquiry then becomes what constitutes an improper withholding. This is one of the more amorphous areas in the FOIA; there are few, if any, helpful guidelines.[209] A conclusory response is that an agency improperly withholds information if that information falls outside the parameters of the FOIA exemptions. While the DOE main-

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206. 445 U.S. 136 (1980).

207. *Id.* at 150.

208. The central issue in this case was whether certain documents which had been removed from the State Department by Henry Kissinger (as well as records of telephone conversations of Kissinger while he was National Security Adviser) and donated to the Library of Congress subject to an agreement which prohibited public access for a specific period of time, were subject to definitional terms of the FOIA. *See The Supreme Court, 1979 Term,* 94 HARV. L. REV. 77, 140-42 (1980). The Department of State refused to comply with the FOIA requests asserting that since it no longer possessed the documents, it could not release them. *Id.* at 143. The Court held that, despite whether or not the documents were wrongfully removed from government custody, the agency was not required to file suit to recover those documents. *Id.* at 154.

The holding is somewhat broad and may provide a means for agencies to avoid compliance with the FOIA by removing documents from their possession. Justice Stevens, dissenting in part, rejected the majority's use of physical possession as the determinative factor in determining if records have been withheld. *Id.* at 161. (Stevens, J., concurring in part and dissenting in part). Justice Stevens suggested that the legal right of the department to retrieve the documents would constitute a withholding when that right is not exercised. *Id.* at 162. (Stevens, J., concurring in part and dissenting in part). Justice Brennan expressed similar concerns:

> If FOIA is to be more than a dead letter, it must necessarily incorporate some restraint upon the agency's powers to move documents beyond the reach of the FOIA requester. . . . Beyond that minimal rule, I would think it also plainly unacceptable for an agency to devise a records routing system aimed at frustrating FOIA requests in general by moving documents outside agency custody with unseemly haste.

Id. at 159. (Brennan, J., concurring in part and dissenting in part). For a more extensive discussion of this case, as well as the companion case of Forsham v. Harris, 445 U.S. 169 (1980), *see The Supreme Court, 1979 Term,* 94 HARV. L. REV. 77, 232 (1980).

In GTE Sylvania, Inc. v. Consumers Union of the United States, 445 U.S. 375 (1980), the Supreme Court did examine the issue of what constitutes an "improper" withholding; however, the decision offers little guidance to this aspect of the decision in *Coastal II.* In this case the Court unanimously held that records are not "improperly" withheld when an agency is enjoined by a federal district court from disclosure. "The concerns underlying the Freedom of Information Act are inapplicable, for the agency has made no effort to avoid disclosure; indeed, it is not the . . . [agency's] decision to withhold the documents at all." *Id.* at 1201.

209. The DOE contended that "[i]n essence, the district court held that under the FOIA the promptness of the government's response is more important than its merit." Brief for Appellant, *supra* note 18, at 11-12. This is, however, clouding the issue. The real issue in this case is whether the DOE had sustained its burden of showing the exempt nature of the documents through its *Vaughn* index.

tains that an explicit determination was never made as to the exemption status of the documents in question,[210] it is submitted that an agency *improperly* withholds agency records when it has initially attempted and failed to sustain its burden of proving the exempt nature of those documents.

The FOIA does not delineate the criteria needed to satisfy the burden of proving an exemption. The statute merely provides that the agency has the burden of proof when it has refused to disclose requested information and that the jurisdiction of a federal district court will be invoked to determine the propriety of that withholding.[211] The legislative history of the FOIA is also silent as to how an agency shall sustain its burden.[212] Therefore, a determination of the requisite standards for an agency to effectively satisfy its burden must be gleaned from judicially prescribed procedures.

The *Vaughn* procedure is precisely the type of court-fashioned criteria that must be complied with for an agency to be able to sustain its burden.[213] If an agency has not complied with the *Vaughn* requirements it would be clearly inconsistent with the FOIA for a district court to sustain the withholding of information. In other words, when an agency proffers an inadequate *Vaughn* index it has not sufficiently shown the factual nature of the documents and therefore has not shown why it is entitled to withhold the information.[214] In such a situation, the agency has not sustained its burden and an improper withholding results.[215]

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210. *See* note 203 and accompanying text *supra.*

211. 5 U.S.C. § 552(a)(4)(B) (1976). *See also* note 184 *supra.*

212. *See* note 198 *supra. See also* note 92 and note 112 *supra.*

213. The primary function of the *Vaughn* procedures is to "provide a detailed justification and specific indexing so that the court may determine whether the Government has satisfied its burden of demonstrating the applicability of particular FOIA exemptions." Thorstad v. CIA, 494 F. Supp. 500, 502 (S.D.N.Y. 1979), *citing* Mobil Oil Corp. v. FTC, 406 F. Supp. 305 (S.D.N.Y. 1976). *See generally* notes 111-179 and accompanying text *supra.*

214. *See* notes 189-198 and accompanying text *supra.*

215. *See* Coastal States Gas Corp. v. DOE, 617 F.2d 854 (D.C. Cir. 1980). *Coastal I* exemplifies the failure of an agency (the DOE) to adequately sustain its burden of withholding information through its proffered *Vaughn* index. With few exceptions, the district court ordered the documents in question released. *Id.* at 858. "It rejected each of DOE's general claims of exemption, finding either that the rationale of the particular exemption did not apply to ... [the] documents or that the agency had failed to demonstrate the prerequisites to proper invocation of the exemption." *Id.* The court of appeals emphatically affirmed the district court's decision. In so doing, the court stated:

> At several points in the course of this opinion we will rely on a conclusion *not* that the documents are not exempt as a matter of law, but that the agency has failed to supply us with even the minimal information necessary to make a determination. We remind the agencies, once again, that the burden is on them to establish their right to withhold information from the public and they must supply the courts with sufficient information to allow us to make a reasoned determination that they were correct.

Id. at 861 (emphasis in original).

The DOE has attempted to distinguish *Coastal I* from *Coastal II* on two grounds. First, the

Another method by which an agency may improperly withhold information is by delay.[216] Congress has clearly mandated that unwarranted delay in making records available is inconsistent with the goals of the Act.[217] If an agency fails to fully substantiate its claimed exemption in a timely manner, it is improperly withholding information and disclosure may be appropriate. Thus, the *Coastal II* court was not without

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DOE contends that the two cases are procedurally distinguishable. In *Coastal I*, the DOE correctly notes that the appeals decision affirmed the district court's refusal to allow the government a second attempt to sustain its burden after both the DOE and Coastal had moved for summary judgment. *See* Brief for Appellant, *supra* note 18, at 33 n.14. The procedural issues raised by the decision are discussed in notes 219 to 268 and accompanying text *infra*. The second ground which the DOE contends sufficiently distinguishes the two *Coastal* opinions is that the district court opinion in *Coastal I* was rendered after "the district conducted a painstaking, document-by-document, review of the merits of the exemption claims which the government had made. It sustained *some* of those claims and rejected others." *Id.* at 33 n.14, 34 n.14 (emphasis added).

The DOE's argument is specious. The district court (in *Coastal I*) did not conduct a "document-by-document," in camera review. The court extensively examined the DOE's asserted exemptions *through* the DOE's *Vaughn* index and when the DOE had failed to sufficiently sustain its burden with that index, the court ordered disclosure. The district court in *Coastal I* stated that "the Court will allow only those documents to be withheld that are described in such detail as to enable the court to determine that the prospect of litigation is likely because specific claims have arisen. . . . An exhaustive review of the *Vaughn* index submitted fails to substantiate the government's argument." Coastal States Gas Corp. v. DOE [1979], GOV'T DISCLOSURE (P-H) ¶ 79,112, at 79,132 (D. D.C. August 21, 1979).

The DOE's contention, however, does raise a significant point. While both district courts, *Coastal I* and *Coastal II*, ordered disclosure based soley on the DOE's submitted index, the district court in *Coastal I* made specific findings as to why the government's index failed to sustain its burden. For instance, the district court in *Coastal I* noted that the documents may be withheld under exemption (b)(7) if release would interfere with law enforcement purposes. *Id.*

> In order to invoke exemption 7 properly, the government would have to show that enforcement proceedings with respect to these investigations are still active or contemplated. In the absence of this showing, in all but a few instances, the Court is unable to assess what the likelihood of interference will be. Accordingly, the Court concludes that the greater part of the documents withheld pursuant to (b)(7) must be released.

Id. at 79, 133. The *Coastal II* opinion fails to approach this level of specificity. Certainly, if the index were as inadequate as stated in *Coastal II* (*see* notes 46 to 51 and accompanying text *supra*) the court should have emulated the district court's opinion in *Coastal I* and given specific examples of why the index failed to sustain the DOE's burden. This failure of the *Coastal II* court may prove fatal on appeal.

216. The House Report stated: "As the subcommittee's hearings clearly demonstrated, information is often useful only if it is timely. Thus excessive delay by the agency in its response is often tantamount to a denial." HOUSE COMM. ON GOV'T OPERATIONS, AMENDING SECTION 552 OF TITLE 5 UNITED STATES CODE, KNOWN AS THE FREEDOM OF INFORMATION ACT, H.R. REP. NO. 876, 93d Cong., 2d Sess., *reprinted in* SOURCEBOOK II, *supra* note 64, at 126.

217. *See* notes 104-107 and accompanying text *supra*. Professor Davis summarized the force behind the amendments to the FOIA as such:

> Indeed, in the 1974 amendments Congress may have accomplished an objective that far transcends the specific provisions. By its decisiveness, it may largely have succeeded in changing the underlying attitudes of the bureaucracy about the policies behind the Information Act. . . .
>
> The time limits on compliance, § 552(a)(6), and the provisions for disciplinary action against an officer or employee who violates, § 552(a)(4), are quite effective ways for Congress to say: "We really mean it."

DAVIS, *supra* note 20, at 5:1.

jurisdiction to order disclosure of the documents in issue. Not only did the DOE fail to show why it should be able to avail itself of a FOIA exemption by its production of an inadequate *Vaughn* index, it also appears to have attempted to protract the proceedings by its late offering of a revised index.[218]

2. Procedural Aspects

It is unclear whether the *Coastal II* court's grant of partial judgment was intended to be a partial summary judgment.[219] The DOE contended that the court-ordered disclosure amounted to an improper grant of partial summary judgment.[220] Coastal responded that the district court's order was not a partial summary judgment and, even it it were, it would not have been improper.[221] Nonetheless, Coastal believed that

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218. *See* 495 F. Supp. at 1174. Interestingly, Coastal indicated that the court in *Coastal II* would have accepted a revised index, had it been timely.

> Finally, in December, Coastal moved for judgment — some seven months after the entry of the district court's original order. Even if at that late date, in response to Coastal's motion the DOE had adduced along with its brief the evidence it was ordered in May to provide, no doubt the court would have received it.

Brief for Appellee, *supra* note 40, at 37.

219. The DOE contends that the *Coastal II* court thought it was dealing with a summary judgment proceeding. "At the hearing on Coastal's motion for partial judgment, the district court indicated that it interpreted that motion as one for partial summary judgment. Brief for Appellant, *supra* note 18, at 23. Not surprisingly Coastal contends otherwise. "However, when the court's attention was focused on the motion for partial judgment itself, it understood quite clearly that he was *not* dealing with a motion for partial summary judgment." Brief for Appellee, *supra* note 40, at 32 n.50 (emphasis in original).

220. The DOE contended:

> On its face the order of the district court grants Coastal "partial judgment" but does not indicate what kind of judgment. The DOE submits that there are only two kinds of judgments known to the Federal Rules of Civil Procedure which the district court's judgment could be: a default judgment or a summary judgment.

Brief for Appellant, *supra* note 18, at 23.

The judgment rendered was not a default judgment entered pursuant to rule 55. That rule provides that a default judgment may be entered when the "party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend. . . ." FED. R. CIV. P. 55(a). On DOE's motion for reconsideration, the district court correctly noted that "the DOE's actions did not constitute a failure to 'plead or otherwise defend' as contemplated by Rule 55(a). On the contrary, the DOE answered Coastal's complaint and vigorously defended its actions with regard to the FOIA request at suit." Coastal States Gas Corp. v. DOE, No. 79-197, slip op. at 2 (D. Del. August 14, 1980) (mem.).

221. Coastal has continued to stress that it did not move the court for summary judgment. "The plain fact is that the district court's order was not a summary judgment. Coastal moved for partial judgment *not* partial *summary* judgment." Brief for Appellee, *supra* note 40, at 31 (emphasis in original). Nonetheless, if summary judgment were appropriate, the court could have *sua sponte* granted summary judgment. *See, e.g.*, Todd Shipyards Corp. v. DOE, [1980], GOV'T. DISCLOSURE (P-H) ¶ 81,041 (D. D.C. Nov. 17, 1980).

Coastal suggested that, in general, summary judgment proceedings are or should be treated differently in a FOIA litigation context. Coastal also suggested that the particular facts of this case further distinguish the use of summary judgment in FOIA cases.

> Even if the district court's order were deemed to be a summary judgment or something akin to one, the circumstances surrounding the making of the district court's

summary judgment would have been inappropriate and, therefore, carefully calculated the form of its motion for partial judgment.[222]

Summary judgment is appropriate when "there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law."[223] In such a proceeding, the moving party is required to show that no material fact is genuinely disputed and all reasonable inferences which may be drawn from the uncontroverted facts are taken in the light most favorable to the nonmoving party.[224] The DOE asserted that there existed a genuine factual dispute and that Coastal, as the moving party, had failed to show otherwise.[225] However, the DOE incorrectly stated that the burden Coastal had to sustain entailed an affirmative showing that the documents were not, in fact, exempt from disclosure.[226] That contention is inaccurate because whether a document is exempt from disclosure is ultimately an issue of law.[227] Thus, for a summary judgment proceeding to have been appropriate in *Coastal II,* Coastal was required to show that there was no genuine dispute as to the *factual nature* of the documents in issue.[228] Had that

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> disclosure order bear no resemblance to the circumstances surrounding a typical motion for summary judgment. The primary difference, of course, is that in the normal summary judgment situation the party against whom the motion is directed has not previously been the object of a specific and detailed court order requiring it to marshall the evidence in support of its claims or defenses for examination by the court. A second difference is that such motions are contemplated to be argued on relatively short (ten days) notice at an early stage of the proceedings before the case has been fully developed.

Brief for Appellee, *supra* note 40, at 33. Coastal's contentions are not without some merit; however, the weight of authority would not recognize these distinctions. *See, e.g.,* Founding Church of Scientology v. National Security Agency, 610 F.2d 824, 836 (D.C. Cir. 1979). *See also* National Ass'n of Gov't Employees v. Cambell, 593 F.2d 1023 (D.C. Cir. 1978).

222. *See* 495 F.2d at 1173.

223. FED. R. CIV. P. 56(c).

224. *Id. See* Adickes v. S. H. Kress & Co., 398 U.S. 144, 157-59 (1970); Founding Church of Scientology v. National Security Agency, 610 F.2d 824, 836 (D.C. Cir. 1979); National Ass'n of Gov't Employees v. Cambell, 593 F.2d 1023, 1027 (D.C. Cir. 1978); Marks v. United States Dep't of Justice, 578 F.2d 261, 262 (9th Cir. 1978).

225. As the Appellants contended: "[I]t was legally erroneous for the district court to enter summary judgment against ... [the DOE], however, since disputed questions of fact exist as to whether the documents at issue in this case are exempt from the FOIA." Brief for Appellant, *supra* note 18, at 24. "Coastal has not shown that there are no disputed questions of fact, it has not disproven the DOE's claims of exemption and so, it has not demonstrated that it is entitled to the documents in question as a matter of law." Brief of Appellant, *supra* note 18, at 28.

226. The Appellants argued: "[I]n order for summary judgment to be entered against the DOE it was Coastal's burden to show that the documents in question were not in fact exempt from the FOIA." Brief for Appellant, *supra* note 18, at 33.

227. *See* Coastal States Gas Corp. v. DOE, 617 F.2d 854, 861 (D.C. Cir. 1980). "Legal issues in an [sic] FOIA case are usually narrow issues of law relating to the specific application of a particular statutory exemption to a particular document or class of documents." O'REILLY, *supra* note 4, at 8-11. If the DOE were accurate the FOIA plaintiff would assume the burden of showing the nonexempt nature of the documents despite Congress' placing of the burden of nondisclosure on the government. 5 U.S.C. § 552(a)(4)(B) (1976). If summary judgment is appropriate, it is because there are no genuine issues of a material fact in dispute and all that need be done to dispose of the case is for the court to apply the law to the undisputed facts.

228. Additionally, Coastal would be required to show there was *no* material fact genuinely in

burden been satisfied, the district court would have then taken the uncontroverted facts and applied the law to those facts.[229] If the exemptions had failed to apply to those facts, Coastal would have been entitled to judgment as a matter of law and it would have been proper to dispose of the case by summary judgment.[230]

Strict application of the standard requiring the moving party to show that there was no genuine issue of material fact in dispute would likely have prevented Coastal from obtaining partial summary judgment.[231] This is because, in most FOIA cases, the plaintiff is unaware of the factual nature of the documents.[232] The *Vaughn* index is the primary vehicle through which the plaintiff is able to acquire an awareness of the factual nature of the documents.[233] If the index is insufficient to adequately convey this knowledge, it is questionable whether the FOIA plaintiff would be able to show that there is no disputed issue as to the factual nature of the documents in question.[234] Thus, if the court in

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dispute. Summary judgment is not a proceeding where factual disputes are resolved. *See, e.g.*, National Ass'n of Gov't Employee v. Cambell, 593 F.2d 1023, 1027 (D.C. Cir. 1978) ("Summary judgment is unavailable if it depends upon any fact that the record leaves susceptible of dispute."); Securities & Exchange Comm'n v. Research Automatic Corp., 585 F.2d 31, 33 (2d Cir. 1978) (on summary judgment motion, trial court does not try issues of fact); Gosset v. Du-Ra-Kel Corp., 569 F.2d 869, 871 (5th Cir. 1978) (summary judgment is not a substitute for trial and is inappropriate if factual dispute exists); and Benton-Volvo-Metaire, Inc. v. Volvo Southwest, Inc., 497 F.2d 135, 138 (5th Cir. 1973) (summary judgment is not a trial by affidavits).

229. When there are no disputed material facts, the only issues to be tried are legal issues, and summary jugdment is appropriate. *See, e.g.*, 10 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE – CIVIL, § 2725 at 499-500 (1973).

230. *See* C. WRIGHT, LAW OF FEDERAL COURTS 492 (3d ed. 1976) ("The [summary judgment] motion strikes at the heart of the claim. In effect it argues that as a matter of law upon admitted or established facts the moving party is entitled to prevail."). *See also* Founding Church of Scientology v. National Security Agency, 610 F.2d 824, 836 (D.C. Cir. 1979).

231. The court in *Scientology* observed: "It is well settled in Freedom of Information cases as in any others that '[s]ummary judgment may be granted only if the moving party proves that no substantial and material facts are in dispute and that he is entitled to judgment as a matter of law.' " Founding Church of Scientology v. National Security Agency, 610 F.2d 824, 836 (D.C. Cir. 1979), *quoting* National Cable Television Ass'n v. FCC, 479 F.2d 183, 186 (D.C. Cir. 1973). *See also* Common Cause v. National Archives & Records Serv., 628 F.2d 179 (D.C. Cir. 1980); Weisberg v. United States Dep't of Justice, 627 F.2d 365 (D.C. Cir. 1980); National Ass'n of Gov't Employees v. Cambell, 593 F.2d 1023 (D.C. Cir. 1978); Marks v. United States Dep't of Justice, 578 F.2d 261 (9th Cir. 1978).

232. *See* notes 118-24 and accompanying text *supra* and notes 136-38 and accompanying text *supra*.

233. *See* notes 144-49 and accompanying text *supra*.

234. If the plaintiff has little or no knowledge of the documents sought it will be nearly impossible for the plaintiff to assume the burden of foreclosing a disputed factual issue. Affidavits submitted by the moving party to show the absence of a disputed factual issue must be based on the personal knowledge of the movant. FED. R. CIV. P. 56(e). The lack of personal knowledge will create a permissible inference that a factual dispute exists to the averment of the moving party if alleged to exist by the nonmoving party. *See* Weisberg v. United States Dep't of Justice, 627 F.2d 365, 369 (D.C. Cir. 1980) (agency affidavit not made on personal knowledge that averred that documents requested did not exist created a permissible inference that documents did exist and were in agency files).

Coastal II treated the plaintiff's motion as a partial summary judgment, and granted it as such, it would appear that the court had failed to adhere to the recognized standards which govern summary judgment proceedings.[235]

An alternative to the foregoing would be that an inadequate *Vaughn* index fails to raise a genuine issue as to the factual nature of the documents in question. As such, the index is not unlike a pleading[236] which avers a contrary factual proposition; a mere denial of which will not necessarily suffice to preclude summary judgment.[237] In a FOIA suit, the plaintiff makes a prima facie case and shifts the burden to the government to prove the propriety of the withholding when the plaintiff has made an identifiable request and that request has been denied.[238]

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235. *See generally* National Ass'n of Gov't Employees v. Cambell, 593 F.2d 1023 (D.C. Cir. 1978) (strictly adhering to the recognized procedure requiring a FOIA plaintiff to foreclose all material factual issues before summary judgment may properly be granted). It should be noted that the opinion failed to state whether Coastal carried its burden with respect to showing that no factual issues were genuinely disputed. *See* Coastal States Gas Corp. v. DOE, 495 F. Supp. 1172 (D. Del. 1980).

A movant need not submit a supporting affidavit to foreclose a factual issue. FED. R. CIV. P. 56(a). Indeed, oral testimony may be used to meet this essential criteria. WRIGHT & MILLER, *supra* note 229, § 2723 at 487-88. ("[I]t is precisely because oral testimony, with the attendant opportunity for cross-examination, is the mode of presentation that is thought most appropriate for use at trial that it is also the most trustworthy form of proof available for a Rule 56 hearing."). Additionally, the products of discovery; depositions, answers to interrogatories and admissions, may be utilized to show there is no genuine issue as to any material fact. *See* FED. R. CIV. P. 56(c). Coastal did engage in discovery and subsequent to that discovery filed its motion for partial judgment, *see* 495 F. Supp. at 1174; however, the *Coastal II* court fails to even remotely suggest that Coastal attempted to and was successful at discharging its burden of showing no material fact was in dispute by any method. The burden of showing no material facts exist in the record which are genuinely disputed is a stringent and well settled prerequisite to obtaining summary judgment and the failure of Coastal to meet this requirement will not withstand scrutiny on appeal. *See, e.g.*, Founding Church of Scientology v. National Security Agency, 610 F.2d 824, 836 (D.C. Cir. 1979) ("[T]he party seeking summary judgment has the burden of showing there is no genuine issue of material fact, even on issues where the other party would have the burden of proof at trial. . . ."), *quoting* United States v. General Motors Corp., 518 F.2d 420, 441 (D.C. Cir. 1975); National Ass'n of Gov't Employees v. Cambell, 593 F.2d 1023, 1027 (D.C. Cir. 1978) ("Though appellants [the government] ultimately have the onus of proving that the . . . [requested documents] are exempt from disclosure, it was incumbent upon . . . [the plaintiff] to establish the absence of material factual issues before a summary disposition of the case could permissibly occur.") (footnote omitted). *See also* Benton-Volvo-Metairie, Inc. v. Volvo Southwest, Inc., 479 F.2d 135, 138 (5th Cir. 1973) (the record must show that the moving party has shown that there are no material facts that are genuinely disputed); WRIGHT & MILLER, *supra* note 229, § 2727 at 524-26 (if any doubt exists to presence of a genuine issue of material fact, it will be resolved against the party moving for summary judgment).

236. The *Vaughn* index is analogous to a pleading in that, like a pleading, it contains the agency's allegations of exemption (it is not evidence; the evidence would be the documents themselves). The primary distinction beween a *Vaughn* index and a pleading contemplated by FED. R. CIV. P. 8 is the degree of specificity required to set forth defenses.

237. *See* WRIGHT & MILLER, *supra* note 229, wherein it is stated: "[T]he apparent existence of a factual dispute based on a denial in the answer . . . does not automatically defeat a Rule 56 motion. If it did, the rule could be rendered negatory by clever pleading." *Id.*, § 2712 at 384.

238. The information requester carries the initial burden to make a request which reasonably

When the court orders the requisite specificity necessary for the government to be able to sustain this burden, the failure of the proffered index to comport with the court order may also mean that the index was insufficient to raise a triable issue of fact as to the factual nature of the documents subject to the plaintiff's request.[239]

If this was the standard employed by the *Coastal II* court, it was applied without specifically being referred to.[240] Even if the district court ordered disclosure pursuant to an implicit partial summary judgment proceeding, it failed to fully comply with rule 56(c) when it refused the government's revised index and affidavit which was filed in opposition to what the DOE perceived as a partial summary judgment motion.[241]

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describes the records sought. Once this has been met, the requester has sustained his burden to obtain agency records and, if necessary, ultimate relief in district court. Irons v. Gottschalk, 548 F.2d 992, 996 (D.C. Cir. 1976), *cert. denied,* 434 U.S. 965 (1977); O'REILLY, *supra* note 4, at 9-7. The burden then shifts to the agency to justify the propriety of the withholding. The Senate Report noted in regard to the burden of proof:

> Placing the burden of proof upon the agency puts the task of justifying the withholding on the only party able to explain it. The private party can hardly be asked to prove that an ageny has improperly withheld public information because he will not know the reasons for the agency action.

SENATE SUBCOMM. ON ADMIN. PRACTICE AND PROCEDURE, CLARIFYING AND PROTECTING THE RIGHT OF THE PUBLIC TO INFORMATION, AND FOR OTHER PURPOSES, S. REP. NO. 813, 89th Cong., 1st Sess. 8 (1965), *reprinted in* SOURCEBOOK I, *supra* note 4, at 43.

239. *See, e.g.,* Marks v. United States Dep't of Justice, 578 F.2d 261, 263 (9th Cir. 1978). *See also* SEC v. Research Automation Corp., 585 F.2d 31, 33 (2d Cir. 1978) ("[A]n adverse party may not rest upon mere conclusory allegations or denials."); Kung v. FOM Investment Corp., 563 F.2d 1316, 1318 (9th Cir. 1977) (finding summary judgment proper where non-moving party's case "rested upon conclusory allegations, unsupported by fact. . . .").

240. Of course, this standard assumes a different, more liberalized application of the principles governing summary judgment to cases where a FOIA plaintiff has moved for summary judgment, something which has no support in the law, and unlikely to gain any. *See* notes 219-235 and accompanying text *supra.*

241. *See* FED. R. CIV. P. 56(c) ("The adverse party *prior to the day of hearing* may serve opposing affidavits.") (emphasis added). The rule makes no reference to a *full* day prior to the hearing as a requisite for timely submission of opposing affidavits. The *Coastal II* court struck the DOE's opposing affidavit and revised index as untimely, despite its submission prior to the day Coastal's motion was heard. *See* 495 F. Supp. at 1174.

The court apparently justified striking this index, as well as its eventual order, on its "inherent power" to control judicial proceedings. *Id.* at 1178. While the existence of a trial court's "inherent power" is well established, its use should not contradict the rules of civil procedure. The "inherent power" that the *Coastal II* court makes reference to — the ability to a trial court to enforce its orders and impose necessary sanctions for failure to comply with those orders — has been specifically incorporated into the federal rules of civil procedure. *See* Riverside Memorial Mausoleum v. Sonneblick-Goldman Corp., 80 F.R.D. 433, 436 (E.D. Pa. 1978). *See also* Societe Internationale Pour Participations Industrielles et Commercials v. Rogers, 357 U.S. 197, 207 (1958) (stating that dismissal of action for failure to comply with a production order should be made to depend exclusively upon Rule 37 and not some inherent power); Rosenberg, *Sanctions To Effectuate Pretrial Discovery,* 58 COLUM. L. REV. 480, 485-86 (1958) ("[C]ourts occasionally fall back on the 'shadowy concept' of 'inherent power' to enforce discovery. . . . There is no justification for the courts' practice of bypassing rule 37, and the practice can only cause trouble.") (footnote omitted). *Cf.* Link v. Wabash R.R. Co., 370 U.S. 626 (1962).

> The authority of a court to dismiss *sua sponte* for lack of prosecution has generally been considered an "inherent power," governed not by rule or statute but by the control

Additionally, it might be questioned that had the *Coastal II* court perceived the plaintiff's motion as one for partial summary judgment, why it avoided using the term partial *summary* judgment.[242] There are thus inherent, if not insurmountable, problems with disposing of this case under a summary judgment proceeding.[243] Moreover, all aspects of the opinion converge to form the conclusion that the court in *Coastal II*

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necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases.

Id. at 630-31 (footnote omitted).

If, as it appears, the trial court has rejected ruling as a matter of discovery law (*see* note 262 and accompanying text *infra*), the *Coastal II* court's ambiguous, off-handed use of a trial court's "inherent power" is unconvincing to justify the striking of the revised index and affidavit as untimely let alone as justification for the disclosure order. The authority cited by the court for this proposition is even less convincing; that authority upheld the use of a trial court's inherent power to refuse to accept an affidavit which was submitted in opposition to a summary judgment proceeding *during the oral argument* on that motion. *See* 495 F. Supp. at 1178. Certainly a trial judge should be able to require adherence to its orders, especially where it is apparent that the litigant is lax to comply. *Id.* However, there is no justification for a district court to do so in contravention of the rules of civil procedure. Riverside Memorial Mausoleum v. Sonneblick-Goldman Corp., 80 F.R.D. 433, 435 (E.D. Pa. 1978) ("[A] trial judge with an individual calendar is charged with the duty of moving his cases expeditiously;. . . to do so, he must have the power to order time limitations and to see to it that the deadlines contained in the Federal Rules of Civil Procedure are enforced. . . ."). *See also* note 63 and accompanying text *supra*.

242. The opinion in *Coastal II* does not mention the term *partial summary judgment*. The closest the *Coastal II* court comes to explaining the purpose and function of Coastal's *partial judgment* fails to account for the apparent uniqueness of this motion. "Plaintiff's motion is styled as one for partial judgment because plaintiff does not seek, at this time, production of documents withheld under 5 U.S.C. § 552(b)(4), the FOIA trade secret exemption." 495 F. Supp. at 1175.

243. Additionally, the adequacy of an agency's search for documents has been held to be a material fact which, when genuinely disputed, is sufficient to preclude an agency from obtaining summary judgment. *See, e.g.*, Weisberg v. United States Dep't of Justice, 627 F.2d 365, 367-68 (D.C. Cir. 1980). *Cf.* Marks v. United States Dep't of Justice, 578 F.2d 261, 263-64 (9th Cir. 1978) (conclusory allegation not supported with sufficient factual basis insufficient to raise factual issue of adequacy of search to preclude summary judgment for the government).

In *Coastal II*, the adequacy of the DOE's search was contested and was the subject of a separate opinion requiring the DOE to search specific offices. *See* 495 F. Supp. at 1180 (motion for a more adequate search). It is unclear whether the adequacy of the agency's search is a sufficiently disputed material fact to preclude partial summary judgment for the plaintiff. The more appropriate view would be that it would not foreclose partial summary judgment for those documents which had in fact been indexed.

It is also unclear whether the adequacy of a *Vaughn* index is a material fact which, if disputed, would preclude summary judgment. It would appear that this is the case. *See* Murphy v. FBI, 490 F. Supp. 1134, 1336-37 (D. D.C. 1980) (limiting discovery to those instances where the adequacy of search or completeness of index are disputed). The question then, is whether the sufficiency of the DOE's initial index was genuinely disputed so as to preclude summary judgment. If it was, then the question whether the court actually resolved this factual dispute against the government. *See* National Ass'n of Gov't Employees v. Cambell, 593 F.2d 1023, 1027 (D.C. Cir. 1978) (a district court may not resolve factual questions in a summary judgment proceeding, it may only determine if facual disputes exist). *Compare,* 495 F. Supp. at 1174 ("DOE apparently does not vigorously contest the plaintiff's view that the ... [initial] index failed to comply ... with the [court's] Order."), *with* Brief for Appellant, *supra* note 18, at 15 ("As a preliminary matter, the DOE does not admit that its initial index was inadequate. Certainly, it was adequate to raise disputed questions of fact as to whether the documents in question are or are not within the FOIA exemptions claimed."). *See generally* notes 219-42 and accompanying text *supra*.

has intentionally disregarded basing the disclosure order on any rule of civil procedure.[244]

Clearly, the remedy ordered by the court is in accord with the general policies of the FOIA. The court's power to create such a remedy may be authorized by the jurisdictional phrase of the FOIA itself, and it is possible that this supplies the basis upon which the decision may rest.[245] Even so, procedurally, there is no standard motion which the plaintiff is able to utilize to prevail upon the court to create a new remedy. Because of this absence, the plaintiff had to avoid making a conventional motion for fear of not meeting all the established criteria for such a motion. Plaintiff, therefore, moved the court for *partial judgment* rather than *partial summary judgment.*[246]

Both Coastal, in making this partial judgment order, and the district court, in granting it, were perhaps testing the extent to which a federal district court may disregard the rules of civil procedure in a FOIA suit.[247] While FOIA litigation is, in some respects, *sui generis,*[248] there is no authority which provides that FOIA litigation shall be conducted without reference to recognized civil procedure.[249] Thus, the *Coastal II* court should have effectuated the policies of the FOIA in accord with the rules governing civil litigation. This could have been accomplished in *Coastal II* by utilizing whatever remedial power is available to a FOIA court[250] in conjunction with the rules which provide a federal

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244. *See* notes 219-43 and accompanying text *supra. See also* 495 F. Supp. at 1177, wherein it is stated: "In holding that documents will be ordered produced without consideration of the DOE's latest index, the Court rests *solely* upon the provisions and policies of the FOIA and the well-established purpose for requiring the filing of an adequate *Vaughn* index." *Id.* (emphasis added).

245. 5 U.S.C. § 552(a)(4)(B) (1976). *See* notes 209-15 and accompanying text *supra.*

246. At the oral argument on the government's appeal of the court's disclosure order, counsel for Coastal, in a heated verbal exchange between the court and counsel, conceded that he had moved under no Federal Rule of Civil Procedure.

247. *See generally* notes 219-43, and note 244 and accompanying text *supra.*

248. As noted, FOIA litigation is unique when compared to most civil litigation. *See* notes 111-135 and accompanying text *supra.* Additionally, Congress has provided that the government defendant will be required to adhere to standards in FOIA litigation which are different from the standards normally required of a government defendant in a general civil litigation context. *Compare,* FED. R. CIV. P. 12(a) (government given sixty days to file a responsive pleading in a FOIA suit) *with* 5 U.S.C. § 552(a)(4)(C) (1976) (agency must file responsive pleading within thirty days of the FOIA complaint being filed). The *Coastal II* court relied upon the unique nature of FOIA litigation in making its disclosure order.

> Counsel for DOE contends that FOIA litigation is to be treated by the courts in the same manner as other litigation involving the federal government. This argument, however, ignores the plain language of the Act, especially the substantially shorter response time provided the government and the requirement for expeditious handling of FOIA suits.

495 F. Supp. at 1177 n.7.

249. FED. R. CIV. P. 1 provides in part that "[t]hese rules govern the procedure in the United States district courts in all suits of a civil nature. . . ."

250. *See* notes 202-18 and accompanying text *supra.*

district court with the power to conduct and control discovery.[251] Specifically, a federal district court is conferred with considerable discretion to sanction a litigant for failure to comply with a discovery order.[252] These sanctions may be levied to accomplish differing purposes and need not be employed solely for remedial purposes.[253] Since it is ostensible that the *Coastal II* court was motivated to grant the plaintiff's motion in order to deter the DOE from engaging in dilatory FOIA litigation in the future,[254] the same result could have been achieved, and

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251. *See* FED. R. CIV. P. 26-37.

252. Rule 37(b)(2) provides in pertinent part: "If a party . . . fails to obey an order to provide or permit discovery, . . . the court in which the action is pending may make such orders in regard to the failure as are just. . . ." FED. R. CIV. P. 37(b)(2). Such orders may include:

> (A) An order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;
> (B) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting him from introducing designated matters in evidence;
> (C) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party. . . .

FED. R. CIV. P. 37(b)(2)(A), (b)(2)(B), (b)(2)(C).

The selection and degree of a sanction to be imposed on the litigant lies within the discretion of the trial judge. *See, e.g.*, United States v. Sumitomo Marine & Fire Ins. Co., 617 F.2d 1365, 1369 (9th Cir. 1980) ("The choice among the various sanctions rests within the discretion of the district court."); Kropp v. Ziebarth, 557 F.2d 142, 146 (8th Cir. 1977) ("The District Court has broad discretion to impose the various sanctions set forth in FED. R. CIV. P. 37(b)(2). . . .") Perry v. Golub, 74 F.R.D. 360, 364 (N.D. Ala. 1976) ("It is well settled that the appropriate sanction is to be determined in the context of the particular facts of the case, with the Court's discretion guided by the standard of the sanction which is just in light of the facts."). Review of a district court's sanction is not based upon whether the appeals court would have ruled differently, but, when considering the record as a whole, whether the district court abused its discretion. *See* National Hockey League v. Metropolitan Hockey Club, Inc., 427 U.S. 639, 642 (1976); Cine Forty-Second Street Theatre Corp. v. Allied Artists Pictures Corp., 602 F.2d 1062, 1068 (2d Cir. 1979); Affanato v. Merrill Brothers, 547 F.2d 138, 140 (1st Cir. 1977). Thus, the distinguishing characteristic of rule 37(b)(2) sanctions is that they are flexible. "The sanctions enumerated in the rule are not exclusive and arbitrary but flexible, selective, and plural." 8 WRIGHT & MILLER, *supra* note 229, § 2284, at 764 (1970).

253. The court may and should consider utilizing the available sanctions as a deterrent to future noncompliance. *See* National Hockey League v. Metropolitan Hockey Club, Inc., 427 U.S. 639 (1976), wherein the court states:

> [T]he most severe in the spectrum of sanctions provided by statute or rule must be available to the district court in appropriate cases, not merely to penalize those whose conduct may be deemed to warrant such a sanction, but to deter those who might be tempted to such conduct in the absence of such a deterrent.

Id. at 643; Cine Forty-Second Street Theatre Corp. v. Artists Pictures Corp., 602 F.2d 1062, 1066 (2d Cir. 1979). *See also* Note, *The Emerging Deterrence Orientation in The Imposition of Discovery Sanctions*, 91 HARV. L. REV. 1033, 1055 (1978) (Advocating tougher use of the sanctions available in Rule 37 in general, "and dismissal and default judgments in particular, . . . [which] furthers the ultimate objective of the Federal Rules of Civil Procedure — to provide efficient and fair litigation").

254. *See* 495 F. Supp. at 1176, 1178. The court stated:

> [T]his Court has no intention of having this case added to the DOE's string citation of cases permitting second, third and even fourth "bites at the apple" in FOIA litigation. . . . The DOE apparently believes it can set its own schedule for compliance

appears to be more rationally based than the district court's partial judgment, by imposing a disclosure order as a matter of discovery law.[255]

The *Vaughn* index may properly be characterized as a discovery device and as such it is a necessary and effective means by which FOIA litigation may be conducted.[256] In light of the unique nature of FOIA litigation, the active involvement of a district court in formulating a specific plan of discovery is essential to the efficient disposition of the case.[257] Moreover, a district court should structure the FOIA action and fashion a remedy which requires adherence to such an action which is consistent with the policies of the FOIA.[258]

In *Coastal II,* the parties entered into a conference from which the

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> with Court orders in this District. . . . This indifference to orders and decisions of this Court is not new. . . . It must be made clear to the DOE that it must comply with Court orders within the time limit set by the Court for doing so, or face the consequences. . . . Permitting the DOE to rely on its latest eleventh-hour effort to delay these proceedings would make a mockery of . . . [FOIA] legislation.

Id. (citation omitted).

255. *See* note 241 and accompanying text *supra.*

256. *See* Editorial Explanation [1980], GOV'T. DISCLOSURE (P-H) ¶ 10,061-07 (1981), wherein it is stated: "Perhaps the most important tool available to plaintiff in FOIA litigation is the *Vaughn* motion. This motion will normally be a crucial part of the discovery plan in FOIA cases." *Id.* at ¶ 10,061. *See also* Murphy v. FBI, 490 F. Supp. 1134, 1137-38 (D. D.C. 1980) (which suggests that the government's index (or affidavits conforming to the *Vaughn* procedures) need be filed before a FOIA plaintiff is entitled to utilize other discovery devices).

257. *See* notes 111-143 and accompanying text *supra.* A court's active involvement in FOIA discovery is necessary for the plaintiff to acquire sufficient knowledge of the factual nature of the documents in dispute. "Judicial involvement in discovery is likely to be greater in FOIA cases than in many other types of litigation. . . . The unique character of FOIA cases . . . creates greater judicial involvement. . . . [Additionally], [t]he government may be particularly sensitive to discovery, and objections are likely to follow." Editorial Explanation [1980] GOVT. DISCLOSURE ¶ 10,075 (1981). In general, discovery is frequently limited by the district court and even if it is not limited, discovery which seeks to go to the heart of the claims will likely be unanswered or evasively answered. *See, e.g.,* Common Cause v. National Archives & Records Serv., 628 F.2d 179 (1980), wherein it was noted:

> After filing its complaint in district court, Common Cause attempted to discover the nature of the material withheld; but this line of discovery was cut short when, pursuant to a motion filed . . . a protective order was entered. Discovery can be controlled by the trial judge or magistrate to avoid both undue prolongation of the case and premature disclosure of the very material sought to be protected. . . .

Id. at 181, 186 (footnote omitted); Founding Church of Scientology v. National Security Agency, 610 F.2d 824, 826 (D. C. Cir. 1979) ("Purportedly to avoid revelation of functions and activities assertedly insulated by the Act from public scrutiny, NSA declined to supply more than minimal information in answer to the interrogatories.") (footnote omitted); Goland v. CIA, 607 F.2d 339, 352 (D.C. Cir. 1978) (upholding district court's grant of summary judgment to government and rejecting plaintiff's request for discovery to test the adequacy of the agency's search). *See also* Editorial Explanation [1980], GOV'T. DISCLOSURE (P-H) ¶ 10,073 (1981).

Generally, depositions and interrogatories are most effective, in a FOIA context, to ascertain the sufficiency of the agency's search. *See* Editorial Explanation [1980], GOV'T. DISCLOSURE ¶ 10,072 (1981) ("[D]epositions are a means of getting more detailed information about agency procedures and practices . . . [and] to resolve factual issues such as the adequacy of the agency's search for records or its *Vaughn* index. . . .").

258. *See* notes 111-43 and accompanying text *supra.*

court ordered the DOE to produce a *Vaughn* index.[259] Consequently, the court ordered, and the parties stipulated to the specificity which would be required of that index.[260] In ruling that the index submitted by the DOE failed to comply with the discovery order, the *Coastal II* court had available to it the wide range of sanctions provided in rule 37(b)(2).[261] Not only did the *Coastal II* court fail to utilize these sanctions, it specifically rejected them.[262]

The harshest sanction which may be imposed on a recusant party's failure to comply with a discovery order is either a default judgment or a dismissal of the suit.[263] While the court in *Coastal II* may have been precluded from imposing partial judgment as a default sanction,[264] it

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259. 495 F. Supp. at 1173. Recently, the discovery provisions in the Federal Rules of Civil Procedure have been amended to specifically provide for a discovery conference analogous to that which occurred in *Coastal II*. FED. R. CIV. P. 26(f) provides in pertinent part:

> At any time after commencement of an action the court may direct the attorneys for the parties to appear before it for a conference on the subject of discovery. . . . Following the discovery conference, the court shall enter an order tentantively identifying the issues for discovery purposes, establishing a plan and schedule for discovery, setting limitations on discovery, if any; and determining such other matters . . . as are necessary for the proper management of discovery in the action.

260. 495 F. Supp. at 1173.

261. *See* note 252 and accompanying text *supra*.

262. The court stated:

> Plaintiff has urged the Court to treat the DOE's failure to comply with the May 9 Order [to prepare a *Vaughn* index] as meriting the sanction of partial judgment as a matter of discovery law. While it is true that the DOE has had several opportunities to submit revised and complete information to the Court, such failures would not merit the relief sought by plaintiff absent the clear policies to be effectuated in FOIA litigation.

495 F. Supp. at 1177 (footnote omitted). The *Coastal II* court reaffirmed this rejection of ruling as a matter of discovery law in its opinion, rejecting the DOE's motion for reconsideration. "[T]his Court made it clear that its decision to grant Coastal's motion for partial judgment was not based upon considerations of compliance with discovery orders." Coastal States Gas Corp. v. DOE, No. 79-197 slip op. at 2 n.2 (D. Del. Aug. 14, 1980) (mem.).

The *Coastal II* court may have rejected ruling as a matter of discovery law, fearing that had it so ruled, an inadvertent precedent would have been set for imposition of discovery sanctions which are the equivalent of ultimate relief in non-FOIA suits. Such a fear is unfounded. There is no compelling reason why such a discovery order entered in a FOIA case should become precedent for non-FOIA litigation. Such an order should be entered solely in consideration of the overriding policies of the FOIA.

263. *See, e.g.*, United States v. Sumitomo Marine & Fire Ins. Co., 617 F.2d 1365, 1369 (9th Cir. 1980).

264. FED. R. CIV. P. 55(e) accords the government a privileged status in regard to the imposition of a default judgment. "No judgment by default shall be entered against the United States or officer or agency thereof unless the claimant established his claim or right to relief by evidence satisfactory to the court." *Id.* While a default judgment imposed under rule 55 (for a failure to plead or otherwise defend) against a government defendant is specifically limited, no such limitation is stated in regard to the entry of a default judgment against the government as a sanction for noncompliance with a discovery order. The seminal case examining interaction between rule 55(e) and rule 37(b)(2)(C) is Cambell v. Eastland, 307 F.2d 478 (5th Cir. 1962). In *Cambell*, the court noted that "[t]he rules of law governing the interplay between Rule 55(e) and Rule 37(b) have not been firmly established." *Id.* 490. Nonetheless, the appeals court reversed the district court's entry of default judgment againt the government for not complying with an order to produce certain documents. While the *Cambell* court failed to categorically state that the scope of Rule 55(e) always

could have employed alternative sanctions which would have been the functional equivalent of a default judgment.[265] For instance, a court may "deem certain facts as established for the purposes of the action or [it may] preclude admission of evidence on designated matters. . . ."[266] Thus, the *Coastal II* court could have established facts which would have been essential for court ordered disclosure as a sanction for non-compliance with its order.[267] Disclosure could have been ordered without contravening the Federal Rules of Civil Procedure despite the order being the equivalent of a partial final judgment.[268]

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includes 37(b)(2)(C) default judgments, it stated that the underlying policy of Rule 55(e) applied to that case. *Id.* at 491. "The Rule rests on the rationale that the taxpayers at large should not be subjected to the cost of a judgment entered as a penalty against a government official which comes as a windfall to the individual litigant." *Id.* It is established that the preferred view is that default judgments entered against the government for failure to comply with a discovery order are subject to the limited privilege conferred by Rule 55(e). *See* 10 WRIGHT & MILLER, *supra* note 229, § 2702 at 358.

265. As the court in *Cambell* stated: "When the Government has refused to comply with discovery orders, as a sanction under Rule 37, the court may declare as established particular matters of fact which the private litigant might have established through evidence obtained from the Government under the discovery procedures." Cambell v. Eastland, 307 F.2d 478, 491-92 (5th Cir. 1962). The privilege conferred under Rule 55(e) is therefore limited and should be applied narrowly.

> [I]t appears that rule 55(e) was directed at defaults in the narrow sense of the government's failure to answer or otherwise move against a complaint, and was not intended to preclude the imposition, at a later stage in the proceeding, of sanctions or other court action which prevent the government from presenting further evidence or otherwise augmenting the record. This interpretation or rule 55(e) comports with the overall scheme and purpose of the Federal Rules of Civil Procedure. . . .
>
> [The rule] puts the government in a privileged position above all other litigants. If this privilege is interpreted too broadly, the government obtains an undue advantage, which enhances its strategic position and upsets the overriding policy that civil litigants receive equal treatment.

Giampaoli v. Califano, 628 F.2d 1190, 1194-95 (9th Cir. 1980) (footnote omitted). *See also* 10 WRIGHT & MILLER, *supra* note 229, § 2702 at 358.

266. United States v. Sumitomo Marine & Fire Ins. Co., 617 F.2d 1365, 1369 (9th Cir. 1980). This could account for the *Coastal II* court's refusal to accept and consider as part of the record the DOE's revised index and additional affidavit in ordering disclosure. It would then be reviewed on appeal by the abuse of discretion standard. *See* note 252 *supra*. In considering all relevant factors, it does not appear that the *Coastal II* court, as a matter of discovery law, abused its discretion. Last minute diligence should not preclude imposition of a discovery sanction. *See* Perry v. Golub, 74 F.R.D. 360, 365 (N.D. Ala. 1976) (where government defendants failed to comply with a court order, court refused to accept defendant's "eleventh-hour" effort at compliance as a sufficient reason to lessen severity of the sanction). Additionally, the court in *Perry* set forth a policy statement which is equally applicable to the facts of *Coastal II:*

> [T]he public interest requires not only that Court orders be obeyed but further that the Governmental agencies which are charged with the enforcement of laws should set the example of compliance with Court orders. Regretably, as this case once again demonstrates, Governmental agencies too often set the contrary example of resistance to discovery.

Id. at 366.

267. In such an instance, partial summary judgment *would* have been proper. *See* Riverside Memorial Mausoleum v. Sonneblick-Goldman Corp., 80 F.R.D. 433, 437 (E.D. Pa. 1978) (preclusionary order entered from which court granted summary judgment).

268. *See In re* Attorney General of United States, 596 F.2d 58, 66 n.15 (2d Cir. 1979). In the

CONCLUSION

In *Coastal II,* the District Court for the District of Delaware has held that a court should be able to require an agency to rest upon its initial *Vaughn* index and order disclosure if the agency fails to sustain its burden of nondisclosure through that index. In doing so, the *Coastal II* court has made a commendable attempt to eliminate abusive agency litigation and expeditiously promote the policies of the FOIA through what amounts to a logical extension of the *Vaughn* procedures. The court, however, has erred procedurally. In granting *partial judgment,* the court has rendered a judgment which appears to have no basis in the civil rules. This seems to have been needless. Such a disclosure order could have emanated from the power conferred on a FOIA court to promote the primary goal of the Act, information disclosure, conjointly with a district court's power to issue discovery sanctions in a FOIA litigation context. Although a court might understandably exercise restraint in making an order which is the equivalent of ultimate relief, the overwhelming emphasis on disclosure, the necessity for an agency to affirmatively sustain its burden, established FOIA case law procedure, and the vulnerable position a FOIA plaintiff is in when faced with a recalcitrant federal agency, are factors which should predominate in administering FOIA litigation as was attempted in *Coastal II.* It is apparent that the *Vaughn* procedures alone are insufficient in solving the problems inherent in FOIA litigation.

To the extent that the procedural issues have been unanswered, and to the extent that the decision fails to comport with the rules of civil procedure, the decision in *Coastal II* must be vacated and the case remanded by the United States Court of Appeals for the Third Circuit. In remanding, the Third Circuit should provide the district court with the means by which the intent of the decision in *Coastal II* may be maintained. This could be done by making clear that the remedial power of a FOIA court may be utilized in tandem with its powers to sanction discovery noncompliance; a unique combination which will not disrupt discovery in traditional civil litigation. It would, indeed, be an unfortunate elevation of form over substance to ignore the substantial policy and practical reasons which influenced the *Coastal II* court's disclosure order and blindly reverse the decision by strict application of procedural rules.*

PATRICK J. WARD

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context of a social security case, it was held that when a sanction has foreclosed the defenses of a government defendant, a judgment for the plaintiff as a result of the foreclosure order is a judgment on the merits. Gaimpaoli v. Califano, 628 F.2d 1190, 1195-96 (9th Cir. 1980). *See also* note 238 *supra.*

* On March 19, 1981, as this article went to print, the United States Court of Appeals for the

Third Circuit issued an opinion in *Coastal States Gas Corp. v. DOE*. *See* Coastal States Gas Corp. v. DOE, No. 80-2199 Slip Op. (3d Cir. Mar. 19, 1981). In this decision, the Third Circuit vacated the holding of the United States District Court for the District of Delaware. The lower court ordered the DOE to release all documents for which it had failed to sustain its burden of withholding in its initial *Vaughn* index. *See* Coastal States Gas Corp. v. DOE, 495 F. Supp. 1172 (D. Del. 1980), *vacated and remanded,* Coastal States Gas Corp. v. DOE, No. 80-2199 slip op. (3d Cir. Mar. 19, 1981).

The Third Circuit opinion is undoubtedly destined to become a landmark decision in FOIA litigation. While the district court's disclosure order based on the agency's initial index was vacated, the Third Circuit has established a rule governing future FOIA litigation. The rule requires an agency "to supply sufficient information *the first time* in order to allow courts to make a reasoned determination respecting the legitimacy of exemptions. . . ." *Id.* at 23-24 (3d Cir. Mar. 19, 1981) (emphasis in the original). Specifically, the Third Circuit did find that "agency delay in providing the court with sufficient information to determine if an exemption is justified, *could amount to a failure to carry the statutory burden of proof and could also constitute [an] improper withholding*, given the policies of full and expeditious disclosure that are embodied in the Act." *Id.* at 10 (emphasis added) (footnote omitted). *See* notes 202-218 and accompanying text *supra.* Additionally, to ensure that the disclosure policies of the FOIA are fully adhered to, the court propounded a rule that "require[s] district courts to explicitly state the legal basis as well as the findings that are necessary to demonstrate that the documents are exempt or disclosable under the FOIA." Slip Op. at 22 (footnote omitted).

The Third Circuit decision is a welcomed one in FOIA litigation. The court has attempted to lay the foundation upon which a district court may order disclosure of documents when an agency is dilatory and has failed to sustain its burden in its initial *Vaughn* index. The Third Circuit was perceptive in noting that there may be two distinct types of improper withholding which will give rise to court ordered disclosure: "findings of nonexemption based on *actual* knowledge of the records involved as well as *inadequate* knowledge of the records caused by the agencies' inability or unwillingness to provide the requested information." *Id.* at 31 n.80 (emphasis in original). The court further noted that the courts' ability to order disclosure based on improper withholding *may* turn on the presence of third parties' privacy interests, and also on national security concerns. *Id.*

> Because *de novo* court review was intended to prevent deference to agency judgment, secrecy, or inertia, the extent to which this supervisory review requires courts to ascertain affirmatively the contents of the records, as opposed to rule solely on the agency's failure to carry its burden of proof, may well be informed by *whose* interests are involved.

Id. (emphasis in the original).

The Third Circuit appears to have left some procedural questions unanswered and available avenues unexplored. While the procedural aspects of the case may not have been sufficiently delineated, the decision should provide more than sufficient grounds upon which future FOIA cases will see ordered disclosure for failure to fully substantiate a withholding in an initial *Vaughn* index. At the least, the decision provides the agencies with sufficient notice to expect such in the future.

BOOK REVIEW

PRACTICE MANUAL FOR SOCIAL SECURITY CLAIMS.
By Dennis M. Sweeney & James J. Lyko.
Practising Law Institute 1980. Pp. 1-411. $35.00. Clothbound.

A controversial plan aimed at altering the present format of fair hearings held to determine a claimant's entitlement to disability was aired last year. The plan struck at the roles played by an Administrative Law Judge (ALJ). The ALJ, in a non-adversarial Social Security hearing, must take on the often conflicting tasks of eliciting testimony, assisting unrepresented claimants press their claim, and finally, deciding the merits of the claim. In place of the present system of an informal hearing, an adversarial proceeding, with attorneys representing both the claimant and Social Security Administration (SSA) arguing before an ALJ, acting solely as a decision-maker, was proposed. A claimant's alleged disasbility would become the focal point of a legal argument with any claim necessarily being opposed by the SSA, which would become a "hostile" party against all persons seeking benefits. Advocates of the plan emphasized that it would produce uniform decisions and eliminate discretionary or erroneous decisions; opponents claimed it would have a chilling effect on individuals seeking a fair hearing and be burdensome and ineffectual.

While the merits of this plan have been debated (and hopefully permanently defeated), other proposals to streamline, complicate, simplify, or just change the present system of disability determination in the SSA will undoubtedly be offered. Until such change occurs, Practice Manual for Social Security Claims will be an informative and readable guide to the intricacies of the SSA operations. Although there have been reasoned pleas to de-emphasize the role of fair hearings and strengthen the decision-making apparatus at the initial application and upon denial, reconsideration steps within the SSA, the fair hearing is still the only stage which encourages the full development of an individual's claim. As such, the authors present a step by step guide which begins with recognizing a valid disability claim through to a final judicial appeal in United States District Court, emphasizing the preparation and conduct of the fair hearing.

This practice manual was written for attorneys who practice or plan to practice in this field (although any person can be chosen by a claimant as a representative, so long as he or she can assist the claimant in developing their claim). The role of an attorney in the claims procedure is to present a prima facie showing of a claimant's disability. Disability

is defined as an inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or has lasted, or can be expected to last, for a continuous period of not less than twelve months. To develop the claim, five factors must be considered by the practicing attorney: age, education, prior work experience and any transferable job skills, the residual capacity, if any, to perform work-related tasks on a regular basis despite the physical and/or mental impairment, and the scope and severity of an alleged impairment or impairments on the particular claimant.

Although prior to a fair hearing a claimant has been interviewed, examined, and evaluated by lay and medical staff of the SSA, the fair hearing is the first opportunity of a claimant to speak of his or her claim in full and be heard. The ALJ asks a battery of fairly uniform quesitons, eliciting information from the claimant in the five areas mentioned above. The attorney is entitled to ask additional questions of the claimant, and present testimony of the claimant that explains, develops, or diminishes information elicited by the judge. At some hearings, an attorney will question his or her client before the ALJ, but this is the exception, not the rule. In some instances, the judge will require that testimony by a qualified medical or vocational expert be taken to further the understanding of the nature of the claim alleged. Claimant's attorney can cross-examine the expert (who is compensated for his or her written or oral opinion by the SSA). An attorney can present experts for the claimant as well as lay witnesses, and such witnesses can be cross-examined by the judge.

The above information, in conjunction with objective clinical laboratory or diagnostic reports pertaining to the claim of physical/mental impairments, comprise the elements of a prima facie case of disability. At this point "the burden shifts to SSA to show that the claimant, given his age, education, and work experience, has the capacity to perform specific jobs that exist in significant numbers in the national economy."[1]

Although an attorney's value is most crucial at this point, the manual stresses pre-hearing preparation, to both present the claim in its most favorable light and deal with the conflicting roles of the ALJ. It explains how to prepare the record and client, pointing out the essential role of the attorney is to develop new medical evidence and additional nonmedical evidence, if needed, in the form of written or oral testimony by lay witnesses with knowledge of how the claimant is affected by the claimed disability on a daily basis, or in rare instances, the obtaining of medical or vocational expert witnesses on behalf of the claimant. The

1. D. SWEENEY & J. LYKO, PRACTICE MANUAL FOR SOCIAL SECURITY CLAIMS 29 (1980).

attorney's client should be familiarized with the detailed type of questioning that can be expected at the hearing and the reasons why the information is elicited.

The chapters on prehearing preparation and the conduct of the hearing compose the bulk of the authors' original writing in the manual. In the chapter on hearings, the manual covered mundane topics, such as the physical set-up of a typical hearing room as well as the intricacies of admissible evidence. Through the device of short, sample dialogues, the manual demonstrates the uses and misuses of eliciting testimony from one's own client as well as the testimony of any possible expert that can be called by the SSA. All hearings are tape recorded and there are suggestions as to how and when objections should be made so as to preserve them for any necessary appeal. A good example of the purposes and cross-purposes of an ALJ is the story of an ALJ who elicited testimony from the claimant which involved the detailing of at least ten claims of physical and mental impairments, supported in the medical records available at the hearing. During his examination the ALJ, while on the record, offered his opinion (on more than one occasion) that the claimant's problems seemed to actually stem from a lack of regular physical exercise and that the claimant should seek out such exercise, not necessarily disability benefits. To complete the picture, the same ALJ awarded the claimant disability benefits in his role as decision-maker, writing a compassionate and thoughtful decision in support of the claimant.

Early chapters in the manual deal with procedure governing representation, the early administrative steps in presenting a disability claim; a later chapter deals with problems that arise for claimants after an award of benefits has already been made.

In reviewing the initial stages of a claim prior to a fair hearing, the manual explains that the adverse decision on an initial application, the result found in most cases, generally

> will be computer-generated and will primarily consist of form paragraphs informing the claimant of the denial. . . . [a]fter the initial determination denial, it may seem to the claimant a waste of time and resources to request a reconsideration prior to seeking a hearing from the Social Security Adminnistration. Whatever the results of this contention, the initially denied claimant must request a reconsideration if he wishes to pursue the claim. . . .[2]

These paper applications tend to mislead a claimant into believing that pursuing his or her claim further is pointless. Statistics of reversal of initial agency determinations at the fair hearing stage belie this belief.

If a claimant has been denied benefits at the initial application, recon-

2. *Id.* at 73.

sideration and fair hearing stages, "the claimant might fully expect that he or she is now done with the Social Security Administration and could turn for relief to the courts."[3] The manual deals with the fourth and final step within the SSA, the Appeals Council, whose members are employed by the SSA and are generally former Administrative Law Judges. The chapter dealing with this final step of agency review covers the scope and nature of appeals, but concludes that it is "all-too-often futile exercise for the claimant."[4]

The final arena of appeal is judicial, and is heard in United States District Courts. The court is empowered legislatively to affirm, reverse, remand, or modify final decisions of the SSA. The court is bound by the administrative record and reviews that record to determine whether there is any substantial evidence to support the finding of the SSA. The court cannot substitute its decision for the SSA's decision unless no merit can be found on behalf of the agency determination. Of course, the court can always hear arguments on procedural due process. Although few judicial appeals are taken due to the restricted scope of review and factors of cost and time involved in judicial review, the manual points to statistics that a majority of those appeals taken result in a favorable decision for the claimant.

What, then, if judicial review is not successful? Quite simply, the choice is to start again and file an initial application for disability benefits at the district Social Security office.

Underlying the objectivity of this useful and informative manual is the impact that this process has on the client and his or her economic position during this process, which if taken in full could take up to nearly three years. A typical client would either have recently stopped work due to the claimed impairment or have been unable to work at all, and thus unable to support him or her self, or spouse or family. The client is physically and/or mentally impaired to some extent and not in a good position to appreciate the workings of the SSA or bear the financial burden of waiting that could be somewhat alleviated by a finding of entitlement of disability benefits. He or she will have been interviewed, examined, and evaluated, and usually denied benefits by the agency, which is established to provide benefits for a category of persons that most clients feel they should belong in, benefits that could better help a person meet the necessary and ordinary expenses of daily living. In acquiring the assistance of an attorney, a client will usually be able to pay his or her fee by having a portion of a past-due benefits award withheld and paid to the attorney. The manual provides a framework in which a practitioner can evaluate the procedures of obtaining disability benefits

3. *Id.* at 129.
4. *Id.*

for his or her client, but the difficulty of representation is only implied as an integral part of the procedure.

More than half of the manual is devoted to reprinting statutory provisions which govern administrative and judicial review of disability entitlement, sample SSA forms used in the application process, a sample decision rendered after a fair hearing by an Administrative Law Judge, sample pleadings and briefs, and a sample client interview form. This section of the book is recommended for practitioners who are new or unfamiliar with this area of law. The authors also add "tidbits" of information which are quite valuable, *e.g.*, where to write for affirmance/reversal rates of reconsideration denials for a particular Administrative Law Judge that will be conducting your fair hearing.

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BOOKS RECEIVED

THE STATE AS DEFENDANT: GOVERNMENTAL ACCOUNTABILITY AND THE REDRESS OF INDIVIDUAL GRIEVANCES. Contributions in Political Science, No. 51. By Leon Hurwitz. Westport, Connecticut: Greenwood Press. 1981. Pp. ix, 211, $22.95. Hardcover. This book examines the processes and methods available to the private citizen in various countries to file a complaint or grievance against his or her government and have a reasonable expectation that the complaint will be heard and acted upon without prejudice or retribution. These complaints concern either alleged violations of personal liberties by the state or the insensitivity of the bureaucratic structures. The book is also a cross-national comparative analysis of an individual's ability to have his or her basic human rights protected against governmental or bureaucratic interference. The study questions how one can bring some measure of justice and sensitivity to the relationship between the expanding, impersonal administrative technology in the modern post-industrial state, and the individuals who comprise this state. Studying systems of redress against the state, the author approaches the problem on two levels; the public policy arguments regarding political goals from the perspective of the political system, and the philosophical arguments from the individual's perspective. Broken down into eight essays, specific functional areas of redress are discussed including a country's regular court system, specialized administrative tribunals such as the French *Consiel d'Etat,* the office of ombudsman or "citizen's protection," parliamentary oversight processes, public intergovernmental institutions such as the European Convention on Human Rights, and private nongovernmental avenues such as Amnesty International. Each segment is examined historically to determine its efficiency in conflict management and dispute resolution. This procedure is limited to the political culture and values of the society in which it operates and reflects the society's past record in providing avenues of redress against the state. The author forces the reader to examine the premises that the state must be liable for its actions and that the individuals can demand sensitive and nonretributive treatment.

JUVENILES' WAIVER OF RIGHTS, LEGAL AND PSYCHOLOGICAL COMPETENCE. By Thomas Grisso. New York, New York: Plenum Press. 1981. Pp. vii, 295. $32.50. Hardcover. This book is one of four volumes contained in a series entitled *Perspectives in Law and Psychology* edited by Bruce Dennis Sales. Mr. Grisso begins by discussing the impact of the 1967 Supreme Court decision of *In re Gault* which held that the due process clause requires that juveniles be afforded the same Constitutional rights to counsel and against self-incrimination as are adults. The author characterizes the juvenile courts' pre-*Gault* approach as being one of benevolence and, as a result, generally void of due process protections. Noting that many post-*Gault* courts have given juveniles special consideration due to their relative immaturity, the book presents a number of empirical studies which attempt to evaluate the validity of that assumption. Specifically, it examines juveniles' ability to understand the *Miranda* warnings and to comprehend the function and significance of the warnings in the context of interrogation and subsequent court proceedings. The research provides strong evidence for the need for special methods to safeguard juveniles' interrogation rights to silence and legal counsel. Among the findings of these empirical studies are: 1) refusal to waive the right to be silent was almost nonexistent among those juveniles who were less than fifteen years of age; 2) about one-half of all juveniles between the ages of ten and sixteen years of age demonstrated an inadequate understanding of at least one of the four *Miranda* warnings; and 3) further deficiencies in juveniles' competence to waive rights were found based upon their inability to understand the function and significance of their Constitutional rights. Overall, Mr. Grisso's book is extremely valuable as an aid to juvenile courts and defense attorneys who must weigh the need for special protection of juveniles' rights in the criminal context.

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